

## Regional Roundtable

May 15, 2001

*Good morning. Because of the program and the quality of it, we wanted to get started early, even before you've finished your last egg. I'm Jay Waldron. I'm part of the board of the Institute of Portland Metropolitan Studies. It's a citizen board. The Institute is part of Portland State University but it is governed by a citizen board. I want to thank Craig Wollner from Portland State who put this program together, Emily Renfrow who did all the hard work, and members of the board—Don Barney, Fran Tangen, and Thane Tienson—who conceived of our shot at intellectualizing the hullabaloo over property rights. I just wanted to let you know that we have a booklet from the Lincoln Institute of Land Policy about state property rights that's on that table when you leave, and there may be some out in front. Without further ado I would like to introduce Jack Faust, who is going to jazz up this very intellectual presentation.*

### *Jack Faust*

Thank you Jay. I guess I'm in charge of the ado since you brought me up here without further ado. I will tell you I'm a Portland lawyer and I've done some time as a talking head with Jim. I learned about some emotions that attend land-use planning and land-use in this state with four years as a commissioner in LCDC back in the time when we were getting in acknowledgements from all the jurisdictions.

We regularly had death threats. The most colorful of which was a guy who came to one of our hearings and he said, "Well, I'm on the official committee to welcome you folks when you come to meet in Jacksonville. My job is to get the ropes." We had one fellow come up, in one hearing, who said, "The trouble with you people is you want to turn this state into a whole vacant lot, the whole state, with nothing but mice and birds." The very next hearing we had a guy come in and say, "If you people had your way you would pave over the whole state. You would just turn it over to the developers."

Those are the kind of emotions that attend all these issues such as Measure 7. Let me just ask you: is there anybody here who doesn't know what Measure 7 is? Okay, I see that none of you have been imprisoned by the Chinese on Hainan Island for the last year so we can proceed to our speakers.

First is Jim Brown. Jim is the President and CEO of the Lincoln Institute, which is the one which does the study and teaching of land policy, taxation, and economic questions. For twenty-six years he was the John F. Kennedy professor at the School of Government at Harvard. His Ph.D. is from Indiana U.

Like all of our people here today, I'm not going to waste the time to tell you about all their civic activities, numerous professional activities, and academic activities because believe me their CV's are heavy to lift. These are people with incredible credentials to talk to you about the subject matter that we have today. I do want to mention one of Jim's articles, which I'm sure you've all read, it's on "Micro-Neighborhood Externalities and Hedonic Housing Prices" and I'm sure you all read that in *People Magazine*. Jim is going to speak to us of the goal. I guess the goal is what we're putting him on, and that is the importance of success of our urban planning and growth in the Portland area, so let's bring up Jim Brown.

### *Jim Brown*

Thank you. I should start by saying that first of all I'm a hopeless optimist. I still think the Red Sox will win the World Series and even this year. The hedonic price index is available in cartoons if you want the cartoon version of it. I should start, I think, with the disclaimer, that is, to have you understand that I don't know very much about Oregon or Portland. I've been interested for some time but I'm not an expert. What I'm not going to be able to do is give you an insider's view about what you're doing. What I hoped I'd be able to do is provide some outside perspective, a different perspective, about some the issues I think are associated with your effort at planning and the growth boundary.

I want to start by saying how I am pleased to be here. I also hear people say that and I really question whether they really mean that they're pleased to be here. I wanted to say that I was pleased to be here because I am actually both pleased and excited about having the opportunity to talk, last night and today, about the issues of planning in Portland. The reason I think it's important is that we're really at a time in the planning effort, again, where it's terribly important that this experiment in Portland succeeds, not only for Portland but also for the whole country.

In my mind, you are, as you probably are aware, a kind of poster child for metropolitan cooperation and planning, to try to provide a better environment in which you and your children and your grandchildren can live. I think it's important that you succeed because I think if you don't succeed the world will judge that metropolitan planning won't work, in the same way that early failures in urban renewal in some major cities led people to conclude that urban renewal just doesn't work. I believe that, unfortunately, if Portland fails in this effort to provide a better environment through planning, I think the world will turn to say it can't be done. There are various reasons, and I want to say some of those, why I think it's important for our country that we do recognize the need for this kind of metropolitan planning. So let me give a few reasons why I think other people need to take your experiment as a success and travel their own ways on their road for planning. And also to give you what I view from the outside are the dangers—that the world would perceive that you have actually not succeeded.

So let me start with some things that I think are the reasons that the US needs to find alternative ways to manage its growth. Alternative from the kind of continued growth

patterns that we've experienced really since World War II. One thing you may note in this conversation is I won't use the word sprawl. I'm not going to use that word because I think it's a stupid word and only means something to people in their own minds. It has no meaning that's helpful. Any serious person thinking about these efforts wouldn't use that word because it's purely political. It makes no effort to try to help people understand what I think the issues are. So I won't use that word.

I want to talk to you about some of the issues around growth and development throughout the U.S. that are troublesome. First I think that, as you're aware, the way that growth is occurring is that some very valuable land is being converted to urban use. What I have in mind here now is habitats, wetlands, special beautiful property, special agricultural land. Protecting those in the process of development is important and I think everybody gains from that.

Second, I think the pattern of development in the US has tended to isolate poor households and limit the choice among households and particularly minority households. I believe that it is necessary for us to expand the opportunities for everyone in our society, for us to continue to have both a free society and a strong economy.

A third issue that comes up, and I'll come back to this issue because I don't have a standard view of this and I want to be somewhat provocative, the third issue is that people often associate the growth patterns with traffic congestion. The image in these people's minds is that if we could manage the growth better we could actually solve or manage the problems of congestion and traffic. I don't believe that traffic congestion and the pattern of urban development are closely associated at all. I do recognize the political importance of traffic congestion but I don't believe that management of urban development will do much to affect the amount of traffic congestion; I'll come back to this issue of what we can do subsequently.

Let me now turn to what I think are the potential dangers that could make the world perceive that Portland's effort to manage/plan its growth failed. First, much of the discussion (certainly outside Portland, possibly even within Portland but I'm not sure), about the effort of planning is focused really on the boundary. In fact, I think, as important as the boundary itself is the provision for and implementation of higher density development within the boundary—this is very much as important. The higher density development increases the choices and opportunities for households and has a major role in mitigating price increases. If the boundary simply generates five-acre lots at the edges and that's the impact of it, it will have a price impact and will be received as a failure because you didn't provide the expanded choices and opportunities. It is essential, for this experiment to be successful, that you continue to permit and facilitate, I would even say mandate, higher density development and more choices for everyone. Without this higher density, I'm afraid, people would judge that the growth management failed.

Second, I think you have to find ways to continue to expand the boundary. I understand the difficulties around that but I think you need to find those methods and you need to find, as a community, a way to expand those methods in a civil way. I'm

sure we understand that if you don't expand the boundaries, ultimately you're going to find increases in land and housing prices. The problem is not simply that you expand the boundaries in some mechanical way it's much, as we were speaking last night, it's much like Greenspan's problem of trying to talk to people about what things are going to happen with the interest rate. It's the expectations about what we think is actually going on in subtle moves by various policy groups. These expectations determine what happens to the price of land—not just the absolute amount of land. If the world perceives that you're not going to provide enough land even if there's enough land there, prices will escalate enormously on the expectation. This is a very tricky business because one of the problems with having a government agency that is permitting this land to be bound is that you've now got a new institution involved. The tea leaves are being read just like Wall Street reads the tea leaves in Greenspan's various speeches and positions and so forth. This is something that we don't think about a lot and we haven't had a lot of experience with, but it's a terribly important issue.

Finally let me close my comments—not my final comments but my comments about traffic and congestion. As I suggested earlier, I believe that in U.S. cities, because of the nature of the way that we've formed them so far, there is really nothing we can do in the pattern of development that will actually change the amount of traffic congestion. We're going to have traffic usage and increased congestion no matter what form the development is in. If you're going to basically affect traffic, you're going to have to deal with traffic. That means you are going to have to try to limit the use of automobiles, the amount of driving, and you've got to do it directly through prices or regulation, and this is something that our country really is likely to want to do or is likely to be able to do politically. For that reason I think we are going to have continued increase in traffic and congestion.

The reason that I raise it in this context is that I think that out there in the world people are mad about the congestion. To the extent that people care about managing development, planning for growth, providing a better road management, to the extent to which they say we should do that because it will improve traffic congestion, I think they're fooling themselves and they're setting themselves up for failure. If the Smart Growth movement in the United States says to the world, "We'll solve your traffic problem by having smarter growth," five years from now people are going to say, "There's more traffic: you failed." It's not a relationship between growth patterns and traffic. It's the fact that we drive too many cars too far and we're going to continue to do that. There's nothing we can do, particularly in the next twenty-five years, that's going to change that very much unless we decide to attack the problem of how many cars people have and how often they can drive them. This is a pricing system—either by making taxes higher or prices higher or through some regulatory means.

How much time do I have? A couple of minutes?

*A few, take two, take five.*

Let me make a few comments on my perspective of issues around Measure 7, which I view as about property rights and use of land. Certainly the issues of land and private property rights have been central to this country since we founded it. I think you go back and with the Pilgrims coming to the United States, and with the immigrants from the very beginning, it was to a large extent about their wanting to have the right to use their land and not have it owned by the king, to have the right to use it in the way they wanted, and for private property rights.

By the way, I think it's significant. I spent a fair amount of time studying immigrants who were coming to the United States over the last ten years. It's amazing how they believe what they're doing is trying to get a piece of the rock. If there's any commonality between immigrants in this country in any time in our history is they all come to try and get their own property, that they can own and use. The ownership rates of immigrants into this country in the last ten years skyrocket—as soon as they can get there, they go buy a house. You've seen what's been happening to home ownership rates in the country driven to a large extent by a very eager immigrant population.

At the same time I want to point out that there's been debate and disagreement about public and private property rights from the very beginning. Some of our founders, like John Adams, believed in some absolute notion of private property rights and others, like Ben Franklin, argued for restraint on private rights for the public good. This debate rages on in Measure 7. It's important to understand that, while there's been strong association with the notion that our home is a castle and we can do what we want, we've continuously altered that view in particular cases. It's not been some absolute. Let me give you just three examples.

From the time we started was an idea that people owned the land from the center of the Earth up to the heavens and that was in fact the language in the laws. The Wright Brothers screwed this up a little bit because then it meant when they flew over they were violating your property. You could sue them. They were trespassing. Our society collectively said that you could own land to a certain height but above that it's free for everyone to use and that's the way we're going to run it.

The civil rights movement after World War II was a fight about property rights. Southern retail and restaurant owners said, "I own this business, I can decide who comes, and it's my choice." Others said, "You're open; I should be able to come in." That was a fight about property rights, and we decided collectively as a society that the rights of the owners of the business were restrained; there were in fact opportunities for people to come and eat when a restaurant was open.

Third, I think we should point out that seventy years ago, the Supreme Court in our society decided that the use of land was limited to the extent that your use hurt somebody else. That was the basis of zoning. Zoning would provide industrial areas where the industrial spillover wouldn't be in residential areas. We limit how high you can build your building, how much noise you can generate, there's a lot of that based on the notion that you are constrained on what you can use your house for. It's basically not a castle of unlimited opportunity. The conflict is one that comes right down to every

one of us who believes we should be able to use the land exactly as we want to but our neighbor should not be able to use it in a way that hurts us. We all believe that and it's a conflict that basically resides in our society.

Where do we go on this question? I would say it's not an easy decision. It's a complicated decision that requires a dialogue. That dialogue is one in which I think your effort at trying to have growth boundaries, to have a dialogue about the pattern of development, provides an outstanding opportunity for you to come to a decision about this, collectively recognizing both the private rights and the public use and public values associated. It's a very difficult discussion. It's one that at no time in our history have we resolved this forever or will we. I think Measure 7 basically pushes that.

Let me just do two more things, two real quick things. One is to say I want to tell you a story about how you should think about this question in the debate. A mountain climber fell over the side. Falling down he grabbed hold of a bush. He held on to the bush, caught his breath, and yelled, "Help! Help! Help! Is anyone up there?" There was dead silence "Help! Help! Help! Is anyone up there?" Dead silence. "Help! Help! Help! Is anyone up there?" And from the sky it says, "I'm here, my son." "Terrific!" "Do you have faith?" "Tons and tons of faith, I'm very faithful." "Let go." "Is anyone else up there?"

I think for you there's no one else up there. This is a debate you're going to have to have, a discussion that you're going to have. This basically closes this. One last point I have to make just because I think...

*There is somebody else up here, Jim.*

One last point. . . (I'm hard of hearing). There's an idea that I want to raise because it's really a fundamental idea of the discussion that's going on in the Lincoln Institute, not only in our offices but also around the world in our efforts. If we think about what we fundamentally find fair about compensating for taking, it's that we think it sounds fair: they took value from you and you should be compensated. There's a flip side to that question which you ought to put in the discussion and that is what we call "giving." In the present system, the public puts a lot of investment in infrastructure, sewers, and roads. It creates value to people and there are many who argue that what we should do is take back that value. The private owner didn't do anything to create the value that provides funds for compensating people where we take value. This notion of capturing the value, which is part of what the public sector did, not what the private did, is an interesting flip side of the question of restoring compensation where there was taking.

*Thank you, Jim, and indeed, there is some one else up here. His name is Carl Abbot. He has more of a local focus than Jim has had. He's been here for thirty years. He is a professor of Urban Studies and Planning at PSU, where he's been Chair of the Department and Executive Assistant to the President. His specialty is Urban Development. He is considered an urban historian, and perhaps you read about him in the last Oregonian. They have a nice article on him about his new*

*book which is out, which is about Portland. So he knows where he speaks. By the way, that's one of a dozen books that he has written. His Ph.D. comes from the University of Chicago.*

*Carl's focus is going to be on the assumptions behind the ideas of Urban Growth. What we are dealing with, as Jim says. I would say I would like to hear a dialogue sometime on the subject but all that you get is competing monologues. Maybe we will have a dialogue as we are having here today and let's hear a little more about it from Carl. Carl, take it, fifteen minutes is yours.*

### **Carl Abbot**

As Jack said, what I want to do is provide essentially, a framework for thinking about the way in which cities deal with their demands for land. The operating title is "Land for Cities and Scenery for City People."

It's clear that cities and the residents make multiple claims on their places and their regions. Underpinning urban planning and growth management, I think, is the simple expectation, which has been built into our social and political system, that cities have the right to exist and to grow: that the residents are justified in utilizing natural landscapes as their workshops and their growing places. This assumption that urbanization is a legitimate use for land has usually been unstated and uncontested.

I think we realize how axiomatic it's been when the contrary message jerks us to attention. I'm thinking, for example, of the Khmer Rouge in Cambodia trying to abolish cities. A shocking reversal of our kind of axiomatic assumption. So my goal today is to briefly inventory and categorize the different sorts of demands that cities as civic entities make on their sites and regions, and discuss the ways in which land regulation regimes respond to these public claims.

Now in quick summary, a first set of claims that cities make revolves around the presumed right to utilize, to urbanize, a particular place, a particular landscape. The second set involves the presumed right to utilize resources at a distance, to conscript a surrounding hinterland in the fulfillment of metropolitan needs.

Underlying this assumption, I think, is the realization that cities are the economic machines that make civilization possible. They increase the efficiency of production. They make it easier for human beings to gain protection from the cold, shelter from the rain, respite from hunger. Were we to abjure cities in a civilized economy we would all be huddling with Lear on the windswept heath.

This is the trade-off, this fundamental trade-off that justifies urban claims on their landscapes and environs. Our society accepts that the benefits of cities outweigh the virtues of the fields and forests that they replaced. Knowing that time will soon enough have its way, few of us are rushing to cast down the walls, rip up the pavements, and invite the fireweed and thistles to reclaim Portland.

The most basic claim, the right to build. From the beginning of the European-American settlement we have asserted title and occupied portions of the landscape for the express purpose of town making. Outposts grew into cities. They took land out of this natural state or out of primary production to serve the urban purposes of processing, exchanging, and negotiating. We expect a successful city to be physically expansive. Its commerce will swell. Its factories will spin off new products. Its universities will create new research enterprises and attract, we hope, new students. These activities require new wharves, new office towers, new classroom buildings, and new parking lots.

Also implicit in this urbanization process is the assumed right to reshape the landscape to our convenience, exercising the same dominion that farmers have always wielded over agricultural lands. City builders make the crooked straight and the rough places smooth. We trim down hills, we fill the ravines with rubble, we divert natural streams, and we make the landscape serve our purposes.

We also assume the right to utilize resources and control land at a distance through purchase, through legislative allocation, through regulation. Through the power of wealth and numbers cities regulate and direct rural communities in the interests of metropolitan economies and people. Major metropolitan areas cast long shadows, stake out vast spheres of influence.

For just one example, water flows through kitchen faucets, fire hydrants, and factory valves because feats of engineering are matched with creative institutional arrangements. Municipalities purchase private water rights, legislatures allocate water supplies, and metropolitan agencies direct the purchase and regulation of watersheds.

Of course, at the other end of the cycle, cities cast particulate and chemicals into the sky, drain lawn fertilizer into streams, ship garbage and rubble to distant landfills.

Beyond the maintenance needs of the urban metabolism, city residents mold rural communities and districts into vast weekend lands. In the early twentieth century municipalities like Denver and Portland acquired outlying parklands. Business interests pushed for nearby national parks. Affluent households road railroad lines to summer colonies. The Automobile Age has turned lakeshores, oceanfronts, and mountain valleys into vast second home districts. Those are exactly those coastal condo-mania and sagebrush subdivisions that Tom McCall inveighed against in 1973. The recreation zone of Greater San Francisco washes over the slopes of the Sierra like a slot-machine tsunami. Second home suburbs of Portland stretch from Newport to Sun River to Hood River.

It is important to repeat that these are civic claims, legitimated because they serve community needs. The agents are sometimes private developers, homebuilders, and second-home purchasers. They can also be city governments, non-profit environmental organizations, regional service agencies, state legislatures, and even the US Congress. The expansive city and its regulatory apparatus creates wealth and we assume every one benefits through increased opportunity and better public services. The rising tide itself is part of the compensation for the cost of regulation. Claims for individual

compensation in fact ignore the larger compensations of prosperity. I think it's another way of talking about the giving side of the equation.

Now how do we manage these claims (with my other five minutes here)? In the American political system public claims on the use of land commonly operate within a regulatory system that recognizes the primacy or at least inevitability of urban needs and uses. The most common form, I will use the word "planned" sprawl, the most common approach to the interaction of city and country. It is based on the deep-seated policy assumption that land conversion on the urban fringe is normal and desirable.

Highest and best use carry specific connotations in land-use law but it also carries the linguistic implication that the most intensive use is valued by the private land market is the socially preferred use. In the specific realm of land-use planning, suburbs and rural communities that lay in the metropolitan pathway use land-use controls and economic development policy to encourage the conversion of buildable land.

The land regulation system designed early in the twentieth century in the US is designed to facilitate investment by rationalizing growth. Regulations such as zoning often direct outward expansion, identify areas exempt from development, but the goal is to put together the most efficient package for rural growth.

Fringe communities are often very cooperative agents in their own transformation. Small town politics is often dominated by property owners, local merchants, community banks, local newspaper publishers, and many others who see benefits from growth. They welcome big bucks, retailers, and casinos. So do workers in communities where resource jobs are drying up.

Looking beyond the daily social and economic system in the metropolitan area, we see the same system for wider urban claims on regional resources. The boarding house reach of city people has pushed metropolitan commuting zones 75 or 100 miles from large city centers. Recreation zones twice that distance. How can we manage the desire of city people to use rural resources, scenery, and places?

Again, I think the standard framework has been what I call economic development planning. That is, like suburban land conversion, economic development planning is a public-private partnership of local governments, state development agencies, and federal agencies, chambers of commerce. They use land assembly, public infrastructure investment, place marketing, and tax breaks. The goal is obviously expansion of local jobs, private profits in land, also the more effective incorporation of outlying areas into metropolitan regional economies.

Let me conclude by mentioning a couple of options. In sharp contrast to planned sprawl are efforts at urban containment. You know the sort of experiment for which Oregon is noted—various forms of urban containment or growth boundaries, containment that utilizes open space reserves, urbanization boundaries, and designation of satellite cities to limit urban development to pre-determined areas.

If planned sprawl is “sort of a yes, when sort of zoning,” containment policies use “yes and no zoning.” Containment works best when the off-limits land has special economic or cultural value. Metropolitan Portland is already lapping against the natural barriers of the Coast Range and the Cascade foothills. Motorists along I-5 in the mid-Willamette Valley can see the forested mountains on both sides. We know that the valley is limited. That’s clearly one of the strongest reasons why land-use regulation, a statewide system, was feasible in this state. A similar sense of limits has helped in the adoption of growth management approaches in smaller eastern States like Maryland with valued rural environments.

At a greater distance is what we can call Green-Line partnerships. These are efforts to create a mechanism for managing the peaceful and creative coexistence of urban and rural uses and lifestyles within the same broadly defined region. They are particularly relevant in areas beyond the suburban frontier, where urban areas expect to find a variety of resources that range from water to scenery. The term comes from European experiments in drawing a green line on the map to define the district of high scenic or cultural value then devising special land management regulations to sustain its character over time. It’s intended for working or living landscapes. It conserves valued regions through special regulations rather than massive land acquisition. Again, there is a regional example, which is the Columbia River Gorge National Scenic Area, which is very much a Green-Line partnership.

Just a point in conclusion: all of these approaches, I would argue, are fundamentally conservative. That is, they assume that compensation for limits on individual use of land comes via the Commonwealth, via participation in a larger civic entity. Traditional regulation assumed that prosperity is the benefit, the compensation that all share directly or indirectly. Some of the newer alternatives which, again as we know are well represented in Oregon, assume that the trade-off for the burdens of individual regulation comes through the preservation of community and the blessings of society.

Some of my colleagues in the Hatfield School of Government at Portland State have been studying some facets of the debate or discourse over Measure 7 and have clearly identified the issue of fairness. Proponents of Measure 7 balanced fairness to the individual, against what I would call the much more fundamentally conservative values of fairness to the future and fairness to the community. So I’ll conclude with those comments and wait for some zingers from Jim.

*Thank you Carl. This has been billed as a round table. You can see this is not a round table. We’re going to round it out with some questions from Jim whom I shall introduce. And then we’re going to round it out a little more by having questions from you. We will be finishing at 9 o’clock — that’s my job. For those of you that are still hyperventilating at 9:00, the two speakers will be up here and you can have at them.*

*The first to have at them is Jim Moore. Jim is a talking head. He does political analysis for Fox 49, that most intellectual of networks and several radio stations including KINK( and I’ll let you make your own puns out of that one). He specializes in city commissioners running amok. He is*

*no stranger to the national media scene. He has been an interviewer, interviewing such figures as Colin Powell, Ralph Nader, and is also an interviewee, interviewed by CBS News, CNN, and others. His hobby is being a political science professor at the University of Portland. His Ph.D. is from Northwestern U. Jim is going to put questions to each of our speakers and I'm giving them two minutes each to answer. At the right time, I will step in and ruin their party and open up to you for your question. Jim Moore, everybody.*

### **Jim Moore**

*Remember, at Fox News we report, you decide. Then we tell you what you should think about it.*

*I would like to direct my first question at Jim Brown. You talked about perception as a crucial element in your talk. In the paper you were talking about, it's basically kind of a case study of different States within the larger context of land-use in the United States for the past 200 years. What they have found in looking at a lot of states is that it's a) too early to tell if takings laws and things like that are going to have any effect because they've all kind of been enacted within the past few years, and b) they found out that in a lot of states what happens is there is a really focused group, usually in the legislature, that feels deeply about takings laws or other kinds of laws and passes them, and then, when they're on the books, people forget about them and don't use them.*

*In Oregon we have a little bit of different situation because the impassioned group put this on the ballot and we the people all passed the law. But still you can see the impassioned groups that are out there, and what happens to these laws when they're finally out in the real world? Clearly, what we have is different views on how property should work in society and so my first question to you is how do we know that the system is broken and needs to be fixed? As we heard in Carl's talk there are assumptions about how we do things. He talked about the planned sprawl idea and those kinds of things. Clearly, that's been the way things have worked especially since World War II but you could argue for the entire twentieth century. So how do we know the system is broken?*

### **Jim Brown**

First, I would make a comment that the reference he was making is in the paper that is available. There is a survey of states that have actually been moving in the direction of providing either some form of compensation or requiring some assessment of the impact on property rights or some other mechanism for that. Twenty-six states have passed such forms. I think the issue about how do we know is a political question; that the issue is whether people care enough to actually raise the issue. It's not some measure that you can go check like the temperature outside or the air pollution. It's basically a question of the political will and I think part of the reason that there have been problems in implementing is that we are very conflicted on this question. We can make a case for both why you should compensate and why you shouldn't compensate. So we basically get in some ways confused and halfway through the process decide that we're not too sure anymore, and we leave ourselves possibly with a law

unimplemented or not with real teeth or in fact occasions in which the law gets reversed.

**Jim Moore**

*Carl, would you like to answer that as well? I would like to hear your perspective on how do we know the system is broken?*

**Carl Abbot**

Well, I think we essentially agree that it's a political question. You know, we know the system is broken when individual complaints and concerns coalesce into a political movement, coalesce into 53% of the voters responding to a ballot measure. I think that certainly none of the issues are new. The courts have debated the extent of takings and the extent of regulation in a multitude of cases over the decades so the issue is not new. We know it's broken if the political system tells us that it is.

**Jim Moore**

*I think that Benjamin Franklin would agree with you apparently on that.*

*I would like to ask another question to Jim. Here in Oregon as I go around and talk to people all around the State, it's interesting when you get to the famous urban-rural split in Oregon. That's really the issue for a very small percentage of the population. Basically when you go around Oregon, Oregon is suburban. When you go to Tillamook, it's a little town but boy it's got a strip mall right through town, it's got growth issues at the boundary, and all those kinds of things.*

*I grew up in Southern Oregon. Right now the big issue in Southern Oregon is Klamath Lake and what they're going to be doing with water, or no water as the case may be, from the farmers down there, but the real big reason that that's taken off in Klamath Falls is not because of the farmers per se. It's because what's going the impact on the suburban area around Klamath Falls and Klamath Falls itself. Will this town be able to survive out there?*

*So when we look at the state, we have to ask a fundamental question. Does the government play a particular role? When I talk to people around the state I find that the people who support Measure 7 see government as an adversary but in a very special way. It's not that it's just against them or trying to take things from them. It's because government is not only the adversary but the only forum in which you can go to to solve your problems. There's no neutral ground in which people feel comfortable to go and deal with land-use issues or to deal with other taxation issues or social issues here in the state.*

*What role should government really play? We have government as adversary. A lot of people see the government as representing the people so by definition the political answers we just heard it's right no matter what it does. What role should the government play? And here in Oregon we make it even more confusing because of the initiative system but also we have State laws that*

*blend into local laws that blend into home-owners associations and things like that just to make things even more interesting. So what role should government play in this fundamental set of questions we have?*

**Jim Brown**

I agree. I think the question is terrific but it's so complicated that it might take us forever to resolve our conversation, but let me take a piece of that which I heard early and I think a problem which I think is fundamental. That is we have a society where less than maybe half the people are actually engaged even in voting for the President of the United States, half of the registered voters. Most people are not engaged and involved in this. Ultimately we ask about what government does and obviously we have an enormous part of the population that either doesn't care or thinks it's going just fine, because they're not playing any role in it at all. I think this question about why voting is so low and people are engaged in such a funny way is really fundamentally a very important question for our society, which I don't know the answer.

**Jim Moore**

*Carl, a variation on this. You talked about the stretch of cities, their economic relationship with the areas around them, the Aspenization problem that extends for hundreds of miles with vacation homes and things like that.*

*We have an example of the Green-Line strategy with the Columbia Gorge right here in the Portland area and in your paper you specifically mentioned that this happened because it was so near to Portland. It was dear to Portlanders' hearts, we then...*

## **TAPE SIDE ONE ENDS – SIDE TWO BEGINS**

*...big can a civic culture be to find a commonality of interest like that. Once again, here in Oregon, we decide things on state votes. If you travel around the State, remember, the Second Congressional District is bigger than every single state east of the Mississippi River. So how big can one of these civic cultures be to make it effective, to make it work?*

**Carl Abbot**

I think it can be as big as a state. I think there is a political culture in Oregon, which has dominated, or at least played a major role in policy decisions over the last thirty years. It's a civic culture of rationality. It's a civic culture that assumes that there is a public interest that you can think your way to. Think of the Oregon Health Plan, it's a rational system of rationing. It's a way of thinking through a solution.

This culture, I think, permeates a lot of decision making in the State. It certainly doesn't dominate every issue. At the same time I was thinking about the role government

should play question. We currently need to have forums outside the formal government for at least local decision-making, whether they're watershed councils and groups. Some people in this room are familiar with the Neighborhood Association system in Portland, which especially in its early years provided a governmentally sanctioned but independent venue for issues to be discussed. So I think that government can help to facilitate those sorts of venues, and governmental organizations—like the Institute for Metropolitan Studies at Portland State—are also venues in which you can have some of that sort of discussion.

**Jim Moore**

*Great. One last question and I'll throw it to Jim first, then Carl second.*

*We began talking about how do we know what the problem is. In Oregon we have a history of dealing with social issues that may not be fundamental to our lives but they become symbols, like the Bottle Bill. The Bottle Bill is now getting old enough that people are kind revisiting it and saying, "Hey, do we have enough deposit money on the Bottle Bill?" and all those kinds of things. It's been around for thirty years.*

*The issues of Measure 7, regardless of where it stands right now in the court,s are going to be around with us for at least the next two or three election cycles, this issue is alive, it's well, it's breathing, it's here in Oregon. How do we know if we have successfully dealt with the issue of growth and the issue of land-use? Do we establish a goal like the Bottle Bill or do we establish a process that people feel more comfortable going to? Jim?*

**Jim Brown**

Well, I definitely think that it's a process issue because I don't think we can easily understand what our expectations are for what our culture will be a hundred years from now and what the requirements will be. So I think it is a process, a process where both people have a voice.

My sense is that the enormous growth in the property rights movement as it's called was really a product of the fact that there had been some pendulum effort towards things from species that were endangered to environmental laws. There was certainly some feeling that we may have pushed to far and taking is a way of resolving back in some ways. I don't think we're going to answer that question indefinitely forever and we'll have new circumstances that will change our views. So it is important to have a process for which there is a way to have decisions made in the way people feel that it was, and even feeling that it was the wrong choice and I disagree with it, that was their view and we could disagree in the sense that sensible people can have different views on very complicated questions.

*Carl?*

***Carl Abbot***

Well, to let you in on a secret, professors like to talk. So I'm going to come down on the side of process as well. In a sense, goal setting is easier than maintaining a process. One can say, here will be our growth boundary here is our goal. We'll build out to that. You can draw a line on a map.

To have a process for deciding how to incrementally change and expand the growth boundary is much more difficult. The process is important and the a process at multiple levels, a process within the Legislature, a process within the forums of State-level policy discussion, a process within more local levels as well. So, more talk.

*In the spirit of more talk we'll turn it back to Mr. Faust so you guys can talk.*

***Jack Faust***

All right, now we are rounding out the table. We have a microphone right here and I would appreciate if you have questions come to that microphone. You may address them to either of our speakers or just to them and let them figure out who answers it. Let's have someone who is curious be the first one to stride up there. I trust our manager figured out a shield to get this started, didn't you, Jay?

*This is for both professors. Is there some place in the United States where there is a successful bright line between regulation and taking? Has somebody in some state figured this out?*

***Jim Brown***

My sense is you guys got the best shot at it. So if the answer isn't here, then I don't think there is a better answer.

***Carl Abbot***

I would also add, you know, Oregon is an early system. There are multiple generations of growth management systems. Oregon is an early system. The things that Oregon can learn from states like Maryland, which are later systems, I think, would be a process of fine-tuning. I don't think we're doing too badly. I think if you look at both results and process, with or without Measure 7, we'll see what happens with it, I think Oregon has not been doing badly with its efforts to manage growth and move careful into its future.

*My name is Lee Leighton and I've had the opportunity to work with some property owners who advanced a conceptual plan for urbanizing an area around the urban growth boundary. Metro*

*acted to bring that area into the urban growth boundary and it has ever since then been the subject of no small controversy and turned over on appeal.*

*One of the problems that I saw very clearly at all those hearing is people are seeing very, very different problems operating here. The land that one group looks at and says, "It's beautiful agricultural land," they don't seem willing to change their mind when confronted with testimony from the owner of that property who says, "We've tried this. We've tried this. We've tried this. We've tried this. There's nothing that can be productive in any economic sense on that land."*

*If we tried to ramp up agricultural production as it's done in agricultural areas, we would have complaints from the urban people who surround us and yet still it is not possible to move the debate broadly enough that would be in the local, not to say parochial, quarters of the people appealing that decision to be able to get past the legal baggage, basically at the State level that sets out a framework for how we will bring land into the urban growth boundary that has become to inflexible to be productive for us.*

*That's my concern and I think it goes right to the heart, Jim, of your pointing to the perception problem. We've got an extreme perception problem. The trouble I'm seeing is how do we get to where we can even have a common set of perceptions about what land means and how we know what's useful for what purpose in this context. I would appreciate any comments you may have on that.*

### **Jim Brown**

That was the question. Well, welcome to democracy. If only there was a better system we would be right there and I think that's the nature of the democratic process.

People are going to have different images and views and the only issue is how do you resolve those in a process that people can feel that they were fairly heard and that it was a fair decision. The decision about "fairly heard" is one in which the process has to provide opportunities for people to be heard and what's a fair answer is going to change over time because we're going to have a different view of that.

Again, think about the changes we had because of the Civil Rights movement. People still remain, I'm sure, convinced their rights were violated and they should be able to run their restaurants the way they would like to and we had the same issues about other kinds of efforts providing more choice for other people. That is the nature of our society. I don't know how we can change that, especially in this country which is going to be increasingly dominated by what we used to consider minority groups which are largely going to be a majority group and will not have exactly the same set of values and concerns that people had previously.

**Carl Abbot**

Yeah, I would like to reframe this. We've set up a system in Oregon with a lot of positive elements but also one in which there is a very elaborate legal appeals system. A special court to deal with land-use questions, which invites legal positioning from both sides. We're embedded in that and in the short run we're certainly not going to escape that. We also have a situation in which much of our policy, we come to points of view through battling anecdotes. Measure 7 advocates had five or six awful examples of unfairness, which probably were unfair, and kept trotting those out. People on the other side, environmental advocates, farmland preservationists, have their own anecdotes about what would happen if you let people do what they wanted. What would they do? They would build great big three story houses right across from Multnomah Falls and try to get away with murder. So we have battling anecdotes that frame our understanding of policies.

*Yes, thank you. My name is Cynthia Eardley and the way I look at it Measure 7 is a reaction. I think Oregonians do support comprehensive land-use planning but I'm glad that I'm hearing people say that we should have the dialogue and I think it's going to be very difficult for us because I question whether what some of our local governments are doing is actually planning.*

*An example is the problem we're having the Willamette River, Portland Harbor being declared a Super-Fund site. Development preceded sewage capacity and what planning is supposed to do is prevent speculative development or to guide development, not cause it.*

*So I think that what one of the really hard questions that I would like to see being addressed in the academic community is, is what's happening, actually planning, because I think it's more than just perception and it certainly should be to academicians and land-use professionals because of the way I see people on the outside saying, "What are you guys doing?" So, I think we need to look at more than just perception.*

**Carl Abbot**

I think it's important to realize how in many ways how limited the land use planning kind of process and system is in the United States. We skimmed over this real briefly but land-use planning as a profession and as a public function developed in the 1910's and 20's as a way to rationalize the process of land development. So, in that way, planning is not to prevent speculative development, it's to facilitate appropriate speculative development. I'm not defending the quality of some of the results but it's been a limited activity with limited responsibilities often disconnected from questions of service provision, which is one of the things that state land use systems in states around the country in various ways have been trying to deal with—which is trying to match the availability of services and developable land. There are different ways of trying to go about that. Florida's way is different from Oregon's way, for example, but the goal that people are muddling toward is to try to deal with the question you're raising.

*Good morning. I have a question about compensation. I am always struck at how a lot of the property rights advocates, Measure 7 advocates, feel that land-use systems or zoning is unfair. Regulation is unfair. That if there is going to be regulations there ought to be compensation. Those very same people tend to be the people who oppose any efforts to establish systems of compensation. I am wondering how you would advise us, or what other states have done to work through that tension and to build support for compensation systems to allow the other side of the argument to actually go out and protect some of the resources that they're using the regulatory system to protect.*

**Jim Brown**

I think that the question about what's right about this idea is that you can get people to nod correctly, to say you know it's not fair. Now the question is, what level of takings in some sense requires compensation and what levels don't, which is an issue that's gone back to the original interpretation of these issues by the Supreme Court, and it's not clear that we have an answer. The answer is a vague one about if they take too much that's a problem.

The problem is we're not sure what exactly that means. What are other states doing? You're one of many states, all of the states are grappling with this problem because it's in some sense a response, a reaction I think some one said, to the idea that we have pushed regulation too far. We need to pull it back; how do we balance that? That happened in many places in the country and in most states.

What are the solutions to these problems? I think there are three forms that have been discussed. One is direct compensation, which gets us into the problem of how much taking does it have to take before you do compensate, how much do you compensate, who pays for it, and how do you get a mechanism for paying for it. Those are very difficult questions; no state has answered those questions in a systematic way.

The alternative to that is less binding but attempts to try to make people be more sensitive. One—kind following in some way the notion of an environmental impact statement—is to require a property rights impact statement, an assessment of what this regulation would do to property rights and require some mechanism for doing that. I don't think that basically resolves the issue, but it may make people attentive to that question, and there was certainly some concern that the regulators didn't have any concern or weren't even facing the question that they were taking. This assessment process requires something to be done in that way.

The other kind of option is something that requires some notion of a mediation that has to go on so that there's some conversation that goes on in each of the cases and there's some mechanism for mediation.

I might note that the reason I'm here in Oregon today is that we are actually running a session to train people how to mediate land-use disputes as part of our training program. There are some thirty-five people at the Benson Hotel learning how to do that

yesterday and today, as a way of trying to provide a mechanism that we can get to some, what I think people view, as a fair solution. Fair in the sense that it's not just regulators making rules and then rules being implemented against what would be a notion of some fair process, but providing a mechanism where in Florida there is a requirement that you have to go through a mediation process and that the regulators and impacted have to be in that process. So we're just struggling to find an answer to that—no one has it yet.

### *Carl Abbot*

I don't have a whole lot to add. I might, as another plug, just mention that another of my colleagues in Urban Studies and Planning at PSU is involved in helping deliver that mediation seminar. Always use an opportunity for advertisement!

Compensation, the problem with compensation that courts tended to by pass is, of course, putting the value on the lost. Valuing the lost value. Soon after Measure 7 some very impressive claims came in. \$50 million for the value of gravel that can no longer be mined. Well, who knows what my 50 by 100 foot lot in Irvington would be worth if I could put a multi-family dwelling on it. I don't have the slightest idea, I could certainly find out, there are plenty of land-use assessment professionals, evaluation professionals, who would be glad to for a fee to tell me what that value might be. And then we get into—again, immediately—dueling experts in the legal system. The courts have historically tried to by-pass that question by saying that if the regulation still leaves you a beneficial economic use, it's okay. But it's whenever you get a compensation measure, whether or not it's for any taking or taking over 25% of the value, who knows what the real figure is? There is no real figure. It's a provisional figure.

Can I make one more plug for givings because I want you to keep think about this as kind of the flip side of takings, because I think it really changes the conversation? While givings may sound like a crazy notion, that you would actually capture back the value the public sector created in the private property, we actually do it, frequently with betterment taxes, taxation with financing, a variety of things where we actually do it, and there are other places in the world that have actually now put it in their constitutions. In fact, the government has the right and should capture back some of the value, not all of it, but some of the value it creates with its actions. In some sense, if you raise this question of takings with givings it provides a different dialogue and you can say to people, "Exactly how much value did you get created for you because we put this road in?" If we take some of the limits on your development, how much will we take, and then it's a different conversation—then it's just a takings issue.

### *Jack Faust*

I'm going to step out of my role and recognize myself for one final comment. You referred several times to the idea of a process whereby people can feel that they've had

a fair hearing. I think when it comes to land-use matters that we are setting the bar too high. I think the people who are the losers will rarely, rarely think that the process was good, that they've had a fair hearing, no matter what you do. I think what you try and do is you set up a system whereby people in fact have the adequate opportunity to present their views, and you resolve the issue in a reasonable amount of time, and you've done the best that you can do, and you live with that. Jay, do you want to say a word or two or shall we just?

*The only thing is that everybody who paid their money, had their nice breakfast, and listened to this gets a transcript of the proceedings.*

Okay, with that we're adjourned.