IN THE SUPREME COURT FOR THE STATE OF OREGON

LEAGUE OF OREGON CITIES, BENTON COUNTY, CITY OF BEAVERTON, CITY OF EUGENE, JUNCTION CITY, CITY OF VENETA, BEV STEIN, VERA KATZ, MULTNOMAH COUNTY, CITY OF PORTLAND, and WASHINGTON COUNTY, Plaintiffs-Respondents, v. STATE OF OREGON, JOHN KITZHABER, M.D., and BILL BRADBURY, Defendants-Appellants, and STUART MILLER, Intervenor-Appellant.	Marion County Circuit Court No. OOC20156 Appellate Court No. A113789 Supreme Court No. S48450 (Control)
AUDREY McCALL, HECTOR MacPHERSON, MICHAEL E. SWAIM, JAMES LEWIS, and MARK TIPPERMAN, Plaintiffs-Respondents, v. JOHN KITZHABER, M.D., BILL BRADBURY, and STATE OF OREGON, Defendants-Appellants, and STUART MILLER, Intervenor-Appellant.	Marion County Circuit Court No. OOC19871 Appellate Court No. A113790 Supreme Court No. S48451

BRIEF OF THE AMERICAN PLANNING ASSOCIATION, AMICUS CURIAE

Continued…

Appeal from the Judgment of the Circuit Court
for Marion County
Honorable PAUL J. LIPSCOMB, Judge

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I. INTRODUCTION

The American Planning Association, and its Oregon Chapter (collectively "APA"), and the Association of Clean Water Agencies ("ACWA") file this Amicus Brief in support of plaintiffs' position in this case, i.e., that Measure 7 is invalid. Because the Court and parties are familiar with the facts and contentions, the amicus parties will not restate them here, but instead, will rely on the position of the plaintiffs in stating those facts and contentions.

In finding that Measure 7 was not validly adopted and cannot lawfully be permitted to become part of the Oregon Constitution, the trial court reviewed the three grounds advanced by the plaintiffs in support of their claim. The Court concluded that the plaintiffs prevailed on two of those three grounds – namely, that Measure 7 violated the "full text" rule of Article IV, Section 1(2)(d) and the "separate votes" rule of Article XVII, Section 1 of the Oregon Constitution. This brief will focus on the two grounds on which the trial court found in favor of the plaintiffs, and the amicus parties will not pursue any argument as to the third ground. For the reasons set forth below, the amicus parties request that the court affirm the decision of the trial court.

II. NATURE AND EFFECTS OF MEASURE 7

Ballot Measure 7, which received a majority of votes at the November 2000 general election, purports to amend the Oregon Constitution to allow compensation to be paid for regulations that are "passed or enforced" and restrict the use of private property with the

effect of reducing the value of the private property.[1] The measure requires that "just compensation equal to the reduction in the fair market value of the property" be paid, and the payer of the compensation is assumed to be the state (although this is not specified in terms in the measure). "Exemptions" are provided to the compensation requirement, but these are not clearly stated and defined. One of them allows for the "adoption or enforcement of historically and commonly recognized nuisance laws" while another allows for enforcement of federal mandates. In both cases, the state or local government is required to construe these exemptions narrowly. A third exemption involves certain uses such as selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gaming parlor.

This Measure makes reference to the unamended provisions of Article I, Section 18 of the Oregon Constitution in its definition of "just compensation" and construction of the entire provision (the original version of the section and the amendments purportedly adopted by Measure 7). However, there was no inclusion of the original version of that Section in the Measure itself that would allow the voters to review the original version and the proposed amendment together. More importantly, the measure sought to amend various other provisions of the state constitution by using "hot button" words, such as pornography,

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[1] There is a great controversy over whether the measure is retroactive, with the proponents strongly asserting that the measure is prospective only and opponents of the measure suggesting otherwise. If the measure is retroactive, it can only add to the argument that the failure to include the full text of Article I, Section 18 of the Oregon Constitution fatally confused the voters about the nature and effects of the measure, as well as effecting a further "logrolling" that is prohibited by the "single subject" rule.

gambling casinos, nude dancing, alcoholic beverages, and the like, without attempting to identify or amend separately the constitutional provisions relating to these subjects.[2] In other words, the measure effects logrolling by adding the extra incentive of denying the same right to compensation as is given to "favored" or "popular" uses.

As the Oregon Supreme Court has pointed out, implementing the provisions of Article XVII, Section 1 of the Oregon Constitution[3] is not a mechanical, ministerial act. Instead, it involves a number of discretionary steps, any one of which may be challenged for failure to comport with the requirements of the state constitution. *State ex rel. Fidanque v. Paulus*, 297 Or 711, 715, 688 P2d 1303 (1984); *OEA v. Roberts*, 301 Or 228, 234, 721 P2d 833 (1986) (obligation to assure proposed amendments did not violate constitution); *Holmes v. Appling*, 237 Or 546, 392 P2d 535 (1964) (nondiscretionary obligation of constitutional officers not to

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[2] For example, pornography or performing nude dancing may or may not be protected under Article I, Section 8 of the constitution. The sale of alcoholic beverages is governed by Article I, Section 39 and Article XI, Section 2. Gambling is regulated by Article XV, Section 4. These disfavored uses may claim that the ability of other lawful businesses or enterprises to claim protection under Measure 7 deprives the owners of those uses of privileges and immunities that they should enjoy, in violation of Article I, Section 20 of the state constitution.

[3] Article XVII, Section 1, reads in relevant part:

> * * * The votes for and against such amendment, or amendments, severally, whether proposed by the legislative assembly or by initiative petition, shall be canvassed by the secretary of state in the presence of the governor, and if it shall appear to the governor that the majority of the votes case at said election on such amendment, or amendments, severally, are cast in favor thereof, it shall be his duty forthwith after such canvass, by his proclamation, to declare the said amendment, or amendments, severally, having received said majority of votes to have been adopted by the people of Oregon as part of the Constitution thereof, and the same shall be in effect as a part of the Constitution from the date of such proclamation. * * *

allow amendment to state constitution that violates provision of the same). Thus, this matter is properly before the Court so that a determination may be made as to whether the requirements of the state's organic law relating to amendments to the constitution have been carried out.[4]

III. STATEMENT OF INTEREST ON BEHALF OF THE AMERICAN PLANNERS ASSOCIATION ("APA")

APA is the oldest and largest organization in the United States devoted to fostering livable communities through effective comprehensive planning. It is a non-profit public interest and research organization representing 30,000 practicing planners, officials and citizens involved with urban and rural planning issues. The Oregon Chapter of APA has 846 members with the same interests as the national organization. The overriding objective of APA is to encourage planning and land use controls that will contribute to the public well

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[4] *See also Kadderly v. Portland*, 44 Or 118, 135-36, 74 Pac 710 (1903) where Justice Bean said, in determining whether certain proposed amendments met the requirements of the Oregon Constitution:

> We pass * * * to a consideration of the question as to whether the initiative and referendum amendment was legally adopted. The provisions of the constitution for its own amendment are mandatory, and must be strictly observed. A failure in this respect will be fatal to a proposed amendment, notwithstanding it may have been submitted to and ratified and approved by the people. The constitutional provisions are as binding on the people as upon the legislative assembly, and the people cannot give legal effect to an amendment which was submitted in disregard of the limitations imposed by the constitution. * * * * * * If, however, an attempt is made to amend an existing constitution, its every requirement regarding its own amendment must be substantially observed, and the omission of any one will be fatal to the amendment. The constitution is the supreme law of the land, binding upon all, and can no more be disregarded in the manner of its own amendment than in any other respect. * * *

Kadderly was cited with approval by the Oregon Supreme Court in *Armatta v. Kitzhaber*, 327 Or 250, 285, 959 P2d 49 (1998).

being through the development of communities and environments that will meet the needs of people and society.

APA believes that Measure 7 has the potential to create irreparable harm to the Oregon state planning system. Not only will the measure significantly increase the cost of implementing and enforcing regulations, it will also seriously degrade the quality of life that Oregonians have become accustomed to as a consequence of the last 30 years of planning controls and successful land use management. If the measure takes effect, many regulations, including zoning ordinances, building codes, setback requirements, height restrictions, open-space requirements, set-asides for low income housing, minimum lot size and restrictions on subdivisions will face attack under the measure. Local governments will have just ninety days to decide whether to repeal or decline to enforce any number of these local land use regulations, passed in the public interest, or face compensation claims from property owners.

Moreover, APA is concerned that Measure 7 requires, in effect, that the public pay for governmental action in the planning field, taken in the public interest. As such, the measure upsets the most fundamental understandings of those involved in land use management. In particular, APA is concerned that Measure 7 gives lexical priority to the right of the private individual to develop land, at the expense of the wider community that may be harmed by that development. This rigid ordering of priorities fails to grasp the complexity of the planning issue, where limitations on developments, and use restrictions, often serve to preserve and increase the value of existing private property. APA is concerned that such a drastic change of course in Oregon's planning system must be made *consciously* by the voters, and that the measure in question failed to meet the constitutional standards for the presentation of

proposed amendments.

IV. STATEMENT OF INTEREST ON BEHALF OF THE ASSOCIATION OF CLEAN WATER AGENCIES ("ACWA")

ACWA is an Oregon non-profit corporation whose members and associate members include 94 municipal wastewater treatment and stormwater management agencies and engineering and consulting firms with similar interests. Its mission is to "protect and enhance water quality in the most effective and efficient way possible." Many of ACWA's members not only implement regulations to aid in managing stormwater and protecting water quality, but also take lead roles in developing programs to comply with the Endangered Species Act ("ESA") to protect fish and the riparian habitat critical to the survival threatened and endangered species.

ACWA believes that Measure 7 has the potential to create irreparable harm to the environment. The measure will significantly increase the cost of implementing and enforcing stormwater and possibly industrial pretreatment regulations. These regulations directly protect water quality but, in some instances, arguably act as a "restriction [that] has the effect of reducing the value of a property" and would be therefore compensable under Measure 7. Affected ACWA members will have ninety days to decide to repeal or decline to enforce numerous water quality regulations, passed to benefit the environment in the public interest, or face compensation claims from property owners.

Measure 7 also has the potential to pose additional risk to threatened and endangered Northwest fish populations. The most immediate and significant impact will be to agencies in the process of developing programs to comply with ESA to protect threatened and endangered

fish, and the associated riparian habitat. Because of the peculiarities of ESA's statutory construct, and the vagueness of Measure 7's exemptions from payment for regulations imposed to implement requirements of federal law, the Measure will result in frequent and costly litigation. Unfortunately, this is a zero sum game; money spent on litigation is money that would have otherwise been spent to benefit the environment.

The ESA legislation is not set up in typical "thou shalt not" fashion. Instead, ESA directs National Marine Fisheries Service ("NMFS") to work with local jurisdictions flexibly and cooperatively to develop programs that avoid the "take" of endangered and threatened species. When NMFS is satisfied that a particular program is sufficiently protective of the species, it issues a letter that serves as a defense in the event of a "take" if the program is being followed. These programmatic exceptions may vary dramatically from one jurisdiction to another based upon environmental conditions, the specific protected species, individual program components, riparian conditions and the like.

The challenge presented by ESA when a Measure 7 claim is brought is that Measure 7's exemption from payment for regulations implementing a requirement of federal law is limited to those imposed "to the minimum extent required."[5] The difficulty in applying this exemption in the ESA context lies in determining what "the minimum extent required"

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[5] The exemption itself is ambiguous: does it mean that 1) an agency has a defense to payment only when it imposes a given regulation to "the minimum extent required" or 2) that an agency many impose the regulation as it finds necessary to benefit the environment but must compensate the landowner for that portion of the regulation that exceeds the minimum requirement of federal law?

means, given the statutory construct. As discussed above, ESA "minimums" are not cut and dry. A streamside buffer of 50 feet may be appropriate as part of one jurisdiction's program, while 100 feet may be more appropriate in another. Proof of "the minimum extent required," which will be necessary in each and every claim to determine compensation, will be difficult and expensive for agencies and is also likely to burden NMFS personnel in countless depositions. Moreover, one "test case" will not resolve the matter because each claim will turn on facts specific to the individual property.

This litigation nightmare will potentially require huge expenditures of public resources, monies that could otherwise be spent to benefit the environment. ACWA is concerned that a constitutional change with such a potential to deleteriously impact the environment and threatened and endangered species be the result of a conscious choice by the voters. Measure 7, however, failed to meet the constitutional standards for clear presentation to voters of proposed amendments.

V. THE "FULL TEXT RULE"

The Circuit Court found that Measure 7 did not comply with the "full text" requirement imposed by Article IV, Section 1(2)(d) of the Oregon Constitution. That provision requires that:

> "An initiative petition shall include the full text of the proposed law or amendment to the Constitution. A proposed law or amendment to the Constitution shall embrace one subject only and matters properly connected therewith." (Emphasis supplied)

The trial court accepted the argument of APA and the plaintiffs that the purpose of the

"full text" requirement is to give the people fair notice of all the legal changes that would follow from the enactment of any proposed amendment.[6] Moreover the trial court distinguished the present case from that of *Schnell v Appling*, 238 Or 202, 395 P2d 113 (1964) on the basis that *Schnell* was premised on the view that inclusion of the provisions left unchanged by the measure in that case would have served no useful purpose.[7] The amicus parties support the position of the trial court and the plaintiffs on this point and argues that this case is distinguishable from *Schnell*. The changes wrought by Measure 7 go beyond the mere insertion of a new provision; it both amends and changes provisions of Article 1, Section 18 by defining "just compensation" and other terms not previously defined in the state constitution and applying the new definition not only to the revised section as proposed by the Measure *but also* to the original and unamended provisions of that section.

Defendants point to the Massachusetts case, *Opinion of the Justices*, 309 Mass 555, 34 N.E.2d 431 (1941) in which the Supreme Court of Massachusetts rejected a full text challenge to a proposed law that would have added certain exceptions to an existing provision. That

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[6] P.8. The defendants argue to the contrary, that,

> [I]t appears more likely that the "full text" requirement is aimed at prospective petition signers and that it is designed to assist them in deciding whether to sign the petition, and to ensure that they do not sign the petition more than once. (State of Oregon's Appeal Br., 32)

Whatever the merits of this argument, there is no *a priori* reason to assume that "full text" requirement cannot serve more than one purpose, as the purposes suggested by the defendants do not *contradict* the purposes suggested by the plaintiffs and the amicus parties.

[7] "It is apparent from the words of the holding quoted above that the rule in *Schnell* was based on the premise that the inclusion of the omitted

case, involving a different constitutional text and tradition, is not binding on this court. Nor are the defendants correct to say that this court has already rejected the distinction between a measure which repeals existing sections and a measure which alters the meaning of existing sections, as in *Schnell* this court was not deciding that question. Moreover, *Opinion of the Justices* was a case decided in 1941 at a time when initiative petitions were significantly simpler, shorter, and less frequent than they are in the year 2001.

For the following additional reasons, the full text requirement could not have been satisfied in this case:

1. Defendants' reasoning would place Article IV, Section 1(2)(d) at odds with Article IV, Section 22 of the Oregon Constitution, which speaks to a similar point. Article IV, Section 22 states:

> "[n]o act shall ever be revised, or amended by mere reference to its title, but the act revised or section amended shall be set forth, and published at full length."

The reason for both provisions is to allow the public to have full information as to the import of proposed amendments and their impact on the current state of the law. This is particularly important when the people are voting on a change to the fundamental law of their state. The special status of constitutional law has already been recognized by this court in *Armatta v. Kitzhaber* 327 Or 250, 959 P.2d 49 (1998), where the court acknowledged that the provisions governing Constitutional amendments were stricter than those governing ordinary legislative enactments or amendments. The *Armatta* decision noted that the "separate votes"

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language in that case would serve no useful purpose[.] Here the situation is

requirement of Article XVII, Section 1, which applies only to Constitutional amendments, is "narrower" than the "single subject" requirement of Article IV, Section 1(2)(d), which applies to both Constitutional *and* legislative amendments. Such a reading of the provisions made sense, "…because the act of amending the Constitution is significantly different from enacting or amending legislation." *Armatta v. Kitzhaber*, 327, Or 250, 276, 959 P.2d 49 (1998). It is inconceivable that a lower standard of notice should apply to amendments to the Constitution ("the fundamental law") than that which applies to amendments to or enactments of ordinary legislation.

2. Given that Article IV, Section 1(2)(d) is a "notice" provision, it is particularly important that the people have before them the original unamended version of the section where, as in this case, the proposed amendment effects significant changes to the meaning of the section by means of minor linguistic devices (in the case of this measure, use of the word "section" rather than "subsection"). As the trial court recognized, "[m]uch mischief could be hidden, *inadvertently or not*, in seemingly innocuous new language that amended other existing provisions of the Constitution without disclosure of the effect of those changes in the text of the measure." P.12. (Emphasis added.) Subtle but legally far-reaching amendments must, under Article IV, Section 1(2)(d), be brought to the attention of voters. Moreover, given the increasing number of complex and lengthy initiative measures, Article IV, Section 1(2)(d) should not be interpreted in such a way as to facilitate covert or even deliberately deceptive proposed amendments.

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different." P.9, 10 of the trial court opinion.

3. Finally, the defendants' argument on the "full text" provision is ultimately implausible. To read the words "full text of the proposed law or amendment" in Article IV, Section 1(2)(d) to mean no more than the newly inserted words would mean that in a case where only one word was inserted there should be only one word present on the initiative petition. Defendants argue that although such a situation would be problematic,[8] the only alternative is a voluminous ballot paper on which all Constitutional provisions altered by an amendment would have to be set out. They suggest that a comprehensive setting out of amended provisions may itself be unhelpful or confusing.

Although, in some extreme situations, these objections may not be without merit, the amicus parties believe that there are at least two reasons why reading Article IV,

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[8] They say

> "In addition, it is possible to envision measures whose text alone might be singularly uninformative (*e.g.*, the word "no," with instructions regarding its placement) or even deceptive (a "notwithstanding" provision placed far away from the constitutional provision it was intended to change).
>
> "But, troubling as those examples (and others) may be…requiring more than the test of the proposed measure itself…starts down a slippery slope without end." (State of Oregon's Appeal Br., 47)
>
> It would surely be even more "troubling" for IV, Section 1(2)(d) to be interpreted in a manner that will increase the likelihood of such measures coming forward or even provoke them. Moreover, the defendant's argument is hardly supported by the claim that the purpose of Article IV, Section 1(2)(d) is to provide a formal safeguard to ensure that petition-signers do not sign the same petition twice. (*See* State of Oregon's Appeal Br., 29 and n.6 above.) Petition-signers are as entitled as voters to know the meaning of their actions, and it is difficult to see what purpose is served by a Kafkaesque reading of Article IV, Section 1(2)(d) which ensures that those signing a petition only sign it once, yet denies both they and the voters the opportunity to decide, on the basis of the material, whether they agree with the changes effected by the measure.

Section 1(2)(d) as a notice provision is far from starting down a slippery slope without end. First, the prospect of an uncontrollable expansion in the amount of material facing voters is held in check to a great extent by Article XVII, Section 1 of the Constitution (the "separate votes rule"). Given that this provision is concerned with changes to the Constitution, it is unlikely that any proposed amendment which effected changes to so many different sections of the Constitution, as to make it unmanageable to put all the changed sections before the voters, would satisfy this provision. The "single subject rule" in Article IV, Section 1(2)(d) can also be expected to have a similar side effect of limiting the amount of material before the voters. Secondly, it is no answer to what was, in the case of Measure 7, the complete lack of opportunity for voters to compare the amended section with the existing section, to argue that in some cases allowing the voters a comparison will not make matters much clearer. It appears to the amicus parties that, in most cases, setting out the existing text will be of benefit in that it would allow the public to see the changes made by the proposed amendment. Although the amicus parties accept that not all voters read all the material before them, that decision – as with any other personal choice made by voters as to how much attention they pay to political campaigns – is a matter for the individual voters, and is not a matter that should affect the interpretation of the "full text" provision.

In any event, it is not necessary that the court use this opportunity to "draw the line" for future cases (as the defendants' slippery slope argument would appear to require). Given the nature of litigation, any such "bright line" would almost inevitably be subject to revision or reinterpretation in future cases in the light of changed circumstances. Moreover, it is clear that the "full text" requirement was not met in this case. Therefore it is unnecessary as well as

unwise to "draw the line" in this case.

VI. THE "SEPARATE VOTES RULE"

Article XVII, Section 1 of the Oregon Constitution, reads:

> "Any amendment or amendments to this Constitution may be proposed in either branch of the legislative assembly, and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall* * * be * * * referred by the secretary of state to the people for their approval or rejection * * * . If a majority of the electors voting on any such amendment shall vote in favor thereof, it shall thereby become a part of this Constitution. The votes for and against such amendment, or amendments, severally, whether proposed by the legislative assembly or by initiative petition, shall be canvassed by the secretary of state in the presence of the governor, and if it shall appear to the governor that the majority of the votes cast at said election on such amendment, or amendments, severally, are cast in favor thereof it shall be his duty forthwith after such canvass, by his proclamation, to declare the said amendment, or amendments, severally, having received said majority of votes to have been adopted by the people of Oregon as part of the Constitution thereof, and the same shall be in effect as a part of the Constitution from the date of such proclamation. *When two or more amendments shall be submitted in the manner aforesaid to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately.* * * * ." (Emphasis supplied)

The principal case on this issue is *Armatta v. Kitzhaber*, recently summarized by the Court of Appeals in *Dale v. Keisling*, 167 Or App 394, 398-99, 9999 P2d 1229 (2000) as follows:

> Thus, under Armatta, the test consists of three component questions: (1) Would the measure effect two or more "changes" to the constitution? (2) Are those changes "substantive" in nature? And, (3) are those *changes* "closely related"? (Emphasis added)

A measure that effects two or more substantive changes that are not closely related violates the "separate vote" requirement of Article XVII, Section 1. Furthermore, the court in *Armatta* held that the "separate votes" requirement focuses upon the extent to which the change(s) would modify the constitution, as well as the procedural form of submitted amendments. This analysis was applied in the *Dale* case, where the court held that in

deciding whether a proposed amendment makes two or more changes to the constitution, "the court's focus is not on the form of the amendment itself, but rather on the effect its enactment would have on the Oregon Constitution." 167 Or App at 399. Therefore, this court must now undertake the task that the defendants prevented the voters from undertaking for themselves, namely juxtaposing the constitutional provisions affected by the proposed amendment with Measure 7 itself and examining the effects of the latter on the former. Plaintiffs describe these effects at some length in their brief, and the amicus parties note the following changes:

1. Article IV, Section 1(1) of the Oregon Constitution gives the legislature, *inter alia*, the authority to restrict the use of non-federal lands, subject to the requirement of Article I, section 18 that compensation be provided for actual takings. Under Measure 7, most land use regulations that reduce the value of private real property will now require compensation. This substantially limits the ability of the legislature and local government to regulate the use of land.

The defendants argue that these effects do not amount to "changes" to the constitutional provisions, within the meaning of the *Armatta* test. Their argument is that "the expense of exercising that power will have changed, but the powers remain the same." (State of Oregon's Appeal Br., 72.) However, the defendants' argument places excessive weight on the form of the changes, at the expense of their substance. First, the amicus parties note that the outcome of that argument differs according to how the court defines the power to restrict the uses of non-federal land in Article IV, Section 1(1) of the constitution. If the power is defined as a bare *power to regulate the use of land*, then the defendants are correct on their

formal argument, in that the power will not legally have changed. However, if the power is defined as being the *power to regulate the use of land without compensation*, then the power will have been changed by Measure 7 insofar as Measure 7 requires the payment of compensation.

Secondly, the amicus parties argue that the capricious nature of the defendants' "no change" argument – the outcome of which varies depending on how the court or the law defines the power being changed – indicates that a substantive test is more appropriate. Courts have long recognized the importance of substance over form in the field of land use regulations, indeed the Takings jurisprudence of the U.S. Supreme Court is premised upon just such an understanding.[9] Therefore the amicus parties argue that Measure 7 amounts to such a massive financial disincentive for the legislature in exercising its Article IV, section 1(1) powers that it undermines the very substance of those powers.[10]

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[9] The Supreme Court's Takings Clause jurisprudence proceeds on the understanding that, although not amounting to a "taking" of title or possession, government land use regulations may place so onerous a burden on the individual landowner that the regulation in question operates as a "taking" for the purpose of the Fifth Amendment. As Justice Holmes said in *Pennsylvania Coal Co. v. Mahon*,

> "When [the diminution in the value of the land caused by the regulation] reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." 260 U.S. 393, at 413 (1922).

Measure 7 therefore defines any reduction of property value as going "too far".

[10] On the ballot itself, the direct costs to the state were estimated at $1.6 billion per year, and local government direct costs were estimated at $3.8 billion per year.

2. Subsections (a) and (b) of Measure 7 have the novel effect of requiring a city or town that *regulates* the sale of alcoholic beverages (for example, by requiring bars to close by a certain time) to pay compensation to landowners whose private real property reduces in value as a consequence of being subject to such regulations. Article I, Section 39, and Article XI, Section 2, give every town and city "…the exclusive power to license, regulate, [or] control, or to suppress or prohibit, the sale of intoxicating liquors therein." This local regulatory power would be eliminated by the proposed amendment, as subsection (c) of the Measure provides exceptions to subsections (a) and (b) only insofar as a government regulation *prohibits* the sale of these goods. The amicus parties note that the defendants' "no change" argument is also made in respect of these changes,[11] and argues that it has no more validity here than it does in the context of Article IV, section 1(1).

3. In addition to the changes noted above, Measure 7 significantly alters the reach of the Oregon Constitution's free speech clause, Article I, section 8. In *State v. Henry*, 302 Or 510, 515, 732 P2d 9 (1987) this court held that the text of Article I, section 8 , "…is broader [than the First Amendment of the Federal Constitution] and covers any expression of opinion…" See also *Senke v. City of Portland*, 81 Or App 630, 726 P2d 959 (1986), *rev den* 302 Or 615 (1987) where this court used Article I, Section 8 to invalidate an ordinance prohibiting nude dancing but not other forms of dancing in taverns and restaurants. Measure 7 changes the scope of Article I section 8 because the exception to subsections (a) and (b) contained in subsection (c) of Measure 7 entitles a property owner to compensation if a

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[11] *See* State of Oregon's Appeal Br., 71.

government enacts a law that restricts the use of the property for some types of speech, but not for two other types - namely selling pornography and performing nude dancing. Measure 7 therefore creates a general right to compensation and then discriminates against certain types of speech, by barring them from receiving compensation, solely because of the exercise of a right that is otherwise protected under Article I, Section 8.

As Plaintiffs have noted, a measure involving Article I section 8 was on the same ballot as Measure 7. Oregon voters voted *against* Measure 87 which would have expressly amended the constitution to permit local governments to regulate the location of commercial establishments, "…the principal business of which is nude dancing, nude entertainment or the production, distribution or display of representations of sexual activity." As Plaintiffs' have noted, the presence of Measure 87 on the ballot and the vote against it indicates that Measure 7 is a logrolling provision containing "two or more" severable amendments ("substantive changes"). Moreover, it suggests that, had Oregonians been given the chance to vote separately upon the multiple changes effected by Measure 7, they would likely have opposed that part of the Measure which creates a compensation regime that discriminates against pornography and nude dancing.

4. Finally, Article VII (amended), Section 1 of the Oregon Constitution, which vests all judicial power (necessarily including power to construe the constitution) in the courts, is altered by Measure 7 because subsection (b) of the Measure instructs the courts to construe the phrase "historically and commonly recognized nuisance laws" (which delineate an exception to the compensation regime) in favor of a finding that compensation is due. As the subsection goes beyond a mere self-referential definition of terms and amounts to an

interpretive obligation placing a legal burden on courts *to favor plaintiffs* in actions brought under subsection (a), it undermines the judicial oath of judges of the Supreme Court, in Article VII (amended), Section 7 insofar as it bars a judge from the "impartial" discharge of judicial duties. As the plaintiffs note, it has been the most important principle of law in this country since *Marbury v. Madison*, 5 US (1 Cranch) 137, 177 (1803) that only the courts may say what the law is.

The defendants state that the judicial power is to interpret the law as set out in the constitution and in statutes, but argue that the law (and any change in it) does not alter the judicial power. Although the amicus parties agree with the defendants that the judicial power is to interpret the law, in this case, the burden placed on courts by subsection (b) of Measure 7 purports to take over this exclusively judicial function. The defendants give this issue summary treatment in their brief, but fail to recognize the merits of the position. In *Commonwealth ex. rel. Roney v. Warwirck*, 33 A. 373 (Pa. 1895), the Supreme Court of Pennsylvania addressed the question of whether what was described as "an expository or declaratory" statute violated the constitution and undertook to perform a judicial duty. The 1867 statute in question purported to require the courts to construe the words "the next city election" to mean the next but one. Mr. Chief Justice Sterrett said,

> "The practical effect of the act of 1867 in the present case would be to compel this court to "construe" the expression, "the next city election," use in the act of 1854, to mean not the "next" but the "next but one." It was clearly beyond the legislative power to thus usurp judicial functions, or to distort language."[12]

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[12] 33 A. 373, at 375. Earlier, at 374, Sterrett C.J. had said, "Nor is it apparent how an exception [to the rule of expository prohibition] can be reconciled with the theory of exclusive legislative and judicial functions. Its

Also relevant in this matter are the observations of Judge Landau, a Judge of the Oregon Court of Appeals. Writing in the 1996 Willamette Law Review, he says,

> "It certainly is arguable that to determine what the statute means is a quintessentially judicial function, and, to the extent that the legislature prescribes rules and objectives of interpretation, it has invaded an exclusive province of the judiciary."[13]

Consequently, the amicus parties believe that the question of whether subsection (b) of Measure 7 is an attempt to usurp the judicial power to interpret the law is open to decision, and at least to consideration, in this case.[14]

Bearing in mind that the "separate votes" requirement of Article XVII, Section 1, as interpreted in *Armatta*, focuses on the *changes to the constitution* and not merely the form of the proposed amendments, the question for the court is whether two or more of these changes are closely related and not merely whether the proposed amendments as written are closely

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existence is an invitation to and has resulted in many attempted encroachments on the province of the latter; and, if it extend [sic] to cases like the present, has no limit in its application and puts in the power of the legislature the abrogation of the principle to which it is said to be an exception."

[13] J. L. Landau, "Some Observations About Statutory Construction in Oregon", 1996 Willamette Law Review, 101, 110. Judge Landau was writing in the context of the decision of the this court in *PGE v BOLI* 317 Or. 606 (1993) which assumed the validity of ORS 174.010 mandating certain rules of construction for statutes. The provisions of ORS 174.010 are largely without controversy, amounting to little more than a declaration of judicial common sense. As such, *PGE v. BOLI*, though binding, is not determinative of the constitutional propriety of ad hoc interpretive obligations such as subsection (b) of Measure 7.

[14] In *City of Boerne v. Flores* 117 S.Ct. 2157 (1997), the Supreme Court noted the Constitutional difficulties with requirements that courts construe legislative or constitutional provisions in a particular manner. The Court held that the Religious Freedom Restoration Act of 1993 was unconstitutional on the ground that it invaded the judicial function and contradicted vital principles necessary to maintain the separation of powers.

related. Two or more unrelated *changes* compels the conclusion that the Measure violates the separate votes rule and is invalid. The amicus parties support the position of the plaintiffs in arguing that the multiple changes proposed to various sections of the Oregon Constitution by Measure are not all closely related. Numerous changes are not closely related but, in particular, the presence on the ballot of Measure 87 and the voters' negative verdict upon it demonstrates the irrationality of the claim that support for compensation for regulatory takings necessarily implies support for that part of Measure 7 that allows for discrimination in land use regulations against pornography and nude dancing.

VII. CONCLUSION

For the reasons given above, the amicus parties respectfully request that this court should affirm the trial court's decision.

DATED this 14th day of October, 2002.

Respectfully submitted,

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