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**Give and Take Over Measure 37: Could Metro
Reconcile Compensation for Reductions in Value
with a Regional Plan for Compact Urban
Growth and Preserving Farmland?**

by

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Originally published in ENVIRONMENTAL LAW
36 ENVTL. L. 187 (2005)

www.NationalAgLawCenter.org

GIVE AND TAKE OVER MEASURE 37: COULD METRO RECONCILE COMPENSATION FOR REDUCTIONS IN VALUE WITH A REGIONAL PLAN FOR COMPACT URBAN GROWTH AND PRESERVING FARMLAND?

BY
ROBERT LIBERTY*

Oregon and the Portland metropolitan government (Metro) have used a regional urban growth boundary and farm and forest zoning to promote compact urban growth and to protect farm and forest lands outside that boundary. Pursuant to state and regional mandates, the urban growth boundary is expanded at intervals, to accommodate additional urban development associated with increasing jobs and population. Because urban development is allowed only inside the urban growth boundary, when land is added to that boundary, its value increases dramatically, conferring an urbanization windfall on the owners. Measure 37 allows people, who purchased rural land before the land was zoned for farm and forest use, to develop that land in accord with the zoning in effect at the time of purchase, primarily, large-lot rural residential development. Owners of thousands of acres of land in farm and forest zones around the Portland metropolitan urban growth boundary have filed claims under Measure 37, seeking permission to develop their land. If approved, these claims could compromise the integrity of the region's effort to manage growth. This essay examines whether or not Metro, under existing law, has the authority to impose a tax on the urban expansion windfall, and to use the proceeds from that tax to 1) acquire conservation easements (purchase development rights) from owners of farm and forestlands with valid Measure 37 claims, and 2) fund the new roads, sewers, water lines, schools, parks, etc. (infrastructure) needed to serve the new urban development. The author concludes that Metro does have the authority.

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I. INTRODUCTION: MEASURE 37 AND METRO'S REGIONAL PLANNING EFFORTS

On November 2, 2005, Oregon voters approved Ballot Measure 37 by a margin of 61% to 39%.¹ Measure 37 requires government to compensate landowners for the reduction in value of land caused by any law or regulation adopted after the date the property was acquired by the landowner. If government fails to pay this compensation, it must forego enforcing the law or regulation and allow the landowner to use the land in any way that was permissible when he or she acquired the land. The measure applies retroactively to reductions in value caused by regulations adopted in the past, as well as prospectively, to any reductions in value that result from regulations adopted in the future.

Measure 37 is widely perceived as posing a major threat to Oregon's efforts to protect farm and forestland and curb urban sprawl through the use of urban growth boundaries and other land-use regulations. That is particularly true in the Portland metropolitan area, where the regional planning efforts of Metro, the regional government charged by the voters with adopting and implementing a regional plan to prevent sprawl, supplement the state's land-use planning program.

Six weeks after Measure 37 passed, Metro adopted a resolution calling for a special work group to consider "[a]lternative methods to achieve the policies of the Regional Framework Plan and the objectives of the 2040 Growth Concept in a post-Ballot Measure 37 environment and to reduce adverse consequences of claims."² This essay examines one way Metro could achieve such a reconciliation—by balancing out the “wipeouts” with the “windfalls” under state and regional land-use planning—and analyzes whether Metro currently has the legal authority to implement this proposal.

¹ Oregon Secretary of State Elections Division, Official Results (Nov. 2, 2004), available at <http://www.sos.state.or.us/elections/nov22004/abstract/m37.pdf>. The measure had been placed on the ballot through the initiative process, by which voters directly pass proposed legislation that qualifies for the ballot through the collection and certification of a minimum number of valid voter signatures. OR. CONST. art. IV, § 1(2).

² Portland, Or., Metro Res. No. 04-3520, at 1 (Dec. 16, 2004).

A. Measure 37

Measure 37³ requires government to compensate the owners of land (as well as the owners of crops, timber, and minerals) for any reduction of value in their land (crops, timber, or minerals) resulting from the enactment or enforcement of any state law, state agency rule, local government ordinance, or any regulation by a special district adopted after the owner acquired the property.⁴ The measure is retroactive and requires compensation for reductions in value caused by the enactment of laws or regulations adopted prior to the passage of Measure 37.⁵ Claims for compensation may even be based on a chain of family ownership, so that a granddaughter acquiring land in 2005 may file a claim based on a reduction in the land's value attributable to a 1950s law or regulation, since the regulation was adopted after her grandfather acquired the property.⁶ In lieu of compensation, the government that adopted the regulation(s) "may modify, remove or not apply the regulation."⁷

Measure 37 has almost no administrative provisions; in fact, it specifically provides that persons filing claims for compensation ("claimants") are not obliged to pay any application fees or to adhere to any administrative review procedures adopted by governments to implement Measure 37's provisions.⁸ Although Measure 37 has no administrative framework, it does impose deadlines on state and local governments that have received claims, and provides for the award of attorney fees against governments for failure to provide compensation or waivers.⁹ This short outline of Measure 37 barely touches on the many issues raised by its provisions, but discussion of those issues (covered by other essays in this law review) is not necessary to address the subject of this essay.

B. Oregon and Metro's Programs to Promote Compact Urban Growth and Protect Rural Lands and Natural Resources

Metro's proposed response to Measure 37 cannot be understood without an explanation of the state and regional efforts, which Measure 37 challenges, to shape development. In 1973, the Oregon Legislature passed

³ As of the date of this essay, Measure 37 has been declared unconstitutional by the Marion County Circuit Court in *MacPherson v. Department of Administrative Services*, No. 00C15769 (Marion County, Or. Cir. Ct. Oct. 14, 2005). Its ultimate fate, however, will presumably be determined by the Oregon Supreme Court. Even if the Oregon Supreme Court invalidates Measure 37, the issue of fairness to property owners under the state's land-use laws still must be addressed to the satisfaction of the voters.

⁴ Ballot Measure 37 § (1) (Or. 2004).

⁵ *Id.* §§ (1), (3)(E). The measure does not use the term retroactive, but that is the consequence of the provision requiring compensation for any reduction in value caused by a regulation adopted after the owner acquired the property.

⁶ *Id.* § (3)(E).

⁷ *Id.* § (8). The decision to modify, remove, or not apply a regulation is commonly, although inaccurately, denominated a "waiver." This terminology will be adopted for the rest of this essay.

⁸ *Id.* § (7).

⁹ *Id.* § (6).

Senate Bill 100, declaring that the “[u]ncoordinated use of lands within this state threaten the orderly development, the environment of this state and the health, safety, order, convenience, prosperity and welfare of the people of this state.”¹⁰ Senate Bill 100 mandated the establishment of statewide goals for the development and conservation of land.¹¹ To adopt and implement those goals, Senate Bill 100 also created a new commission, the Land Conservation and Development Commission (LCDC), and a new agency, the Department of Land Conservation and Development (DCLD).¹² The mission of the new commission and agency aimed not to promote planning in the abstract, but rather to define and attain very specific land-use objectives both in cities and in the countryside.

To accomplish this, the Commission first adopted a set of binding, statewide and regional planning goals.¹³ Based on hundreds of informal meetings and formal hearings over the course of three years, and on a preliminary set of topics set out by the legislature,¹⁴ LCDC adopted 14 statewide goals and five regional goals.¹⁵ The statewide goals and the related statutes took effect in binding, mandatory, comprehensive land-use plans and implementing regulations (such as zoning ordinances) adopted by all cities and counties that apply to all private land in the state.¹⁶ (The local land-use plans were reviewed by LCDC for compliance with the goals.¹⁷

¹⁰ OR. REV. STAT. § 197.005(1) (2003). For a more complete review of the establishment and implementation of Oregon's comprehensive land-use planning program, see Robert L. Liberty, *Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States*, [1992 News & Analysis] 22 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,367. See also JOHN M. DEGROVE, *LAND GROWTH & POLITICS* 235–90 (1984) (giving a narrative history of the adoption of the legislation as well as its structure and early administration).

¹¹ See OR. REV. STAT. § 197.005(2) (creating the goal of “coordinated administration of land uses consistent with comprehensive plans adopted throughout the state”).

¹² *Id.* §§ 197.005(4) (stating that “statewide land conservation and development requires the creation of a statewide planning agency”), 197.030 (establishing the seven member Commission), 197.075 (establishing the Department), 197.090 (establishing the role for the Director of the Department).

¹³ See *id.* §§ 197.015 (defining the statewide planning standards as the “goals” of the statute), 197.040(1)(c)(A) (directing Commission to adopt planning rules), 197.040(2)(a) (directing the plans to be revised and updated periodically), 197.225 (directing the Department to create the Commission to adopt goals to guide state and local governments).

¹⁴ See *Id.* § 197.230 (2003) (directing the Commission to consider a range of potential impacts from planning goals).

¹⁵ OR. ADMIN. R. 660-015-0000 to 0010 (2005). The text of the goals can be found at http://www.lcd.state.or.us/LCD/goals.shtml#The_Goals (last visited Jan. 22, 2006).

¹⁶ See *id.* §§ 197.005(2) (communicating the need to review state agency, city, county, and special district compliance with goals), 197.010(1) (declaring policy of requiring comprehensive and coordinated plans for cities, counties, regional areas, and the state as a whole), 197.175(2)(a)(b) (requiring cities and counties to implement comprehensive plans that comply with the goals), 197.225 (requiring LCDC and DCLD to adopt goals and guidelines for use by state agencies, local governments, and special agencies).

¹⁷ OR. REV. STAT. §§ 197.040(2)(d), 197.045(6), 197.251(1)–(2), 197.274 (2003) (reviewing Metro's regional framework plan). LCDC, as well as third parties, were given the power to enforce the planning requirements, to make sure that amendments to plans and regulations complied with the goals, and to ensure that local governments properly interpreted and applied their approved land-use plans and regulations. See *Id.* §§ 197.013 (acknowledging that management plans are of statewide significance), 197.251(2)(a) (providing an opportunity for objections to proposed plans), 197.253 (limiting commission-level objections to those who

At the heart of the Oregon program are a few key goals intended to curb urban sprawl and preserve farm and forestlands. These are the goals that could be most significantly compromised by the effects of Measure 37. Statewide Goal 14, Urbanization, mandates urban growth boundaries (UGBs) around every city in Oregon regardless of size.¹⁸ Urban development, such as construction of shopping centers, subdivisions, and office buildings, is allowed inside UGBs¹⁹— but not outside UGBs—even if the land is no longer usable for farming or forestry. UGBs prohibit leap-frog development and promote concentric urban development.²⁰ Goal 11, Public Facilities and Services, encourages the extension of urban services inside urban growth boundaries, and discourages their extension outside of them.²¹ Goal 10, Housing, requires all cities and counties to zone and rezone land outside of cities, but inside urban growth boundaries, for all types of housing, including apartments and manufactured housing.²² Goal 10 has had the effect of curbing sprawl by promoting more efficient patterns of urban development.²³

State legislation reinforces the pro-development aspects of Goals 14, 11, and 10 by prohibiting local governments from adopting moratoria on new development or on the extension of urban services (except in very limited circumstances),²⁴ and by backing up Goal 10's ban on exclusionary residential zoning.²⁵

participated in the local planning process), 197.319–197.350 (establishing enforcement procedures); 197.805 (affirming judicial review of planning decisions), 197.830 (establishing a system of judicial review of planning decisions).

¹⁸ OR. ADMIN. R. 660-015-0000(14) (Statewide Land Use Planning Goal 14, Urbanization); see also OR. REV. STAT. § 197.296(1) (2003) (explaining determinations a local government must make to ensure sufficient buildable lands within an urban growth boundary).

¹⁹ OR. REV. STAT. § 197.752(1) (2003) (Land inside urban growth boundaries “shall be available for urban development concurrent [sic] with the provision of key urban facilities . . .”).

²⁰ 1000 Friends of Or. v. Land Conservation Dev. Comm'n, 724 P.2d 268, 294–95 (Or. 1986).

²¹ OR. ADMIN. R. 660-015-0000(11) (Statewide Land Use Planning Goal 11, Public Facilities and Services); see also OR. REV. STAT. § 197.754 (2003) (allowing local government to zone for urban uses inside UGBs); 1000 Friends of Or., 724 P.2d at 294–95; Gisler v. Deschutes County, 945 P.2d 1051, 1054 (Or. 1997). These cases explain that Goal 11 allows the conversion of intense non-resource uses on rural land outside UGBs only after intensive uses and development to existing urban and urbanizable land takes place.

²² OR. ADMIN. R. 660-015-0000(10) (Statewide Land Use Planning Goal 10, Housing). For more information on Goal 10 and its impacts, see Robert Liberty, *Abolishing Exclusionary Zoning: A Natural Policy Alliance for Environmentalists and Affordable Housing Advocates*, 30 B.C. ENVTL. AFF. L. REV. 581 (2003).

²³ Liberty, *supra* note 22, at 600–02.

²⁴ OR. REV. STAT. §§ 197.510 (finding regional moratoria on construction to be of statewide concern), 197.520 (explaining requirements for cities, counties, and districts declaring moratoria), 197.522 (requiring local governments to authorize subdivisions and partitioning of construction that is consistent with the comprehensive plan or could be made consistent by imposing reasonable conditions), 197.524 (requiring local governments to adopt moratoria or public facilities strategies if the local government consistently delays or denies permits for subdivisions or partitioning of construction), 197.530 (imposing deadlines on cities, counties, and districts to correct problems underlying moratoria).

²⁵ *Id.* §§ 197.303 (defining “needed housing”), 197.307 (explaining approval standards for development of needed housing including manufactured homes), 197.312 (placing limitations on

Two of the statewide planning goals protect the vast majority of Oregon's rural land which is used for farming, ranching, and forestry. Goal 3, Agricultural Lands, requires the preservation of all farmland including grazing land.²⁶ Goal 4, Forest Lands, requires the protection of private forest lands used for growing and harvesting wood products.²⁷

Both Goal 3 and Goal 4 are codified in farm²⁸ and forest²⁹ zoning statutes³⁰ that establish 80 to 160 acre minimum lot sizes³¹ and regulate the authorization of new houses in these zones.³² The strictest limits on new houses on farmland apply to "high value farmland" (defined in terms of agricultural soils) found primarily the Willamette Valley.³³ The Willamette Valley is home to more than two-thirds of the state's population (including the Portland metropolitan area) and where half of the state's agricultural production occurs.³⁴ In addition to the statutes, LCDC administrative rules limit and place conditions on the construction of new houses and other uses in farm and forest zones.³⁵ For example, in order to build a new house on high value farmland, the owner must have grossed at least \$80,000 in annual farm sales (adjusted for inflation since the adoption of that requirement) in two of the previous five years.³⁶

An important part of the responsibility for implementing Senate Bill 100's objectives in the Oregon part³⁷ of the Portland metropolitan region has

local governments' ability to prohibit certain kinds of residential development), 197.314(1) (restricting local governments' capacity to regulate placement of manufactured homes).

²⁶ OR. ADMIN. R. 660-015-0000(3) (Statewide Land Use Planning Goal 3, Agricultural Lands).

²⁷ *Id.* 660-015-0000(4) (Statewide Land Use Planning Goal 4, Forest Lands).

²⁸ *See* OR. REV. STAT. §§ 215.203–215.311, 215.438–215.459, 215.700, 215.710–215.780 (2003) (regulating zoning for farm use zones). The application of exclusive farm use zoning to the broad majority of agricultural soils is mandated by Statewide Planning Goal 3, Agricultural Lands. OR. ADMIN. R. 660-015-0000(3).

²⁹ *See* OR. REV. STAT. §§ 215.700–780 (2003) (regulating zoning for farmland and forestland zones).

³⁰ The requirements of zones are set out in general in OR. REV. STAT. §§ 215.438–215.459, 215.700, 215.705, 215.710–215.780 (2003) and the use of such zones is mandated by Statewide Planning Goal 4, Forest Lands. OR. ADMIN. R. 660-015-0000(4).

³¹ OR. REV. STAT. § 215.780(1) (2003).

³² *Id.* §§ 215.213, 215.236, 215.262, 215.278, 215.281, 215.283, 215.294, 215.705, 215.710 (governing dwellings in exclusive farm use zones); *id.* §§ 215.705, 215.720–215.755 (governing dwellings in forest zones).

³³ *Id.* § 215.710.

³⁴ The ten counties making up the Willamette Valley (Benton, Clackamas, Columbia, Lane, Linn, Marion, Multnomah, Polk, Washington and Yamhill) had a population in 2003 constituting 71% of the state's total of 3.5 million. OR. SEC'Y OF STATE, OREGON BLUE BOOK 2005–2006, tbl. County Populations: 1970–2003, at 247 (2005), *available at* <http://bluebook.state.or.us/local/populations/pop06.htm>. These same counties accounted for 53.6% of Oregon's gross farm sales in 2002. U.S. DEPT OF AGRICULTURE, 2002 CENSUS OF AGRICULTURE: VOLUME 1, PART 37, OREGON STATE AND COUNTY DATA 204–08 (2004), *available at* <http://www.nass.usda.gov/census/census02/volume1/or/index2.htm>.

³⁵ OR. ADMIN. R. 660-006-0025 (restricting uses authorized in forest zones); *see also* OR. ADMIN. R. 660-033-0120, 660-033-0130, and 660-033-0135 (describing uses and construction permitted on farmland).

³⁶ *Id.* 660-033-135(7) (explaining criteria for construction of a dwelling on high-value farmland).

³⁷ As defined by the federal government, the Portland metropolitan area includes urbanized portions of Clark County in Washington State, as well as urbanized areas in Clackamas,

been assigned to Metro. Metro is a regional government³⁸ governed by an elected Council and President.³⁹ It has been given broad authority over regional land use and transportation planning by the legislature, including the responsibility for adopting and amending the urban growth boundary around the city of Portland and twenty-five other cities and unincorporated parts of Clackamas, Multnomah, and Washington counties.⁴⁰ As of early 2005, Metro's urban growth boundary contained 397 square miles⁴¹ out of the 3,071 square miles in Clackamas, Multnomah, and Washington counties.⁴² The 2003 population of the three metro counties was roughly 1.5 million, of which about 1.3 million resided inside the Metro urban growth boundary.⁴³ About 1,256 square miles (70%) of those three counties are zoned for exclusive farm use or forest conservation, as required by the statewide goals and planning statutes.⁴⁴

Metro, like LCDC, has the power to require local governments to amend their plans and regulations to adhere to Metro's own planning mandates.⁴⁵ But, like cities and counties in the region, Metro's decisions to amend the

Columbia, Multnomah, and Washington counties in Oregon. Metro's political boundary, which extends beyond its urban growth boundary, includes only the urban area around the central city of Portland that lies within Clackamas, Multnomah, and Washington counties. OREGON BLUE BOOK 2005–2006, *supra* note 34, at 267.

³⁸ METRO, CHARTER, pmb1. (2003), *available at* http://www.metro-region.org/library_docs/about/charter.nov2000.may2002.clean.03.pdf. The Charter was adopted as provided in the Oregon Constitution, article XI, section 14, which provides that “[t]he Legislative Assembly shall provide by law a method whereby the legal electors of any metropolitan service district . . . may adopt . . . a district charter.” Oregon Revised Statutes Chapter 268 provides for and described the role and powers of “metropolitan service districts” generally; the Portland region is the only part of the state to have implemented these provisions. *See* Metro, About the Charter, <http://www.metro-region.org/article.cfm?ArticleID=211> (last visited Jan. 22, 2006) (stating that “Metro is the only regional government in the United States with a home rule charter. . .”).

³⁹ METRO, CHARTER § 16(1)–(2).

⁴⁰ OR. REV. STAT. §§ 268.390, 268.390 (2005); OREGON BLUE BOOK, *supra* note 34, at 267.

⁴¹ When the regional UGB was first established in 1978–79, it contained 227,491 acres. Over the next 26 years, 26,665 acres were added, bringing the total land area within the metropolitan urban growth boundary, as of early 2005, to 254,146 acres, which is 397.1 square miles. Map, METRO DATA RESOURCE CENTER, UGB EXPANSION OVER TIME (May 26, 2005).

⁴² OREGON BLUE BOOK 2005–2006, *supra* note 34, at 249, 261, 265.

⁴³ *Id.* at 247. Metro estimated the population inside the boundary at 1,305,574 in 2000, and forecast that it would reach 1,419,000 by 2005. ECONOMIC REPORT TO THE METRO COUNCIL (PROPOSED FINAL DRAFT) 4 (Sept. 2002), *available at* http://www.metro-region.org/library_docs/maps_data/2000_2030regionalforecastsept2002.pdf.

⁴⁴ E-Mail from Ron Eber, Farm & Forest Lands Specialist, Department of Land Conservation and Development, to Robert Liberty (Dec. 5, 2005, 11:05:27 PST) (on file with author). Clackamas County ranked second out of thirty-six counties in agricultural sales in 2004; Washington County ranked third, and Multnomah County ranked fourteenth. Marion County, a few miles south of the southernmost part of the Portland metro area, ranked first. OR. AGRIC. STATISTICS SERV., JANICE A. GOODWIN, OR. STATE UNIV. EXTENSION SERV., OREGON AGRICULTURE: FACTS AND FIGURES 1 (Aug. 2005), *available at* <http://www.oregon.gov/ODA/docs/pdf/pubs/ff.pdf>.

⁴⁵ OR. REV. STAT. §§ 268.380(1)(b), 268.390(5)(a)–(d) (2003); *City of Sandy v. Metro*, 115 P.3d 960, 968 (Or. Ct. App. 2005) (holding that under the Oregon Constitution and its governing statutes, Metro had the authority to require limitations on the types of uses Hillsboro could authorize on land Metro added to the regional urban growth boundary for the purpose of providing industrial employment).

regional UGB, along with other planning efforts, are themselves subject to oversight by LCDC.⁴⁶

In 1992, the region's voters approved a home rule charter for Metro that identified its primary responsibility as "planning and policy making to preserve and enhance the quality of life and the environment for ourselves and future generations."⁴⁷ The Charter required the Metro Council to adopt a non-binding, fifty-year "Future Vision" for the region, "a conceptual statement that indicates population levels and settlement patterns that the region can accommodate within the carrying capacity of the land, water and air resources of the region, and its educational and economic resources, and that achieves a desired quality of life."⁴⁸ The Future Vision was required to address the:

(1) use, restoration and preservation of regional land and natural resources for the benefit of present and future generations; (2) how and where to accommodate the population growth for the region while maintaining a desired quality of life for its residents; and (3) how to develop new communities and additions to the existing urban areas in well-planned ways.⁴⁹

The Future Vision, adopted in 1995, expressed the hope that in 2045 the rural land in the region still "shapes our sense of place by keeping our cities separate from one another, supporting viable farm and forest resource enterprises, and keeping our citizens close to nature, farms, forests and other resource lands and activities."⁵⁰

To achieve this vision, the Future Vision Commission called for Metro to:

Develop and implement local plans, the UGB and the rural lands elements of the Regional Framework Plan to: Actively reinforce the protection of lands currently reserved for farm and forest uses for those purposes. No conversion of such lands to urban, suburban or rural residential use will be allowed. Allow rural residential development only within existing exception areas or their equivalent.⁵¹

The Metro Charter also required the Metro Council to adopt a Regional Framework Plan that addressed a long list of topics, including:

⁴⁶ OR. REV. STAT. § 197.274 (subjecting "the regional framework plan, its separate components and amendments" to review, *see also id.* § 197.301(1) (requiring Metro to report to LCDC on performance measures established by LCDC in regard to density of housing, amount of vacant land, and available jobs). For an analysis of Metro's UGB decision-making process and an example of appellate review of that decision, see *City of West Linn v. Land Conservation & Dev. Comm'n*, 119 P.3d 285 (Or. Ct. App. 2005).

⁴⁷ METRO, CHARTER pmbl. (2003), *available at* http://www.metro-region.org/library_docs/about/charter.nov2000.may2002.clean.03.pdf.

⁴⁸ *Id.* § 5(1)(a).

⁴⁹ *Id.* § 5(1)(b).

⁵⁰ FUTURE VISION COMM'N, METRO, REPORT OF METRO'S FUTURE VISION COMMISSION: VALUES, VISION STATEMENTS, AND ACTION STEPS 11 (Mar. 4, 1995), *available at* http://www.metro-region.org/library_docs/land_use/fvc.pdf.

⁵¹ *Id.*

(2) management and amendment of the urban growth boundary; (3) protection of lands outside the urban growth boundary for natural resource, future urban or other uses; . . . (5) urban design and settlement patterns; (6) parks, open spaces and recreational facilities; . . . The regional framework plan shall also address other growth management and land use planning matters which the Council, with the consultation and advice of the [Metro Policy Advisory Committee] determines are of metropolitan concern and will benefit from regional planning.⁵²

The Regional Framework Plan (unlike the Future Vision) is directly and indirectly binding on Metro and the regional governments within its boundary.⁵³

During the period when the Future Vision and Regional Framework Plan were being drawn up, Metro carried out an elaborate public examination of various metropolitan growth scenarios for the period from 1990 to 2040, when the region was projected to add 720,000 new residents and 350,000 new jobs. Four scenarios were examined: 1) continuing current trends, 2) growing outward through major UGB expansions, 3) growing upward through intensification of urban uses, and (4) distributing growth to neighboring cities outside the Metro UGB.⁵⁴

The scenario planning process became the basis for Metro's preferred long-range strategy for urbanization, called the 2040 Growth Concept.⁵⁵ The 2040 Growth Concept approved by the Metro Council was a hybrid of the growth scenarios, but relied primarily on focusing growth inside the existing UGB in downtown Portland, in the downtowns of various suburbs, at light rail transit stops, and along high frequency transit routes.⁵⁶ The 2040 Growth Concept was not mandated by the Charter or Metro's statutes, but became the analytical and policy foundation for the 1997 Regional Framework Plan:

The quality of life and the urban form of our region are closely linked. The Growth Concept is based on the belief that we can continue to grow and enhance livability by making the right choices for how we grow. The region's growth will be balanced by:

1. Maintaining a compact urban form, with easy access to nature;

⁵² METRO, CHARTER § 5(2)(b).

⁵³ The Regional Framework Plan is implemented in part through Metro's various functional plans; these plans are the basis for mandatory changes to local governments' land-use plans and zoning. *City of Sandy*, 115 P.3d 960, 966 (Or. Ct. App. 2005).

⁵⁴ METRO, REGION 2040 DECISIONS FOR TOMORROW: CONCEPTS FOR GROWTH, REPORT TO COUNCIL 23-76 (June, 1994).

⁵⁵ See generally METRO, REGION 2040 DECISIONS FOR TOMORROW: RECOMMENDED ALTERNATIVE DECISION KIT (Sept. 1994) (describing the recommended alternative for the Region 2040 project).

⁵⁶ Portland, Or., Metro Ordinance 95-625-A (Dec. 14, 1995) (amending the Regional Urban Growth Goals and Objectives to reflect the 1992 Metro charter, and to include the Region 2040 Urban Growth form and Growth Concept).

2. Preserving existing stable and distinct neighborhoods by focusing commercial and residential growth in mixed-use centers and corridors at a pedestrian scale;
3. Assuring affordability and maintaining a variety of housing choices with good access to jobs and assuring that market-based preferences are not eliminated by regulation; and
4. Targeting public investments to reinforce a compact urban form.⁵⁷

These objectives are backed by various regulatory provisions in Metro's Urban Growth Management Functional Plan,⁵⁸ including provisions governing development inside the urban growth boundary, such as specifying how many new residents and how many new jobs each local government must accommodate within its boundaries,⁵⁹ as well as a reduction in land devoted to parking.⁶⁰ Outside the urban growth boundary, the Regional Framework Plan calls for the protection of agricultural and forest lands, and for the adoption by Metro and the cities and counties in the region of "Rural Reserves" to protect these lands.⁶¹

C. Results of the State and Metropolitan Planning Efforts

After three decades, the results of these planning efforts by Oregon, Metro, and various local governments are quantifiable and visible on the ground—and from space. The Northwest Environment Watch of Seattle, Washington commissioned research of the three largest metropolitan regions in the north Pacific coast: Portland, Oregon-Washington,⁶² Seattle-

⁵⁷ Portland, Or., Metro Ordinance 97-715B-04 § 1.1 (Dec. 11, 1997), *available at* http://www.metroregion.org/library_docs/land_use/chapter1landuse.pdf. This preferred form of urban growth reflected and implemented the overall strategy developed in the 2040 Growth Concept, which emphasized infill and redevelopment in existing downtowns, along main streets, and at new light rail transit stops as a primary means of accommodating the forecasted growth in population and jobs rather than outward expansions of the urban growth boundary. *See* METRO, *supra* note 55, at 1–20. A map of the 2040 Growth Concept can be found on Metro's website at http://www.metroregion.org/library_docs/land_use/concept.pdf.

⁵⁸ PORTLAND, OR., METRO CODE § 3.07 (2003), (laying out an Urban Growth Management Functional Plan), *see also* Portland, Or., Metro Ordinance 96-647C (Nov. 21, 1996) (adopting the "Urban Growth Management Functional Plan").

⁵⁹ PORTLAND, OR., METRO CODE § 3.07.160 (2003); *see also id.* § 3.07.170 (setting out target densities per acre for residential population and employment across a range of urban design classifications including the central city (downtown Portland), town centers, main streets, and high frequency transit corridors).

⁶⁰ *Id.* §§ 3.07.210, 3.07.220.

⁶¹ Portland, Or., Metro Ordinance 97-715B-04, § 1.12 (Dec. 11, 1997) (directing Metro to protect agricultural and forest resource lands outside the urban growth boundary from urbanization consistent with the Regional Framework Plan); *id.* § 1.12.3 (directing Metro to "enter into agreement with neighboring cities and counties to carry out Council policy on protection of agricultural and forest resource policy through the designation of Rural Reserves and other measures"); *id.* § 1.12.4 (directing Metro to "work with neighboring counties to provide a high degree of certainty for investment in agriculture and forestry and to reduce conflicts between urbanization and agricultural and forest practices").

⁶² NW. ENV'T WATCH, SPRAWL AND SMART GROWTH IN METROPOLITAN PORTLAND: COMPARING

Everett-Tacoma, Washington,⁶³ and Vancouver, British Columbia.⁶⁴ The research was based on analyses of 1990 and 2000 U.S. census data, 1991 and 2001 Canadian census data, and satellite imagery. The analyses showed that the Oregon portion of the Portland metropolitan region had grown significantly more compactly than either the Seattle region or that part of the Portland region in Washington State not subject to Oregon's sprawl prevention laws.⁶⁵

Research into past and future development patterns in Oregon's Willamette Valley (where two-thirds of the state's population and growth are located) showed that in the twenty-five years before Oregon passed its comprehensive land-use laws, the Willamette Valley's population grew by 570,000, and about 900,000 acres of farmland were lost.⁶⁶ In the twenty-five years after the adoption of the land-use planning goals, the Willamette Valley's population grew by 670,000 people but only 105,000 acres of farmland were developed.⁶⁷ Research conducted by the Pacific Northwest Forest and Range Experiment Station and Oregon State University showed that the rate of conversion of private farm and forest lands to low and high density development in western Oregon slowed dramatically in the 1990s—even though the amount of growth was far greater than in the 1980s.⁶⁸

In fact, it was the effectiveness of the laws and rules in protecting farm and forest lands from sprawl that were widely blamed in the press for the passage of Measure 37.⁶⁹ While opinion research and other election results

PORTLAND, OREGON WITH VANCOUVER, WASHINGTON DURING THE 1990s (2002), *available at* <http://northwestwatch.org/press/portlandgrowth.pdf>.

⁶³ NW. ENV'T WATCH, *SPRAWL AND SMART GROWTH IN GREATER SEATTLE-TACOMA* (2002), *available at* http://northwestwatch.org/press/seattle_sprawl.pdf.

⁶⁴ NW. ENV'T WATCH, *SPRAWL AND SMART GROWTH IN GREATER VANCOUVER: A COMPARISON OF VANCOUVER, BRITISH COLUMBIA WITH SEATTLE, WASHINGTON* (2002), *available at* http://northwestwatch.org/press/vancouver_sprawl.pdf.

⁶⁵ *Id.* at 3; NW. ENV'T WATCH, *supra* note 63, at 3; *see also* NW. ENV'T WATCH, *THE PORTLAND EXCEPTION: A COMPARISON OF SPRAWL, SMART GROWTH, AND RURAL LAND LOSS IN 15 CITIES*, *available at* http://www.northwestwatch.org/scorecard/PDX_sprawl_final.pdf (comparing metropolitan Portland and other urban areas of similar size such as San Antonio, Texas and Columbus, Ohio, and demonstrating that Portland's compact urbanization saved substantial amounts of rural land from development).

⁶⁶ Paid Supplement Sponsored by the Willamette Valley Livability Forum, *The Future is in Our Hands: Population Explosion Endangers Quality of Life Across Willamette Valley*, WILLAMETTE CHRON. (SPECIAL ISSUE), Apr. 2001, at 3.

⁶⁷ *Id.*

⁶⁸ DAVID L. AZUMA ET AL., U.S. DEP'T OF AGRIC., *LAND USE CHANGE ON NON-FEDERAL LAND IN WESTERN OREGON 1973-2000*, at 35 (2002). This is consistent with prior research showing a significant drop in the conversion of forest land in Western Oregon to urban and low-density urban uses after the mid-1970s. DAOLAN ZHENG & RALPH J. ALIG, U.S. DEP'T OF AGRIC., *CHANGES IN THE NON-FEDERAL LAND BASE INVOLVING FORESTRY IN WESTERN OREGON, 1961-1994*, at 8-9 (1999).

⁶⁹ As an example, one commentator notes:

Over the past three decades, Oregon has earned a reputation for having the most restrictive land-use rules in the nation. Housing was grouped in and near the cities, while vast parcels of farmland and forests were untouched by so much as a suburban cul-de-sac. . . . But in a matter of days, the landowners will get a chance to turn the tables. Under a ballot measure approved on Nov. 2, property owners who can prove that environmental or zoning rules have hurt their investments can force the government to

suggest that voters, by supporting Measure 37 did not intend to repudiate the state's land-use planning laws,⁷⁰ evidence is mounting that Measure 37 may dramatically compromise those laws.

D. Metro's Response to Measure 37

On December 16, 2004, the Metro Council adopted a resolution which noted that the "effects and consequences to the metropolitan region of Ballot Measure 37 are not known, but may adversely affect the region's

compensate them for the losses—or get an exemption from the rules. Supporters of the measure, which passed 60 percent to 40 percent, call it a landmark in a 30-year battle over property rights.

Felicity Barringer, *Property Rights May Alter Oregon Landscape*, N.Y. TIMES, Nov. 26, 2004, at A1. In a review in *The New Yorker* of Jared Diamond's book, *Collapse*, Malcolm Gladwell wrote:

For the past thirty years, Oregon has had one of the strictest sets of land-use regulations in the nation, requiring new development to be clustered in and around existing urban development. The laws meant that Oregon has done perhaps the best job in the nation in limiting suburban sprawl, and protecting coastal lands and estuaries. But this November Oregon's voters passed a ballot referendum, known as Measure 37, that rolled back many of those protections. . . . One can imagine Diamond writing about the Measure 37 debate, and he wouldn't be very impressed by how seriously Oregonians wrestled with the problem of squaring their land-use rules with their values, because to him a society's environmental birthright is not best discussed in those terms.

Malcolm Gladwell, *In 'Collapse' Jared Diamond Shows How Societies Destroy Themselves*, THE NEW YORKER, Jan. 3, 2005, at 72–73.

⁷⁰ A statewide public opinion poll conducted four months after Measure 37 passed found:

Oregonians firmly believe protecting the rights of the property owner (67%) is very important. This belief extends to a clear preference for protecting individual rights (60%) over a responsibility to the community (37%) and an affirmation that private rights (56%) are more valued than the public good (38%). At the same time, Oregonians are concerned about the environment and they value planning. They say protecting farmland for farming (64%), protecting the environment (61%) and protecting wildlife habitat (58%) are very important. They also say that protecting land for future needs (70%) is more important than using land now for homes and business (25%) and that land use should be based on public planning decisions (69%) rather than market-based decisions (23%). Overall, two in three Oregonians (69%) say that growth management has made the state a more desirable place to live. . . . [A] majority supports compensation to landowners for reduced property values without waiving regulations (55%). However, residents are equally divided (44% to 43%) about exempting regulations in lieu of compensation. The survey results indicate there is no mandate on either side: property rights or managing growth. Oregonians recognize a fundamental value in property rights. They also want to protect the environment and recognize land use policies make the state a better place to live.

CFM RESEARCH (TOULAN SCH. OF URBAN STUDIES AND PLANNING, PORTLAND STATE UNIV.), OREGON LAND USE STATEWIDE SURVEY: A REPORT FOR THE OREGON BUSINESS ASSOCIATION AND INSTITUTE OF PORTLAND METROPOLITAN STUDIES 2–4, 2005, available at <http://www.pdx.edu/ims/paperspubs.html>. Interestingly, in November 2004, the Portland metropolitan region voted strongly for Measure 37, but two years before, the same voters rejected Metro Measure 26–11 (an initiative placed on the ballot by the proponents of Measure 37) by a margin of 57% to 43%, that would have curbed the powers of the regional government to curb sprawl. Multnomah County Elections Division, May 2002 Primary Election Regional Results, http://www.co.multnomah.or.us/dbcs/elections/2002-05/reg_results.shtml#2629 (last visited Jan. 22, 2006).

ability to protect livability in the region and to manage growth according to the Regional Framework Plan and the 2040 Growth Concept⁷¹ The Metro Council's resolution directed Metro's Chief Operating Officer to

[c]onvene a Ballot Measure 37 Work Group composed of representatives of local governments in the region and other organizations that will be affected by claims or which can contribute expertise to advise the Metro Council and staff on potential consequences of claims submitted under Ballot Measure 37, coordination among public entities in the region, policy options to maintain the region's commitment to the 2040 Growth Concept, and a coordinated claims and waiver process⁷²

The Measure 37 Work Group assignments also included developing

policy options to respond to the potential consequences of claims submitted under Ballot Measure 37, considering, among other matters . . . [a]lternative methods to achieve the policies of the Regional Framework Plan and the objectives of the 2040 Growth Concept in a post-Ballot Measure 37 environment and to reduce adverse consequences of claims⁷³

On March 3, 2005, the Metro Council appointed people with a spectrum of interests—farmers, home builders, and supporters and opponents of Measure 37—to serve as the task force to conduct the work described in its December resolution.⁷⁴

E. Impact of Measure 37 on Oregon and Metro's Urban Containment and Farm and Forestland Preservation Objectives

Metro staff presented to the Measure 37 Task Force an estimate that as of July 28, 2005, more than 700 Measure 37 claims for compensation or waiver of land use restrictions had been filed on 17,776 acres within the three counties that encompass the Oregon part of the Portland metropolitan region.⁷⁵ Out of that total, claims on 2,571 acres had been approved by cities and counties, were pending on 14,982 acres, and had been withdrawn on 22 acres.⁷⁶ A separate analysis showed only 47 acres of claims on 152 acres were made for properties inside the urban growth boundary; 135 claims on 1,160 acres had been made on lands zoned for rural residential development; and 562 claims were made on 16,697 acres of land zoned for farming or forestry.⁷⁷ To date, there has been no comprehensive analysis to determine

⁷¹ Portland, Or., Metro Res. 04-3520, at 1 (Dec. 16, 2004).

⁷² *Id.*

⁷³ *Id.* at 2.

⁷⁴ Portland, Or., Metro Res. 05-3554A (Mar. 3, 2005).

⁷⁵ Map, METRO DATA RESOURCE CENTER, MEASURE 37 CLAIMS (July 28, 2005).

⁷⁶ *Id.*

⁷⁷ Correspondence with Karen Scott Lowthian, Metro Data Resource Center (Nov. 3, 2005). Newspaper accounts have described only a few high-profile claims and potential claims for property inside cities. For example, one Portland landowner has stated that unless he receives approval to build a Wal-Mart on property designated for a future light rail station, he will file a Measure 37 claim. Editorial, *Possible Snag for that Proposed Wal-Mart?*, THE BEE, available at

the number and acreage of farm and forest zoned properties in Oregon or the three-county Portland metropolitan area that could qualify for compensation or waivers to allow rural development under Measure 37.⁷⁸

Almost all the claims requested waivers to land use regulations rather than compensation. A large number of these claims did not specify any particular use of the property, but those that did suggest that the majority of the requested waivers will involve the development of acreage home sites, reflecting the zoning that claimants believe was in effect at the time these properties were acquired.⁷⁹ A few other rural claims have requested uses other than acreage home sites, such as a claim that seeks a waiver to allow gravel mining on 80 acres of farmland.⁸⁰

<http://www.friends.org/issues/documents/M37/Sellwood-Bee-M37-Wal-Mart-2005-11.pdf>. A Washington County landowner requested and received a waiver allowing her to have a 14 by 48 foot billboard on her property, illustrating how some are finding new applications outside Measure 37's intent. Luciana Lopez, *Land-Use Decision Will Allow Billboard*, OREGONIAN, Aug. 19, 2005, at C01.

⁷⁸ As a general proposition, properties acquired before the statewide planning goals preserving farm and forestlands and mandating urban growth boundaries went into effect (January 1, 1975) would be exempted from those requirements. But that does not mean that properties acquired years after that date will necessarily have valid claims:

Until the local land use regulations were acknowledged [i.e. approved as complying with the statewide planning goals] by the [Land Conservation and Development] Commission, the use of the subject property was subject to both the local ordinances *and* the applicable statewide land use planning goals and their implementing rules (as well as any applicable state statutes). That being the case, we want to ensure that local governments do not unintentionally purport to authorize a particular use of property that (even under Measure 37) is still subject to state laws that were in effect at the time an owner acquired the property.

Letter from Lane Shetterly, Dir., Oregon Dep't of Land Conservation and Dev., to Local Government Partners (May 2, 2005) (on file with author).

⁷⁹ For example, consider state claim number M120337, filed by Washington County property owners:

The claimants, Marvin F. and JoAnn Winters, seek compensation in the amount of \$3,504,315 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real properties. The claimants desire compensation or the right to subdivide the subject 84.30 acre property [zoned for agriculture and forestry] into 17 to 35 lots and to develop dwellings on 15 to 33 of the lots.

Marvin F. & JoAnn Winters, Final Staff Report and Recommendation, M120337, Or. Dep't Land Conservation and Dev. (Sept. 15, 2005), *available at* http://egov.oregon.gov/LCD/docs/measure37/finalreports/M120337_Winters_Final_Report.pdf. The Department recommended approval of the requested subdivision. *Id.* at 2. A large share of the claims filed with and approved by the Clackamas County Commission are for rural home-site developments as of October 9, 2005. Clackamas County Department of Transportation and Development, Measure 37 Information, <http://www.co.clackamas.or.us/dtd/zoning/37> (last visited Jan. 22, 2006).

⁸⁰ As one commentator noted,

Faced with one of the most controversial Measure 37 claims to be filed in Clackamas County, commissioners on Wednesday voted to allow a gravel mine on about 80 acres of farmland south of Molalla. Charles Daugherty will have to overcome a number of hurdles to mine his property, including obtaining a state mining permit and having the state sign off on a similar Measure 37 claim. The mining proposal prompted 43 neighbors to sign a petition opposing the plan and drew a number of neighbors to the hearing to ask county

In its August 16, 2005, final report to the Metro Council, the Measure 37 Task Force noted that:

The number of claims region-wide has continued to increase dramatically; almost all of the claims are located outside of the UGB and on exclusive farm use and exclusive forest conservation (EFU/EFC) lands.

....

Commercial and industrial claims have not been filed to date although this may not be an indication of a lack of claims that will propose converting residential or industrial land for commercial uses. Claims that seek conversion to commercial uses may have significant impacts on employment projections.⁸¹

The Task Force identified several problems that would arise from development of these properties assuming all of them resulted in waivers from state and local Exclusive Farm Use and Forest Conservation Zoning and their development (primarily as large-lot residential subdivisions):

The location of claims may create difficulties with planning for future UGB expansions.

....

Both Department of Environmental Quality (DEQ) and the Water Resources Department (WR) departments have no plans to assess the long-term impacts that will be associated with the granting of individual permits for water and sewage disposal systems for single-family rural residential development, whether small or large in scale.

Impacts on the adequacy of providing public safety (police, fire and environmental) services that will be generated by Measure 37 development have not been assessed by local governments.⁸²

The Work Group suggested both short-term and long-term steps that Metro should consider in responding to Measure 37, including the following:

There is currently no funding mechanism to compensate claimants.

Recommendation: Explore present and future funding mechanisms that could generate sufficient funds for purchase priority claims and provide matching dollars for conservation easement programs. Funding could take the form of a tax, bond measure or a fee. Consider using the capture of increased property values attributed to government actions to fund the purchase of claims.

commissioners to block it.

Sarah Hunsberger, *Measure 37 Claim for Mine Gets Nod*, OREGONIAN, July 14, 2005, at C2.

⁸¹ Memorandum from Lydia Neill, Principal Regional Planner, to Judie Hammerstad, Chair, Measure 37 Task Force 1-2 (Aug. 9, 2005) (on file with author).

⁸² *Id.*

....

Define key areas where claims should be settled by means other than waiver (e.g. compensation) due to negative effects on the agricultural and forest industry. The agricultural industry needs to address this issue.⁸³

II. THE CONCEPT: USING UGB EXPANSION "GIVINGS" TO HELP PAY MEASURE 37 CLAIMS WHILE ACHIEVING OTHER REGIONAL OBJECTIVES

As noted above, the work group suggested "using the capture of increased property values attributed to government actions" as a potential source of funding to pay claims. The concept of government-created increased values has been described as "givings," the intellectual counterpart to the idea of government "takings" of property through regulation.

While takings—government seizures of property—have been the subject of an elaborate body of scholarship, givings—government distributions of property—have been largely overlooked by the legal academy. Givings are ever-present and yet not discussed. They can be found in almost every field of government endeavor related to property. Every time the government "upzones," or changes a zoning ordinance to the benefit of certain property owners, it has executed a giving. Similarly, when the government relaxes environmental regulations, a giving occurs.⁸⁴

Just as with takings, the failure to consider givings results both in unfairness and in economic inefficiencies by government and private property owners.⁸⁵

Several writers have suggested that givings (sometimes labeled "windfalls") could be taxed to offset reductions in values caused by government actions, including those that do not constitute regulatory takings.⁸⁶ The idea of taxing windfalls from urban growth boundary expansions became the basis for the development of a proposal to use these tax revenues to protect farmland in the region from development authorized through Measure 37 waivers, while achieving other urban development objectives that are part of Metro's regional efforts.

On November 17, 2005 the Metro Council passed a resolution approving a Council project led by Metro Councilors Carl Hosticka and Robert Liberty to develop a proposal based on the Measure 37 Task Force recommendations. The approved project was to develop a proposal for the

⁸³ *Id.*

⁸⁴ Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 549–50 (2000) (footnotes omitted).

⁸⁵ *Id.* at 578–84.

⁸⁶ Frederik Jacobsen & Jeffrey Redding, *Impact Taxes*, in WINDFALLS FOR WIPEOUTS: LAND CAPTURE AND COMPENSATION 367, 367–70 (Donald G. Hagman & Dean J. Misczynski eds., 1978); see also White House News, *ACRS "Windfall" Recapture Proposal*, 27 TAX NOTES 1172, 1174 (1985) (proposing the recapture of depreciation deductions over a three year period).

adoption of a “windfall tax” on the increase in value when land was brought into the urban growth boundary. The proceeds from that tax could address

three important regional problems in relation to the [Measure 37] task force’s recommendations:

Issue 1

Measure 37 promised voters that landowners would be paid for reductions in value caused by government laws and regulation. To date, no landowner in the three-county region (if not the state) has been offered compensation.

Issue 2

Measure 37 waives to allow residential and other development on approximately 12,000 acres of land in exclusive farm use and forest conservation zones in Clackamas, Multnomah and Washington Counties. The potential adverse consequences of this development for the implementation of the 2040 Growth Concept have been identified by the Council in its December 2004 resolution and amplified by the Measure 37 Task Force in its report in August.

Consequences include degradation of the effectiveness of the urban growth boundary itself through leapfrog development, possible problems for the rural and urban transportation network and a threat to the economic viability of farming in the region with the resulting likelihood of wide-scale conversion of tens of thousands of acres of land just outside the UGB to rural development.

Issue 3

The absence of adequate funding to build civic improvements (“infrastructure”) in areas added to the urban growth boundary is frustrating the implementation of plans for the development of these new communities.⁸⁷

A. Metro’s UGB Expansion Givings

Metro’s expansion of the regional UGB confers an increase in the value of the property added to the boundary. This is because the uses allowed on lands outside the boundary are limited to use for farming, forestry, and two, five, and ten acre rural home sites, while the full range of urban development is permitted once the land is inside the boundary. An estimate of the scale of UGB expansion givings can be made based on Metro’s past UGB expansions.

In order to estimate the value of UGB expansion windfalls, it is also necessary to understand the sequence of events leading up to UGB expansions. Each of those events contribute to the increase in land value. The following sequence is typical: In 1996 Metro designated 18,579 acres of “urban reserves” around the UGB, including a large area near the then unincorporated community of Damascus.⁸⁸ Because lands designated as

⁸⁷ Portland, Or. Metro Res. 05-3628, Exhibit A-5 “Windfall Tax” (Nov. 17, 2005).

⁸⁸ Portland, Or., Metro Res. 96-655E (Mar. 6, 1997); *see also* D.S. Parklane Dev., Inc. v. Metro, 994 P.2d 1205, 1205–20 (Or. App. Jan. 12, 2000) (describing the process Metro used to

urban reserves are given priority under state law for addition to the UGB,⁸⁹ this designation increased the speculative value of these properties. This was followed by the Metro Council's formal consideration of the urban reserve lands near Damascus for addition to the UGB during 2002; Metro eventually added these lands to the UGB on December 5, 2002, as part of an 18,540 acre expansion.⁹⁰

This was not the end, however, because Metro's action did not change the prior zoning (mostly large-lot rural residential and exclusive farm use), or even establish an overall comprehensive plan for the added lands in the Damascus area. That task was left to Clackamas County and the new City of Damascus, created by a vote of the residents in November 2004.⁹¹ The work of adopting a comprehensive land-use plan and the implementation of zoning is not expected to be completed before 2006.⁹² The land-use plan and zoning for Damascus will then be submitted to the LCDC for review and possible approval. Following that review and approval will come investments in roads and sewers and ultimately development. This narrative illustrates the sequence of actions by Metro that increase value, of which the expansion of the UGB is one, and that some of the increase in value is caused by speculation in advance of the actions.

Metro staff first conducted research into the sale of 51 properties, totaling about 600 acres in the UGB expansion properties around Damascus. For 17 sales made between 1998 and 2002, the average weighted price per acre was \$22,499. The average weighted price per acre for the 34 sales after the UGB expansion was \$55,584 per acre, an increase in the per acre price of about 150%.⁹³ The average weighted price per acre of the 9 sales in 2004 was \$96,392, an increase of about 330% over the average pre-UGB expansion price.⁹⁴ The price increases occurred despite the fact "land developers in general do not know what the zoning designations will be; when infrastructure services will be provided or what will be charged for them."⁹⁵

designate these urban reserves).

⁸⁹ OR. REV. STAT. § 195.145 (2003) (allowing cooperative designation of urban reserves into urban growth boundaries by local government and compulsory incorporation of designated urban reserves by the Land Conservation and Development Commission); OR. REV. STAT. § 197.298(1)(a) (designating urban reserves as land given first priority for inclusion into urban growth boundaries).

⁹⁰ Portland, Or., Metro Ordinance 02-969B (Dec. 5, 2002).

⁹¹ Clackamas County, Office of the Clerk, Elections Division, Unofficial November 2, 2004 General Election Results, <http://www.co.clackamas.or.us/elections/results/archives/NOV2004.htm> (last visited Jan. 22, 2006).

⁹² Portland, Or., Metro Res. 03-3306 (Apr. 10, 2003).

⁹³ Memorandum from Reed Wagner to Dan Cooper, Legal Counsel, Urbanization and Measure 37 Funding Mechanism 4 (Mar. 11, 2005) (on file with author); *see also* Memorandum from Karen Hohndel and Sonny Conder, to Reed Wagner and Dan Cooper, Evaluation of Damascus Inclusion Area Land Sales Transactions 2000-2004 (Mar. 11, 2005) (on file with author) (documenting the methods used to evaluate Damascus Inclusion Area land sales).

⁹⁴ Wagner, *supra* note 96, at 4.

⁹⁵ Hohndel, *supra* note 96. For much earlier papers documenting the differences in land value between property just inside and just outside urban growth boundaries, see Arthur C. Nelson, *Evaluating Urban Containment Programs 77-81* (1984) (unpublished Ph.D dissertation, Portland State University) (on file with Portland State University Library), and Gerrit J. Knaap, *The Price Effects of Urban Growth Boundaries in Metropolitan Portland, Oregon*, 61 *Land*

*B. Metro's Intent to Adopt a System of "Value Capture" for
UGB Expansion Givings*

When the Metro Council approved a major set of urban growth boundary expansions in December 2002, it was aware of the magnitude of the windfalls it was conferring on various property owners. It passed a resolution noting that land brought into the UGB increases in value, and directing its Chief Operating Officer

- [t]o study and propose to the Metro Council for adoption or referral to the voters, measures that require that the increase in value in land added to the Urban Growth Boundary by Metro Council action after December 1, 2002, be subject to regional value capture for regional purposes related to implementation of the 2040 Growth Concept.⁹⁶

There are a host of important and interesting factual and administrative details that would need to be addressed to implement this proposal,⁹⁷ but none of those details are worth considering unless Metro has sufficient legal authority to act. There are three major questions regarding Metro's authority to implement this concept: 1) Does Metro have the authority to impose taxes on the increase in value resulting from its expansion of the urban growth boundary? 2) Does Metro have the authority to pay Measure 37 claims and/or acquire easements to protect farmland outside its political boundary? 3) Does Metro have the authority to fund urban capital improvements inside the urban growth boundary?

III. METRO'S AUTHORITY TO ADOPT A WINDFALL TAX

The most complex legal questions addressed in this essay concern Metro's authority to levy a tax on UGB expansion windfalls. The discussion is organized as follows:

- 1) taxes specifically authorized for use by Metro and their limits, 2) Metro's general taxing authority, 3) limits on Metro's general taxing authority under the state constitution, 4) limits on Metro's general taxing authority under state statutes, 5) limits on Metro's general taxing authority under its Charter, and 6) discussion of potential taxes or fees Metro could levy on windfalls that are not prohibited or severely limited.

Economics 26, 32-33 (1985).

⁹⁶ Portland, Or., Metro Ordinance. No. 02-998 (Dec. 5, 2002).

⁹⁷ These include: 1) the tax rate, 2) the method for its calculation, 3) the precise triggering events for the tax, 4) methods for payment, including the possibility of payments in kind with land dedications or construction of the capital improvements that would otherwise be financed by the tax, 5) the civic improvements that should be financed with the tax proceeds, 6) the area within which conservation easements will be acquired, 7) whether the easements will be perpetual or for a limited term and the conditions under which they could be removed, 8) the precise contents of the easements, and 9) whether anything would be required beyond a restriction prohibiting additional development.

A. Taxes Specifically Authorized for Use by Metro and Their Limits

State statutes specifically authorize Metro to impose *ad valorem* property taxes, income taxes, excise taxes, and vehicle registration taxes.⁹⁸ Each of those authorizing provisions also contain limitations that affect their potential usefulness for taxing windfalls created by Metro's expansion of the UGB.

1. Property Taxes as a Vehicle to Tax UGB Expansion Givings

Metro can impose an *ad valorem* property tax⁹⁹ and is expressly authorized to differentiate tax rates in accordance with the types of services the property receives from Metro.¹⁰⁰ This ought to allow for a tax only on undeveloped and unserviced land added to the urban growth boundary. But Metro's *ad valorem* property taxes are subject to a maximum rate of 0.5%,¹⁰¹ too low of a rate to yield enough income to make a serious contribution to pay Measure 37 claims or finance civic improvements.

The same statute allows Metro to assess "a special tax" sufficient to pay for the principle and interest on any outstanding bonds. This "special tax," unlike the *ad valorem* tax described in the preceding paragraph, is not subject to the 0.5% limitation. However, it is a tax to be levied generally on all property in the district, not the subset of property owned by people who have benefited from a UGB expansion.¹⁰² Therefore, neither the expressly authorized property taxes nor the "special taxes" would provide a suitable basis for a tax or fee on UGB expansion windfalls.

2. Taxing UGB Givings Through an Income Tax

Metro can impose a tax "upon the entire taxable income of every resident of the district subject to tax under ORS Chapter 316" and on nonresidents doing business in Metro's district.¹⁰³ A tax on a gain in the value of property, based on the Federal tax on capital gains, is thus expressly authorized,¹⁰⁴ but would be limited to a maximum rate of 1%,¹⁰⁵ an

⁹⁸ Each of these authorizations are discussed below, except the vehicle registration fees that Metro is authorized to impose. Vehicle registration fees are not discussed further because the tax cannot be levied, nor the proceeds used, to implement Measure 37, protect farmland, or promote urban development in UGB expansion areas. OR. REV. STAT. § 268.503 (2003).

⁹⁹ *Id.* § 268.500(1). Metro is also expressly authorized to impose property taxes to finance a zoo. *Id.* § 268.315.

¹⁰⁰ *See id.* § 268.500(3) ("In taxation a district may classify property on the basis of services received from the district and prescribe different tax rates for the different classes of property.").

¹⁰¹ *Id.* § 268.500(1).

¹⁰² *Id.* § 268.500(1) ("The district may also annually assess, levy and collect a special tax upon *all such property* in an amount sufficient to pay the yearly interest on bonds previously issued by the district and then outstanding, together with any portion of the principal of such bonds maturing within the year. The special tax shall be applied only in payment of the interest and principal of bonds issued by the corporation, but the corporation may apply any funds it may have towards the payment of principal and interest of any such bonds.") (emphasis added).

¹⁰³ *Id.* § 268.505(1)(a), (b).

¹⁰⁴ In general, the Oregon income tax is supposed to be identical in operation and terms as

inadequate amount from the urbanization windfall to fund civic improvements or pay measure 37 claims.

3. Taxing UGB Expansion Givings Through an Urbanization Excise Tax on Persons Benefiting from Metro's UGB Expansion and Urbanization Planning Functions and Services

Oregon Revised Statute 268.507 authorizes Metro to levy an excise tax on "any person using the facilities, equipment, systems, functions, services or improvements owned, operated, franchised or provided by the district."¹⁰⁶ To date, Metro has used this authority only to impose a surcharge on the fees paid by users of its various facilities.¹⁰⁷ But this authorization could cover other Metro activities.

Title 11 of the Metro Code was adopted "to require and guide planning for conversion from rural to urban use of areas brought into the UGB. It is the intent of Title 11 that development of areas brought into the UGB implement the Regional Framework Plan and 2040 Growth Concept."¹⁰⁸ In the course of expanding the UGB, Metro itself applies "the 2040 Growth Concept design type designations applicable to the land added to the Urban Growth Boundary."¹⁰⁹

These Metro activities governing the urbanization of the property can reasonably be considered a "function" or "service" "provided by the district," as would Metro's role in the development and implementation of a plan to conserve farmland from future development. These functions and services are therefore the basis for an excise tax payable by someone benefiting from the execution of these responsibilities.

Whether such an excise tax would or would not violate the various limits on Metro's taxing authority is discussed below.

4. Metro's General Taxing Authority

Specific statutory grants and limitations on Metro's taxing authority do not constitute the sum total of Metro's taxation power. The legislature gave Metro "full power" to carry out its responsibilities.¹¹⁰ Metro also derives taxation authority from the consent of the voters, who passed a home-rule charter for Metro in 1992, as authorized by the state constitution.¹¹¹ The Charter gives Metro the authority to "impose, levy and collect taxes"¹¹² as

the federal income tax. *Id.* §§ 316.007(1); 316.012(1).

¹⁰⁵ *Id.* § 268.505(2).

¹⁰⁶ *Id.* § 268.507.

¹⁰⁷ PORTLAND, OR., METRO CODE §§ 7.01.010–7.01.190 (2003).

¹⁰⁸ *Id.* § 3.07.1105.

¹⁰⁹ *Id.* § 3.01.040(b)(2).

¹¹⁰ OR. REV. STAT. § 268.300(1) ("A metropolitan service district has full power to carry out the objectives of its formation and the functions authorized pursuant to its charter.").

¹¹¹ OR. CONST. art. XI, § 14 (1990).

¹¹² METRO, CHARTER, § 10 (2003), available at http://www.metro-region.org/library_docs/about/charter.nov2000.may2002.clean.03.pdf.

well as any powers, necessary to fulfill its responsibilities, that are within the power of the people to confer.¹¹³

In 2001, the Oregon Court of Appeals addressed the issue of whether a specific taxation power limited a local government's ability to adopt similar but not identical taxes under their broad home rule authority.¹¹⁴ In *AT&T Communications v. City of Eugene*, a state statute specifically authorized cities to collect an annual tax based on the lineal feet of public right of way used for communication lines and cables. This tax was subject to a maximum rate of 7% of gross revenues of the company paying the tax. The city of Eugene assessed the 7% lineal foot tax, but also imposed a separate annual telecommunications company registration fee equal to 2% of gross sales inside the city. Various communications companies argued that a telecommunications registration fee was implicitly prohibited by the limited authorization of the lineal-foot fee. The combined registration fee and lineal foot tax violated the 7% limit in the right-of-way taxation statute.¹¹⁵

The court concluded that "the city's charter broadly confers all authority not specifically denied by state or federal statute or constitution. Such broad charters have been construed to confer on municipalities the power to impose taxes."¹¹⁶ It also found that the enactment of a specific authorization of a particular tax, did not create an implied pre-emption of Eugene's ability to impose other taxes:

Indeed, to adopt the position of AT&T Communications and AT&T Wireless necessarily would mean that, by enacting ORS 221.515, the legislature intended to divest the city of the power to impose any other tax—whether a business license tax, or a hotel room tax, or *any* other tax not constituting a privilege tax on telecommunications carriers—not expressly authorized by the legislature. We find no such intention in the language of the statute. We conclude therefore that the challenged registration and license fees do not violate ORS 221.515.¹¹⁷

This situation is analogous to Metro's situation in that it has broad charter authority, but also specific statutory authorizations, combined with limits, on levying a property tax and income tax. Therefore, Metro's authority to establish taxes not specifically authorized should be broadly construed.

¹¹³ *Id.* § 9.

General Grant of Powers to Carry Out Functions; Construction of Specified Powers. When carrying out the functions authorized or assumed under this charter: (1) Metro has all powers that the laws of the United States and this state now or in the future could allow Metro just as if this charter specifically set out each of those powers; (2) the powers specified in this charter are not exclusive; (3) any specification of power in this charter is not intended to limit authority; and (4) the powers specified in this charter shall be construed liberally.

Id.

¹¹⁴ See generally *AT&T Commc'ns v. City of Eugene*, 35 P.3d 1029 (Or. Ct. App. 2001).

¹¹⁵ *Id.* at 1034.

¹¹⁶ *Id.* at 1037.

¹¹⁷ *Id.* at 1038 (emphasis in original).

B. Review of Limits on Metro's Taxing Authority

1. Limitations on Metro's General Taxing Authority in the Oregon Constitution

Whether exercising general or specific taxing authority, Metro is subject to limitations imposed by the Oregon constitution. The most important of these is the requirement that “[a]ll taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax.”¹¹⁸

The state constitution also imposes limits property taxation. These provisions were added to the constitution by statewide initiatives 5 and 50.¹¹⁹ These initiatives established maximum property tax rates of 1.5% and limited increases in assessed value to 3% per year.¹²⁰ Thus any potential tax on UGB expansion givings would need to be analyzed to determine that it is not actually a property tax subject to these constitutional limitations.

2. Statutory Limits on Metro's Taxing Authority: Real Estate Transfer Taxes and Systems Development Charges

State statute specifically prohibits local governments from imposing real estate transfer taxes.¹²¹ Any potential tax on UGB expansion givings could not be based “upon the right, privilege or act of transferring title to real property.”¹²² Local governments (cities and counties), however, are allowed to levy systems development charges (SDCs) to pay for capital improvements, such as roads, sewers, and parks.¹²³ Metro is defined as a local government.¹²⁴ However, under the SDC statute, local governments cannot impose SDCs to pay for the construction of schools or to buy easements to protect farmland from development.¹²⁵ For these reasons, real estate transfer taxes and SDCs would not be permissible methods for capturing windfall gains from UGB expansions.

¹¹⁸ OR. CONST. art. I, § 32.

¹¹⁹ Initiatives 5 and 50 were passed in 1990 and 1997, respectively. OR. SEC'Y OF STATE, OREGON BLUE BOOK 2005–2006, at 297, 299 (2005) available at <http://bluebook.state.or.us/state/elections/elections06.htm>.

¹²⁰ OR. CONST., art. XI, § 11(1)(b). However, Measure 50 passed in 1997 and amended Measure 5 to allow the assessed value to increase by more than 3% if the property is rezoned and used for the new purpose. OR. CONST. art. XI, § 11 (1)(c)(C).

¹²¹ OR. REV. STAT. § 306.815 (1) (2003) (“A city, county, district or other political subdivision or municipal corporation of this state shall not impose, by ordinance or other law, a tax or fee upon the transfer of a fee estate in real property, or measured by the consideration paid or received upon transfer of a fee estate in real property.”).

¹²² *Id.* § 306.815(2) (“A tax or fee upon the transfer of a fee estate in real property does not include any fee or charge that becomes due or payable at the time of transfer of a fee estate in real property, unless that fee or charge is imposed upon the right, privilege or act of transferring title to real property.”).

¹²³ *Id.* §§ 223.297, 223.299(1)(a).

¹²⁴ *Id.* § 223.001(8) (cross referencing *id.* §§ 174.116(1)(a), 174.116(2)(h)).

¹²⁵ *Id.* § 223.299(1).

3. Limits on Metro's Taxing Authority Under Its Charter

In various ways, Metro's own charter limits and conditions its ability to impose taxes. For example, the charter requires a popular vote on a tax or fee under two circumstances: when Metro imposes a tax of general applicability across the region,¹²⁶ and in order to spend more than \$12,500,000 (in 1993 dollars) from revenues derived from taxes not approved by a vote of the people.¹²⁷ When a popular vote is not required, Metro must convene and consult a special Tax Study Committee before imposing a tax.¹²⁸ These limitations only apply to "taxes" and not to other charges including user fees, permits, or franchises.¹²⁹ Metro's Code includes other limits on its taxes and fees, but the code can be easily amended by the Council should it wish to avoid these restrictions.¹³⁰

C. Two Potential UGB Expansion Windfall Taxes or Fees

1. Urbanization Excise Tax Under Metro's Specific or General Taxing Authority

Using either its specific excise taxing authority¹³¹ or broad taxing authority, Metro could impose an excise tax upon persons seeking permission to change the pre-UGB (*viz.* rural) zoning for their property to

¹²⁶ "Any ordinance of the Council imposing broadly based taxes of general applicability on the personal income, business income, payroll, property, or sales of goods or services of all, or a number of classes of, persons or entities in the region requires approval of the voters of Metro before taking effect." PORTLAND, OR., METRO CHARTER, § 11.

¹²⁷ The relevant portion of the Charter is the following:

(1) Generally. Except as provided in this section, for the first fiscal year after this charter takes effect Metro may make no more than \$12,500,000 in expenditures on a cash basis from taxes imposed and received by Metro and interest and other earnings on those taxes. This expenditure limitation increases in each subsequent fiscal year by a percentage equal to (a) the rate of increase in the Consumer Price Index, All Items, for Portland-Vancouver (All Urban Consumers) as determined by the appropriate federal agency or (b) the most nearly equivalent index as determined by the Council if the index described in (a) is discontinued.

(2) Exclusions From Limitation. This section does not apply to (a) taxes approved by the voters of Metro or the Metropolitan Service District and interest and other earnings on those taxes.

Id. § 14, available at http://www.metro-region.org/library_docs/about/charter.nov2000.may2002.clean.03.pdf.

¹²⁸ *Id.* § 13.

¹²⁹ "For purposes of Sections 11, 13 and 14 of this charter, 'taxes' do not include any user charge, service fee, franchise fee, charge for the issuance of any franchise, license, permit or approval, or any benefit assessment against property." *Id.* § 11(3). However, user charges have their own limitations. *Id.* § 15.

¹³⁰ PORTLAND, OR., METRO CODE § 1.01.003 (2003). Amendment of the Code requires only the adoption of an ordinance by the Council.

¹³¹ OR. REV. STAT. § 268.507 (2003) ("[Metro can] impose excise taxes on any person using the facilities, equipment, systems, functions, services or improvements owned, operated, franchised or provided by the district.").

conform to the Metro 2040 Growth Concept designation for their property, or the subsequently adopted urban plan designation or zones adopted by the governing city or county. Alternatively, the tax could be imposed upon the person seeking a development permit or building permit to develop the land in conformity with its new urban zoning. That urbanization authorization tax could be based on the net present value of the estimated increase in the gross revenue stream from new construction permitted as a result of Metro's actions and services. The date for calculating that increase in value might be December 5, 2002.¹³² It would apply to transactions governing property added to the UGB after the date the tax is approved by the voters. The tax would be payable no sooner than the time of the application for a development permit or a zoning change for the property, or annexation into Metro's political boundary, and no later than the date building permits are issued for development of the property. Payment could be made in cash, through in-kind contributions of capital improvements, donations of easements, dedications of land, or by other means.

This kind of tax on the government authorization of urbanization would pass state constitutional and statutory muster so long as it is not assessed, administered, or collected in such a way that it would 1) be limited by the statutory and constitutional limitations that apply to *ad valorem* property taxes,¹³³ 2) be limited by the maximum rate applied to income taxes imposed by Metro,¹³⁴ 3) be prohibited as a real estate transfer tax,¹³⁵ or 4) violate the tax uniformity requirements of the state constitution.¹³⁶

2. *Would A Metro Urbanization Excise Tax Satisfy Oregon Constitutional Requirements?*

a. Uniformity Clause Requirements

The taxation "Uniformity Clause" in the Oregon constitution provides that, "[A]ll taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax."¹³⁷ For decades this clause was interpreted as requiring complete tax uniformity across all of a taxing district's land. But in 1980, in *Jarvill v. City of Eugene*,¹³⁸ the Oregon Supreme Court adopted a more flexible standard.

In *Jarvill*, Eugene had amended its charter to create a downtown development district (to build parking structures among other things) and to

¹³² This date represents when the Metro Council expressed its intent to impose a "value capture" mechanism on property added to the UGB.

¹³³ See *supra* note 105 and accompanying text.

¹³⁴ See *supra* note 109 and accompanying text.

¹³⁵ See *supra* note 126 and accompanying text.

¹³⁶ See *supra* note 122 and accompanying text.

¹³⁷ OR. CONST. art. I, § 32. The other constitutional tax uniformity provision, article IX, section 1 ("All taxes shall be levied and collected under general laws operating uniformly throughout the State."), applies only to statewide taxes, not local taxes, so this provision is not an issue for Metro. *Jarvill v. City of Eugene*, 613 P.2d 1, 9 n.15 (Or. 1980).

¹³⁸ *Jarvill*, 613 P.2d at 12.

tax persons, property, and businesses in the district. Plaintiffs challenged the city's ability to charge a tax on the property in the Downtown Development District different from charges to all other taxpayers in the city. The court held that a geographic distinction between taxpayers and taxes did not violate the uniformity clause

if it is also based upon qualitative differences that distinguish the geographical area from other areas within the territorial limits of the authority levying the tax. In other words, a taxing authority may not single out a subterritory for exclusive tax treatment (either taxation or exemption) if that subterritory is indistinguishable from the rest of the territory. But if the subterritory is different in quality compared to the rest of the territory, then article I, section 32, does not prohibit a taxing authority from defining the subterritory as a separate class. . . . In addition, if the taxing authority selects a subterritory for taxation and that subterritory is the only area so taxed, then the subterritory must not only be qualitatively different but must also be unique.¹³⁹

The court described two types of "qualitative differences" that would be a permitted basis for different taxes. One type was "natural qualities," i.e., "qualities that exist in the land by reason of nature, for example, swamp land . . . or a flood plain."¹⁴⁰ The other type of permitted differentiation was created "by political decision, commitment and action."

[A]rticle 1, section 32 does not prevent tax classifications from reflecting qualitative differences that result from land use planning decisions. Such planning decisions are almost inevitably stated in territorial terms; but this does not mean that a tax classification which reflects a land use classification is based only on location and therefore invalid, rather than being validly based on the qualitative difference in land use characteristics.¹⁴¹

Both the standard articulated by the court in *Jarvill* and the facts of that case suggest that Metro would be able to distinguish property in new UGB expansion areas from other property within its boundaries based on some or all of the following "qualitative differences in land use characteristics":

- Land retaining rural comprehensive plan and zoning designations but which has been brought within the urban growth boundary;

¹³⁹ *Id.* at 13.

¹⁴⁰ *Id.* at 13–14.

¹⁴¹ *Id.* at 14. In contrast, in *Mathias v. Dept. of Revenue*, 817 P.2d 272 (Or. 1991), the Oregon Supreme Court struck down a statutory tax classification that valued lots within a subdivision, for *ad valorem* tax purposes, differently if a property owner owned more than four lots in the subdivision. *Id.* at 274. The Oregon Department of Revenue argued that the statutory classification was justified because the legislature had a "rational basis" for concluding that four or more lots in a subdivision held under one ownership would have a discounted value due to the "holding time" of such lots in the market, and to create an incentive for development. The Oregon Supreme Court disagreed that the tax classification was justified. The Court held that "classifications, to pass state constitutional muster, must be based on inherent, qualitative, genuine, rational differences between the classes of property to be accorded different treatment," and the classification at issue in the case did not meet this standard. *Id.* at 278.

- Land that will be, or has been, assigned a 2040 Growth Concept design type but has not been replanned or rezoned under city or county land-use plans and zoning ordinances;
- Land that will be the subject of a Metro-approved concept plan for urbanization;
- Land that has been approved for addition to the urban growth boundary but not yet annexed into Metro's political boundary.

b. Would a Metro Urbanization Excise Tax Constitute a Property Tax Limited by State Statute or the State Constitution?

The state constitutional limits on taxation under Measure 5 apply to “any charge imposed by a governmental unit upon property or upon a property owner as a direct consequence of ownership of that property”¹⁴² These limits apply “whether the taxes imposed on property are calculated on the basis of the value of that property or some other basis”¹⁴³

In *Roseburg School Dist. v. City of Roseburg*, the Oregon Supreme Court held that a storm drainage utility fee was not a property tax subject to Measure 5, because it lacked two hallmarks of property taxes; (1) the tax liability accrued to the user of the property, not the owner; (2) failure to pay the tax was enforced by withholding water service, not by the imposition of a lien on the property.¹⁴⁴ These distinctions were relied upon in subsequent Tax Court decisions.¹⁴⁵

The urbanization tax could be levied on anyone seeking a zone change or building permit, which could be a prospective purchaser or a developer, as well as an owner. The urbanization tax could be enforced by withholding development or building permits.

There are Oregon Tax Court decisions that hold that the limits on property taxation in Measure 5 do not apply to taxes that are triggered by an affirmative act of the landowner.¹⁴⁶ Following those cases, the Oregon Attorney General recommended that a school impact fee could be imposed by the Legislature, and not run afoul of the limits in Measure 5 if the fee was imposed “on the person who develops the property, not on the property” and

¹⁴² OR. CONST. art. XI § 11b (2)(b).

¹⁴³ OR. CONST. art. XI § 11b (1).

¹⁴⁴ *Roseburg School Dist. v. City of Roseburg*, 851 P.2d 595, 598–99 (1993).

¹⁴⁵ See *Alien Enterprises Inc. v. Dep't of Revenue*, 12 Or. Tax 126, 129 (Or. T.C. 1992) (amusement fee tax imposed on person controlling the premises not the landowner); *City of Portland v. Atwood*, 13 Or. Tax 136, 139 (Or. T.C. 1994) (business property management license fee applied to manager of property and was not enforced by a lien); *Knapp v. City of Jacksonville*, 18 Or. Tax 22 (Or. T.C. 2004) (public safety surcharge, as amended by the city, was constitutional because it applied to user of the property and was not enforced by a lien).

¹⁴⁶ See *Alien Enterprises Inc.*, 12 Or. Tax at 130 (tax on amusement devices held not to be a property tax because the landowner chose whether or not to put the devices on the property); *Dennehy v. City of Gresham*, 12 Or. Tax 194, 197 (Or. T.C. 1992) (tax on impervious surfaces held to be a property tax when applied to existing paved areas, but would not be if applied to areas paved at the choice of the landowner).

that it should be tied “to the privilege of engaging in the development activity, not to the mere ownership of the property.”¹⁴⁷ The proposed urbanization tax is triggered only by the affirmative act of the landowner, developer or another third party, when he or she seeks a zone change, development permit or a building permit.

The additional limits on property taxes imposed by Measure 50 apply to “ad valorem property taxes.” This phrase does not appear elsewhere in the Oregon Constitution and has not been the subject of interpretation by the appellate courts in an appeal of a local tax. The Oregon Tax Court held that a tax that was based on the number of residential and nonresidential units on the property, and not the value of the property itself, was not an “ad valorem” tax subject to Measure 50.¹⁴⁸ The Oregon Attorney General has opined that “ad valorem” refers to taxes calculated as a share of a property’s assessed value and are “payable regardless of whether the property is used or not.”¹⁴⁹

The urbanization tax would be computed based on the increase in development value, which would reflect potential number of units or types of use, rather than the whole value of the land.

c. Would a Metro Urbanization Authorization Excise Tax Constitute an Income Tax Limited to a 1% Rate by State Statute?

As noted above, Metro can impose an income tax, but that tax is limited to a 1% rate. The statute specifies that Metro can levy a tax “upon the entire taxable income of every resident of the district.”¹⁵⁰ The statute also permits Metro to tax “the net income” of an enterprise “having a place of business or office within or having income derived from sources within the district which income is subject to tax under ORS chapter 317 or 318.”¹⁵¹

As applied to persons or enterprises, the urbanization excise tax (levied on the occasion of an application for a change in the plan designation or zoning, and based on the change in estimated revenue streams from the newly authorized urban development) would not fall within these provisions because it would not be levied upon “the entire taxable [annual] income” of any person in any one year. Instead it would be applied once, based on the present value of a future stream of gross revenues derived from future urban development, even though the urbanization taxpayer may not receive those revenues. Because the tax would not be based on income reflecting the difference in value between the purchase price and the sale price,¹⁵² it would

¹⁴⁷ 49 Or. Op. Att’y Gen. 77, 77 (1998).

¹⁴⁸ *Knapp*, 18 Or. Tax at 35.

¹⁴⁹ 48 Or. Op. Att’y Gen. 241, 274 (1997). The term “ad valorem” as used in Measure 50 was also discussed by the Oregon Supreme Court in the context of a challenge to the ballot title for a proposed initiative to cap property taxes in. *See Kain v. Myers*, 93 P.3d 62, 64 (2004).

¹⁵⁰ OR. REV. STAT. § 268.505(1)(a) (2005).

¹⁵¹ *Id.* § 268.505(1)(b).

¹⁵² For example, an important part of the gain in the value of real property purchased in 1960, at a location that was then distant from the edge of the urban area and added to the UGB in 2005, would not be attributable to the UGB expansion windfall but rather to the ambient rise

not be a capital gains tax (a type of income tax). In addition, this tax would not apply to “every resident of the district,” but only to those persons seeking or receiving Metro’s urbanization services. Therefore, a Metro urbanization excise tax would not be limited to one percent.

d. Would a Metro Urbanization Excise Tax Constitute a Real Estate Transfer Tax Prohibited by State Statute?

For the same reason the urbanization authorization excise tax would not be an income tax, it would not be a real estate transfer tax, since the tax is based on the increase in projected revenue from urban development, not the sale price. In addition, the tax liability would not be imposed upon sale of a property but upon application for a change in the zoning or a development permit, or a building permit.¹⁵³ The tax could even be levied at the time of the transfer of property, just so long as the tax was not based on the right or act of transfer itself.¹⁵⁴

3. A Potential Income Tax on Urbanization Windfalls Under Metro’s General Taxing Authority

As noted above, Metro can levy a tax “upon the entire taxable income of every resident of the district” and of businesses doing business in the district, but that tax is limited to a rate of 1%.¹⁵⁵ The implication of these

in real estate values and its increasing proximity to urban services and facilities. This part of the increase in value would not be taxed by the urbanization excise tax but would be subject to a capital gains tax.

¹⁵³ OR. REV. STAT. § 306.815(1) (emphasis added).

A city, county, district or other political subdivision, or municipal corporation of this state shall not impose, by ordinance or other law, a tax or fee upon the transfer of a fee estate in real property, or measured by the consideration paid or received upon transfer of a fee estate in real property.

Id.

¹⁵⁴ *Id.* § 306.815(2) (“A tax or fee upon the transfer of a fee estate in real property does not include any fee or charge that becomes due or payable at the time of transfer of a fee estate in real property, unless that fee or charge is imposed upon the right, privilege or act of transferring title to real property.”).

¹⁵⁵ Specifically, the statute provides:

- (1) Subject to the provisions of a district charter, to carry out the purposes of this chapter, a district may by ordinance impose a tax:
 - (a) Upon the entire taxable income of every resident of the district subject to tax under OR. REV. STAT. chapter 316 and upon the taxable income of every nonresident that is derived from sources within the district which income is subject to tax under OR. REV. STAT. § 316; and
 - (b) On or measured by the net income of a mercantile, manufacturing, business, financial, centrally assessed, investment, insurance or other corporation or entity taxable as a corporation doing business, located, or having a place of business or office within or having income derived from sources within the district which income is subject to tax under OR. REV. STAT. § chapter 317 or 318.

provisions is that Metro *could* use its general taxing authority to levy a tax of more than 1% of a *portion* of the income of *some* residents of the district. The portion of the income would be that part attributable to the urbanization authorization windfall. The tax would become due when the gains on the property were realized or possibly by a certain date.

This potential form of windfall tax would not be subject to the state constitutional limitations on property taxes, because it would be levied on income, not property. It would not be required to satisfy the uniformity clause for the same reason. Finally, it would not be a real estate transfer tax provided it was collected as income taxes are collected, that is, not imposed upon the sale of the property, but rather upon the realization of the income.

4. Either an Urbanization Windfall Excise or Income Tax Would Require Approval of the Voters

Metro's Charter limits its spending from taxes (and income earned on those tax proceeds) to \$12.5 million a year, indexed from 1992, unless additional amounts are approved by the voters.¹⁵⁶ As of 2005, the Charter spending cap is about \$17 million.¹⁵⁷ There was \$12.8 million in spending subject to the Charter spending cap in Metro's fiscal 2005–06 budget.¹⁵⁸ Because of this cap, regardless of which form the tax on UGB expansion givings takes, it will require the consent of the voters if the annual proceeds exceed more than a few million dollars.¹⁵⁹

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- (2) The rate of the tax imposed by ordinance adopted under authority of subsection (1) of this section shall not exceed one percent. The tax may be imposed and collected as a surtax upon the state income or excise tax.

Id. §§ 268.505(1), (2).

¹⁵⁶ METRO, CHARTER, § 14(1), (2) (2003), available at http://www.metro-region.org/library_docs/about/charter.nov2000.may2002.clean.03.pdf.

¹⁵⁷ PORTLAND, OR., METRO, ADOPTED BUDGET FISCAL YEAR 2005–06, vol. 2, p. A-9.

¹⁵⁸ *Id.* at vol. 2, p. A-8. Most of Metro's projected 2005–06 income of \$185 million comes from enterprise earnings and voter-approved property taxes. *Id.* at vol. 1, p. B-2 to B-6.

¹⁵⁹ As highlighted *supra* note 88, land values increased by \$33,000 to \$74,000/acre measured a few years before and after land was added to the urban growth boundary in 2002, reflecting the anticipated increase in development revenue made possible by the boundary expansion. In that year, Metro added about 18,600 acres to the boundary. If Metro had previously adopted a 20% urbanization windfall tax and if we assume the value of the added acres increased by an average of \$50,000/acre, the total amount of revenue generated by that expansion would have been \$180,600,000.

IV. METRO'S AUTHORITY TO SPEND THE FUNDS ON EASEMENTS
AND CAPITAL IMPROVEMENTS

*A. Metro's Authority to Spend Urbanization Tax Proceeds on UGB
Expansion Givings to Acquire Conservation Easements Outside its Political
Boundaries*

Metro has the authority to acquire conservation easements on the farm and forest lands outside its political boundary and the UGB. Metro also has jurisdiction over matters of metropolitan concern.¹⁶⁰ Matters of metropolitan concern extend outside Metro's UGB and political boundary. As noted above, Metro's Future Vision statement, the Charter-mandated Regional Framework Plan and its Urban Growth Management Functional Plan, all call for the conservation of farm and forestlands outside Metro's UGB and political boundary.¹⁶¹

In addition, Metro has express statutory authority to buy land or "any interest therein" inside or outside its boundaries "to the extent necessary to provide a metropolitan aspect of public service."¹⁶² It has previously exercised this authority to buy land outside its political boundary (and outside the UGB) as part of its regional open space system, funded by a bond measure passed by the voters in 1995.¹⁶³ Finally, Metro's Code specifically provides for the purchase of conservation easements, including easements for the purpose of protecting agricultural and forest lands.¹⁶⁴

However, Metro does not have authority to require Measure 37 claimants whose claims are made against exclusive farm use zoning (or forest conservation zoning) to accept payment in lieu of a waiver of the implicated laws and regulations. Only the government against whom the claim is made can make the choice between providing compensation or waiver.¹⁶⁵ In this case it is the state of Oregon and counties that implement state farm and forest zoning requirements, not Metro.¹⁶⁶ In acquiring its regional open space properties, Metro used a willing buyer/willing seller approach. Thus, the same technique and the acquired skills of its staff could be used in this program.

¹⁶⁰ OR. REV. STAT. § 268.310(6).

¹⁶¹ See *supra* notes 48–61 and accompanying text.

¹⁶² OR. REV. STAT. § 268.340(1) ("To the extent necessary to provide a metropolitan aspect of a public service, a district may acquire by purchase, condemnation, devise, gift or grant real and personal property or any interest therein within and without the district, including property of other public corporations.").

¹⁶³ Metro, Open Spaces Acquisition Target Areas, <http://www.metro-region.org/article.cfm?ArticleID=587> (last visited Jan. 22, 2006).

¹⁶⁴ "The purpose of this chapter is to encourage the voluntary retention and protection of the natural, scenic, or open space values of real property, assuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, and preserving the historical, architectural, archeological, or cultural aspects of real property by private property owners through sale, donation, or dedication of conservation easements to Metro." PORTLAND, OR., METRO CODE § 10.03.020 (2003).

¹⁶⁵ Ballot Measure 37 (Or. 2004).

¹⁶⁶ See *supra* notes 28–35 and accompanying text.

B. Metro's Authority to Distribute Proceeds from an Urbanization Excise Tax to Local Governments and Service Districts to Finance Civic Improvements in UGB Expansion Areas

The Metro Council has read news reports and heard developers express concern that despite expansions of its urban growth boundary, urbanization in the expansion areas seems stymied.¹⁶⁷ As noted above, Metro has jurisdiction over matters of metropolitan concern.¹⁶⁸ Given the various policy statements Metro has adopted regarding the urbanization of UGB expansion areas,¹⁶⁹ it would not be much of a step for Metro to identify the provision of adequate capital investments as a matter of regional concern. Metro has the authority, either implicit in its general powers¹⁷⁰ or through an

¹⁶⁷ As highlighted in the local papers,

Even though many more people are moving to the Portland area than expected previously, regional planners, home builders and real estate agents are worried that land already designated for residential development is languishing — driving home prices even higher than today's record amounts. . . . 'We cannot build until the land is planned and zoned and the services are ready[,] [said home builder Don Morrisette.] . . . Metro President David Bragdon shares Morrisette's concerns. Metro administers the urban growth boundary that separates urban from rural land. Although the elected Metro Council repeatedly has expanded the boundary to allow for more housing, it typically takes several years of planning and infrastructure work before construction can begin. 'Just because we've voted to expand the boundary to include more land doesn't mean that it's ready to be built on,' Bragdon said. . . . A solution to the second part of the problem — paying for infrastructure improvements — may be further off. . . . Morrisette talked about how local governments cannot afford to build the roads, water lines and sewers needed to serve new developments.

Jim Redden, *Builders, Planners See Land Shortage*, PORTLAND TRIBUNE, Oct. 21, 2005, at A1.

¹⁶⁸ OR. REV. STAT. § 268.310 (2005) ("Subject to the provisions of a district charter, a district may, to carry out the purposes of this chapter: (6) Exercise jurisdiction over other matters of metropolitan concern as authorized by a district charter.").

¹⁶⁹ See, e.g., METRO, CHARTER § 5(4)(c) (2003), available at http://www.metro-region.org/library_docs/about/charter.nov2000.may2002.clean.03.pdf ("Prior to approving any amendment or amendments of the urban growth boundary . . . [the Council shall address:] (iii) [t]he cost impacts on existing residents of providing needed public services . . ."); FUTURE VISION COMMISSION, REPORT OF METRO'S FUTURE VISION COMMISSION: VALUES, VISION STATEMENTS AND ACTION STEPS 14–15 (Mar. 4, 1995), available at http://www.metroregion.org/library_docs/land_use/fvc.pdf ("[To achieve Metro's growth management vision, Metro should] [c]reate an . . . institutional framework for discussing and addressing issues which extend beyond Metro's jurisdictional boundaries . . ."); METRO'S REGIONAL FRAMEWORK PLAN: SUMMARY OF GROWTH CONCEPT 1 (Jan. 2005), available at http://www.metro-region.org/library_docs/land_use/00rfpintroduction.pdf (stating "the preferred form of regional growth and development . . . including a general approach to approximately where and how much the UGB should be ultimately expanded"); METRO CODE § 3.07.1105 (2004), available at http://www.metro-region.org/library_docs/about/chap307.pdf ("It is the purpose of Title XI [of the Metro Code] to require and guide conversion from rural to urban use of areas brought into the UGB.").

¹⁷⁰ OR. REV. STAT. § 268.300(1) (2003) ("A district shall constitute a municipal corporation of this state . . . [and] shall have full power to carry out the objectives of its formation and the functions authorized pursuant to its charter.").

intergovernmental agreement,¹⁷¹ to distribute funds to local governments or service providers to build capital facilities.

V. CONCLUSION

Metro may have sufficient legal authority to: 1) impose a tax on the givings that come from its expansion of the regional urban growth boundary, 2) to use some of those funds to pay Measure 37 claims (through voluntary purchases of development rights) on farmland outside Metro's boundary, and 3) use the remainder of funds to help pay for capital improvements in or near urban growth boundary expansion areas.

¹⁷¹ *Id.* § 268.300(2) ("For purposes of its authorized functions, a district may contract with the United States or with any county, city, state or public body . . .").