

# THE QUIET REVOLUTION GOES WEST: THE OREGON PLANNING PROGRAM 1961-2011

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## I. INTRODUCTION AND SCOPE

This Article examines the beginnings of the Oregon planning program, chronicles the influence of THE QUIET REVOLUTION IN LAND USE CONTROL<sup>1</sup> in the development of that program, and evaluates that program in light of the objectives of THE QUIET REVOLUTION. The thesis of this Article is that THE QUIET REVOLUTION—the work of Fred Bosselman and David Callies—was a significant influence on the Oregon program, one of a number of circumstances and personalities that coalesced in 1973 when the program was first conceived.

There were other works and circumstances that also contributed to the Oregon program, but THE QUIET REVOLUTION provided direction, particularly with regard to the role of the plan, the need to protect the environment, and above all an increased role of the state in planning. Under the model acts in force in most states,<sup>2</sup> the state simply delegated planning and zoning powers to local governments. Oregon's political, social, and economic history provided amenable grounds for planning and land use controls. These circumstances combined with a number of remarkable personalities resulted in a program unlike any other in the United States.

In addition to the history of the formulation of the Oregon land use program, this Article demonstrates how Oregon's particular history provided the grounds for that program. Beginning in 1961, Oregon began deviating from traditional notions of planning when the state commenced a relationship

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1. FRED P. BOSSELMAN & DAVID L. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (President's Council on Environmental Quality, 1971) [hereinafter THE QUIET REVOLUTION].

2. For an explanation of the model zoning acts, see *infra* notes 20-21.

between its tax and land use systems in order to preserve farmland. In 1979, when the present structure of the system was completed, Oregon continued this approach to planning to the present, albeit not without trial and tribulation. Finally, the program is evaluated by the stated objectives of THE QUIET REVOLUTION: plan consistency, environmental preservation, and an enhanced role of the state in setting and implementing planning policy.

## II. THE DEVELOPMENT OF THE OREGON PLANNING SYSTEM: CIRCUMSTANCES, PERSONALITIES, AND LUCK

No complex system springs into maturity instantly or unaided. Rather, such systems are usually the product of political, social, and economic circumstance, as well as the work of strong personalities. The Oregon planning program followed this pattern.

### A. Oregon Background

In the 1830s and 1840s, Oregon captured the national imagination as a place where land and opportunity abounded.<sup>3</sup> The “Oregon Trail”—from Independence, Missouri, to Oregon City, Oregon—became a path for many families to make a new life by homesteading on federal lands.<sup>4</sup> Even though the flow of immigration to Oregon never stopped, it was profoundly affected by the California gold rush. As a result of the gold rush, even more immigrants were diverted to California.<sup>5</sup> This opened Oregon to the influence of the views and prejudices held by the white Protestant farmers who had settled from the South and the Midwest during these first twenty years.<sup>6</sup> The abundance of fertile

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3. OR. SEC’Y OF STATE, 2011 OR. BLUE BOOK 344-46 (2011).

4. See Pre-Emption (Distributive Preemption) Act of 1841, 27 Cong. Ch. 16, 5 Stat. 453 (1841); The Homestead Act of 1862, 37 Cong. Ch. 75, 12 Stat. 392 (1861) (allowing for acquisition of title to a certain amount of land by its use for a statutory period). The Donation Land Claim Act of 1850, however, was not open to blacks, Hawai’ans, Indians and Asians. 31 Cong. Ch. 76, 9 Stat. 496 (1850).

5. *A New Territory and the California Gold Rush*, OR. STATE ARCHIVES, <http://arcweb.sos.state.or.us/exhibits/1857/before/new.htm> (last visited Feb. 12, 2012).

6. William G. Robbins, *The Great Divide: Resettlement and the New Economy: Missions in Oregon*, OR. HIST. PROJECT (2002), [http://www.ohs.org/education/oregonhistory/narratives/subtopic.cfm?subtopic\\_ID=21](http://www.ohs.org/education/oregonhistory/narratives/subtopic.cfm?subtopic_ID=21). See *Oregon Racial Laws and Events, 1844 – 1959*, OR. LEADERSHIP NETWORK, [http://oln.educationnorthwest.org/webfm\\_send/72](http://oln.educationnorthwest.org/webfm_send/72) (last visited Feb. 29, 2012) (stating that Oregon originally had a “lash law” requiring that blacks in Oregon—be they free or slave—be whipped twice a year “until he or she shall quit the territory,” was passed in June 1844, but was soon deemed too harsh and its provisions for punishment were reduced to forced labor in December 1844); see also *Oregon Exclusion Law (1849)*, BLACKPAST.ORG, <http://www.blackpast.org/?q=primarywest/oregon-exclusion-law-1849> (last

land for farm and forest uses also influenced state land use policy.<sup>7</sup>

Oregon was admitted to the Union in 1859 as a free state;<sup>8</sup> however, a sizeable element of the population was sympathetic to slavery.<sup>9</sup> In 1857, Oregon voters approved a state constitution, which prohibited slavery, but it also prohibited the settlement of “free negroes” in the state.<sup>10</sup>

Because the population of the state was generally homogenous, the political battles that mattered in the state before World War II were over legislative control of utilities and corporations.<sup>11</sup> Until a 2010 change to the Oregon Constitution, the legislature met biennially, so the opportunity to undertake change was temporally limited. The interests of the utilities and corporations—influential with the legislature—were opposed by a populist movement that agitated for the legislative enactment or constitutional amendment of the municipal home rule (1906),<sup>12</sup> the initiative<sup>13</sup> and referendum (1899),<sup>14</sup> and recall (1908).<sup>15</sup>

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visited Feb. 12, 2012) (stating that in 1849, the Oregon Territorial Legislature passed the Oregon Exclusion Law, i.e., “A BILL TO PREVENT NEGROES AND MULATTOES FROM COMING TO, OR RESIDING IN OREGON”); H. JEFFREY LEONARD, *MANAGING OREGON’S GROWTH: THE POLITICS OF DEVELOPMENT PLANNING* 136 (1983) (speculating that the relative homogeneity of the population was a factor in the success of land use planning in Oregon).

7. *See History of Logging in Oregon*, OR. PUB. BROAD. (Jan. 18, 2007), <http://www.opb.org/programs/oregonstory/logging/timeline.html>; *Urban and Rural Issues*, OREGON.GOV, <http://www.oregon.gov/LCD/urbanrural.shtml> (last updated Feb. 24, 2012) (discussing land use issues arising from the conflicts between natural resource uses and urban and rural residential uses).

8. *An Act for the Admission of Oregon into the Union*, OR. BLUE BOOK, <http://bluebook.state.or.us/cultural/history/historyact.htm> (last visited Feb. 29, 2012).

9. DOROTHY O. JOHANSEN, *EMPIRE OF THE COLUMBIA* 261 (2d ed. 1957). *See Oregon History: Statehood*, OR. BLUE BOOK, <http://bluebook.state.or.us/cultural/history/history15.htm> (last visited Feb. 29, 2012) (discussing Oregon history). *See generally* T. W. Davenport, *The Slavery Question in Oregon* (Pt. 1), 9 Q. OR. HIST. SOC’Y 189, 189-253 (1908), available at <http://homerdavenport.com/docs/twdohq0903.pdf> (discussing “slavery agitation” in Oregon’s history).

10. JOHANSEN, *supra* note 9, at 262. *See Initiative, Referendum and Recall: 1958 – 1970*, OR. BLUE BOOK, <http://bluebook.state.or.us/state/elections/elections18.htm> (last visited Feb. 29, 2012) (listing that the constitutional provision was only repealed in the May 3rd primary in 1970 as Measure 2).

11. *See* William G. Robbins, *Political and Economic Culture, 1870 – 1920: Oregon Populism*, OR. HIST. PROJECT, [http://www.ohs.org/education/oregonhistory/narratives/subtopic.cfm?subtopic\\_ID=47](http://www.ohs.org/education/oregonhistory/narratives/subtopic.cfm?subtopic_ID=47) (last visited Feb. 29, 2012) (discussing Oregon and Washington Alliances’ disdain for the power of trusts and corporations).

12. Norman R. Williams, *Direct Democracy, the Guaranty Clause, and the Politics of the “Political Question” Doctrine: Revisiting Pacific Telephone*, 87 OR. L. REV. 979, 985 (2008).

13. *Id.* at 983-84.

14. *Id.*

The darker side of populism was demonstrated in 1922, when the Ku Klux Klan successfully supported the “Oregon School Bill,”<sup>16</sup> which would have closed all nonpublic schools, had it not been declared unconstitutional by the United States Supreme Court in 1925.<sup>17</sup> However, this populism, along with an attachment to the land, was the social basis from which the first efforts at planning and land use regulation found a hospitable place for germination.

### B. *In Principio Erat Zoning*

Oregon’s planning and land use control began in Portland after having received enabling legislation to do so in 1919.<sup>18</sup> That legislation allowed cities to zone and was similar to that of New York.<sup>19</sup> Soon thereafter, a committee formed by the Secretary of

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15. *Id.* at 985.

16. Compulsory Education Act, 1923 Or. Laws 9 (1923), *invalidated by* *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925). See *Catholic Patriotism on Trial: Oregon’s “Compulsory School Law,”* THE CATHOLIC UNIV. OF AM., <http://archives.lib.cua.edu/education/osc/osc-intro.cfm> (last visited Feb. 29, 2012) (explaining that the Compulsory Education Act would have eliminated private or parochial schools). There were almost no blacks and few Jews in the state in the 1920s, but the Klan, which was the second largest state group in the nation, found Catholics and “Popery” a fit target for action; see also *Portland KKK*, OR. HIST. PROJECT, [http://www.ohs.org/education/oregonhistory/historical\\_records/dspDocument.cfm?doc\\_ID=417F3549-9486-7453-D7A35663D4DC0529](http://www.ohs.org/education/oregonhistory/historical_records/dspDocument.cfm?doc_ID=417F3549-9486-7453-D7A35663D4DC0529) (last visited Feb. 29, 2012) (detailing the presence of the KKK during the 1920s in Oregon).

17. See *Pierce*, 268 U.S. at 534 (finding that the Act unreasonably interfered with a guardian’s right to raise his or her child).

18. 1919 Or. Laws 539 (1919). The Portland City Planning Commission was established by city ordinance in 1918, but did not have its first meeting until 1919. The proximate cause of the commission’s establishment was a report from planning consultant Charles Cheney advocating for: (1) the production of more affordable housing (the shipbuilding boom during WWI had caused a housing shortage); and (2) the adoption of a building code to prevent shoddy construction. The establishment of a city zoning code was one of the commission’s first orders of business. The commission recommended an effective—or strict, depending on a point of view—code with eight zones and six height districts. The Portland Realty Board convinced the city council, rather than enacting the proposed code by ordinance, to refer the code to a city-wide vote. The Realty Board then worked actively to defeat the code in a 1920 election. The margin of defeat was very narrow. In 1924 the voters approved a watered-down, Realty Board-blessed, four-zone code with no height districts. This “four-zone” code was actually a three-zone code since one of the “zones” was “unrestricted.” The other “real” zones were: (1) single family housing; (2) duplexes and apartments; and (3) mixed commercial and residential. This 1924 zoning code was incrementally revised, but not fully replaced until 1959. Email from Al Burns AIPC, Senior Planner, Portland Bureau of Planning and Sustainability, to author (February 24, 2012, 10:41 AM PST) (on file with author).

19. The court in *Lincoln Trust Co. v. Williams Building Corp.*, had already upheld land use regulation by zoning under the New York City Zoning

Commerce drafted the Standard Zoning Enabling Act (1926)<sup>20</sup> and the Standard City Planning Enabling Act (1928). Those Acts became the basis for authorizing planning and zoning in the United States.<sup>21</sup> Notwithstanding the differences between the Standard Acts and the Oregon-enabling legislation, for the first fifty years following the legislation, the Oregon experience in planning and zoning did not differ significantly from elsewhere.<sup>22</sup>

Oregon counties successfully sought enabling legislation to plan and zone in 1947;<sup>23</sup> however, that legislation tracked neither the 1919 city enabling legislation nor the two model acts of the United States Department of Commerce. Rather, zoning was subordinate to a separate “development pattern,”<sup>24</sup> which it was statutorily required to “carry out.”<sup>25</sup> However, in 1963, the words “comprehensive plan” replaced the term “development pattern.”<sup>26</sup> Yet, it would be twenty-five years before the significance of the statutory references to planning and zoning would be understood.<sup>27</sup>

Local governments, then comprised only of cities and counties, also were authorized to control certain land divisions<sup>28</sup> and were required after 1955 to regulate the creation of new access that facilitated the sale of parcels.<sup>29</sup> In these areas, Oregon was substantially similar to other states. As elsewhere, zoning was

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Resolution of January 25, 1916. 128 N.E. 209, 211 (1920). *See About Zoning - Background*, NYC.GOV, <http://www.nyc.gov/html/dcp/html/zone/zonehis.shtml> (last visited Feb. 29, 2012) (discussing history of New York zoning, including that of the 1961 Zoning Resolution, which emphasized the incorporation of open space into zoning requirements).

20. U.S. DEPT OF COMMERCE, ADVISORY COMM. ON ZONING STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING (1926), *available at* <http://www.smrpc.org/workshops/ZBA%20Workshop%20April%2029%202009/A%20Standard%20State%20Zoning%20Enabling%20Act,%201926.pdf>.

21. U.S. DEPT OF COMMERCE, ADVISORY COMM. ON ZONING, A STANDARD CITY PLANNING ENABLING ACT (1928), *available at* <http://www.planning.org/growingsmart/pdf/cpenabling%20act1928.pdf>.

22. *See generally* Edward J. Sullivan, *From Kroner to Fasano: An Analysis of Judicial Review of Land Use Regulation in Oregon*, 10 WILLAMETTE L. REV. 358 (1974) [hereinafter *Kroner to Fasano*] (discussing Oregon case law throughout its different periods of land use control and planning).

23. 1947 Or. Laws 948 (1947).

24. *See* Carl Abbott, *Land Use Planning*, THE OR. ENCYCLOPEDIA, [http://www.oregonencyclopedia.org/entry/view/land\\_use\\_planning/](http://www.oregonencyclopedia.org/entry/view/land_use_planning/) (last visited Feb. 29, 2012) (explaining that Oregon counties gained zoning authority in 1947).

25. OR. REV. STAT. § 215.110(2) (2011).

26. Ch. 619, §7, 1963 Or. Laws 1299 (1963).

27. *See generally* Fasano v. Bd. of Cnty. Comm'rs., 507 P.2d 3 (Or. 1973) (illustrating a landmark Land Use Planning and zoning case).

28. OR. REV. STAT. § 92.010 (2011).

29. OR. REV. STAT. § 92.014 (2011).

the planning tool of choice and had the virtue of certainty. Plans—when or if they existed—were often worded in vague, nonbinding terms, or perhaps existed merely as future land use patterns on a map devoid of text.<sup>30</sup> Land use controls were local matters, subject only to consistency with statute and judicial review. The state was not involved with these issues before 1969, except for delegating its authority to local governments, the pattern that existed in nearly every other state.

### C. *Postwar Progressivism Outside the Land Use Context*

The populism of pre-World War II Oregon lost its chauvinist edge as black and other nonwhite workers entered the state to work in war industries.<sup>31</sup> Oregon became more progressive, as shown in the statewide elections of Democrats Wayne Morse and Bob Straub and of moderate Republicans Mark Hatfield, Norma Paulus, Clay Meyers, Dave Frohnmeyer, Tom McCall, and Bob Packwood. That progressive streak was also reflected in legislation that often drew bipartisan support.

In 1953, Oregon passed a public accommodations law that prohibited discrimination on the basis of race, color, or ethnicity.<sup>32</sup> This law did not come to pass nationally for more than a decade.<sup>33</sup> In 1967, the legislature heeded the demand of Governor Tom McCall to set up an effective means to clean up the polluted Willamette River.<sup>34</sup> In that same year, Governor McCall and State Treasurer Bob Straub (himself to succeed McCall as Governor) began the planning of the Willamette River Greenway to preserve rural lands within 150 feet of the high water mark on each side of that river from development.<sup>35</sup> Additionally, the legislature enacted the Oregon Beach Bill, which declared that the dry sands areas of Oregon beaches were public property and accessible to all.<sup>36</sup> That legislation was upheld against constitutional and other

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30. The statutory term “development pattern” in OR. REV. STAT. Section 215.110(2) did not necessarily lend itself to the formulation of written policies.

31. JOHANSEN, *supra* note 9, at 560.

32. *Id.*

33. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 21 (2011)).

34. McCall was a broadcast news journalist before entering politics and presented a program on this subject, called *Pollution in Paradise*. William Robbins, *Pollution in Paradise*, OR. HIST. PROJECT, <http://www.ohs.org/the-oregon-history-project/narratives/this-land-oregon/people-politics-environment-1945/pollution-in-paradise.cfm> (last visited Feb. 29, 2012). It aired on November 12, 1962 and was sharply critical of state water quality policy. *Id.*

35. See *Willamette River Greenway*, METRO, <http://www.oregonmetro.gov/index.cfm/go/by.web/id=24630> (last visited Feb. 29, 2012) (discussing goals and objectives of the Greenway, including a brief history of its creation).

36. The “beach bill” was the culmination of a series of events that began in

challenges in 1969.<sup>37</sup>

In 1971, Oregon became the first state to regulate forest practices on private and state lands through the Oregon Forest Practices Act, which regulated timber harvesting, replanting, and stream setbacks.<sup>38</sup> In that same year, the state enacted the Oregon Bottle Bill, which required a deposit on the purchase of soft drink bottles to encourage recycling.<sup>39</sup> In 1973, the legislature passed sweeping public records<sup>40</sup> and public meetings<sup>41</sup> legislation to promote openness in government.

This newly enacted legislation provided support for the environment. Public control of resource lands and good government practices provided fertile grounds for the land use reforms that came to the forefront of the political agenda.

#### *D. Early Oregon Exceptionalism – Exclusive Farm Use Zones and Mandatory Planning and Regulation*

As noted earlier, aside from the wording of city and county enabling acts, there was little to distinguish early Oregon planning and land use regulation from that which existed elsewhere. The first inkling of something different occurred in 1961, when Oregon began its longstanding efforts to preserve farm land through a combination of preferential property tax assessments.<sup>42</sup> Additionally, Oregon employed land use planning

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1913 when Governor Oswald West issued an Executive Order declaring the dry sands a public highway and undertaking other measures to protect the coast. *The Beach Bill*, OR. PUB. BROAD., <http://www.opb.org/programs/oregonexperiencearchive/beachbill/> (last visited Feb. 29, 2012).

37. Oregon *ex rel.* Thornton v. Hay, 462 P.2d 671, 673 (Or. 1969).

38. See Edward J. Sullivan & Alexia Solomou, *Preserving Forest Lands for Forest Uses – Land Use Policies for Oregon Forest Lands*, 26 J. ENVTL. L. & LITIG. 179, 230-31 (2011) [hereinafter *Preserving Forest Lands for Forest Use*] (stating the strategies for accomplishing one of the Oregon Land Use Policy's goals of protecting natural resources).

39. Oregon *Liquor Control Commission*, OREGON.GOV, [http://www.oregon.gov/OLCC/bottle\\_bill.shtml/#Retailer\\_s\\_Responsibilities\\_Resources](http://www.oregon.gov/OLCC/bottle_bill.shtml/#Retailer_s_Responsibilities_Resources) (last updated Oct. 12, 2011); see JOHN M. DEGROVE & NANCY E. STROUD, OREGON'S STATE URBAN STRATEGY 6-7 (1980) (citing the bottle bill as one of the "three B" bills that evinced a state concern for the environment in this era; the others being legislation dedicating a percentage of highway funds to bike paths and providing for water quality through water pollution bonds).

40. Ch. 794 §§ 1-11, 1973 Or. Laws 2021-27 (1973) (codified as amended at OR. REV. STAT. §§ 192.410-.505 (2011)).

41. Ch. 172 §§ 1-9, 1973 Or. Laws 276-78 (1973) (codified as amended at OR. REV. STAT. §§ 192.610-.690 (2011)).

42. Edward Sullivan & Ronald Eber, *The Long and Winding Road: Farmland Protection in Oregon 1961-2009*, 18 SAN JOAQUIN AG. L. REV. 1, 2-3 (2009) [hereinafter *Long and Winding Road*]. The "father" of state land use planning in Oregon, Hector MacPherson, was interested in assuring that farmers were not discouraged in undertaking farm activities by property tax assessments. *Id.* at 13. He worked on both statewide land use planning in

by authorizing the creation of “Exclusive Farm Zones” (“EFUs”) to designate preferred areas and uses.<sup>43</sup> The Act was revised to define “farm use,” provide tax benefits to farmers, define the land use elements of the program, and determine nonfarm land uses allowed within EFUs.<sup>44</sup>

A second unique feature of Oregon’s planning and land use regulatory experience came in 1969 with the passage of SB 10.<sup>45</sup> The bill required every city and county to have plans and zoning regulations in place by 1971 or the Governor would undertake that work.<sup>46</sup> However, the legislation was relatively weak; even a strong and popular governor like McCall could not force planning and zoning on unwilling local governments entirely on his own.<sup>47</sup> The 1971 legislative session did not resolve the issue of mandatory planning and zoning.

### *E. Coastal Zone Management*

Responding to concerns by Governor Hatfield and reinforced by Governor McCall, the legislature established the Oregon Coastal Conservation and Development Commission (“OCC&DC”) in 1971 to provide for planning and land use regulation for coastal

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what became SB 100 and farm property tax assessments, which became SB 101. *Id.* at 12-14. Both of the bills were introduced in the 1973 Oregon legislative session. E-mail from Steve Schell, attorney who worked on SB 100 and SB 101, to author (May 26, 2011, 12:33 PM PST) (on file with author). See discussion *infra*, Parts II(E)-(F) (discussing land use regulations for coastal areas and the enactment of SB 100).

43. *Long and Winding Road*, *supra* note 42, at 2-8.

44. *Id.*

45. *Id.* at 8-9. Governor McCall believed in planning and had previously moved the state planning function into his office in 1967. E-mail from Arnold Cogan, the first Director of the Department of Land Conservation and Development, to author (June 3, 2011, 2:45 PM) (on file with the author). SB 10 was the sole surviving bill of the four McCall proposed which were designed to require a greater level of local planning and land use regulation. *Id.* For Cogan’s views on Oregon planning history, see generally *Planpdx.org: Interview with Arnold Cogan*, PORTLAND ST. UNIV., <http://www.pdx.edu/usp/planpdxorg-interview-arnold-cogan> (last visited Jan. 31, 2012). For a description of the legislation, see S. Schell, *Summary of Land Use Regulations in the State of Oregon*, in STAFF OF S. COMM. ON INTERIOR AND INSULAR AFFAIRS, 93D CONG., REP. ON STATE LAND USE PROGRAMS 55-64 (Comm. Print 1973) (on file with author).

46. *Long and Winding Road*, *supra* note 42, at 8. The legislation was listed as Measure 11 in the November 3, 1970, general election, was referred to a vote, and was confirmed by the electorate. *Initiative, Referendum and Recall: 1958-1970*, OR. BLUE BOOK, <http://bluebook.state.or.us/state/elections/elections18.htm> (last visited Feb. 29, 2012).

47. See DEGROVE AND STROUD, *supra* note 39, at 6-7 (stating that Governor McCall vocalized a plan to strengthen SB 10 during his reelection campaign, but implementation of the plan was poor).



areas.<sup>48</sup> This action provided a model for state planning when Oregon accepted federal funds to undertake planning and regulation of coastal areas under the recently enacted Coastal Zone Management Act of 1972.<sup>49</sup> The creation of this commission assumed a state role in planning beyond individual jurisdictions for resources of statewide concern.<sup>50</sup>

Although that commission was dominated by local government officials and was regarded as relatively weak,<sup>51</sup> its recommendations to the 1975 Oregon legislature regarding coastal resources were incorporated into the statewide planning program in 1976 and have protected important coastal resources.<sup>52</sup>

#### *F. The Path to the Enactment of SB 100*

Following the 1971 legislative session, several events converged that added to the effort to establish a state role in planning and plan implementation in the same way that the state had intervened with regard to clean rivers, public beach access, and recycling. However, the establishment of a state planning program was not inevitable. First, State Senator Hector MacPherson, a Linn County Republican who strongly advocated farmland protection, unsuccessfully sought funding in 1971 for an interim committee to study the issue and to deal with the inability to implement SB 10.<sup>53</sup> Notwithstanding this hurdle, MacPherson worked with Bob Logan, Governor McCall's Local Government

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48. See generally PART ONE: OCEAN MANAGEMENT FRAMEWORK, OREGON TERRITORIAL SEA PLAN 1-2 (1994), available at [http://www.oregon.gov/LCD/OCMP/docs/Ocean/otsp\\_1-a.pdf?ga=t](http://www.oregon.gov/LCD/OCMP/docs/Ocean/otsp_1-a.pdf?ga=t); INTERVIEWS WITH MEMBERS OF THE OREGON CONSERVATION & DEVELOPMENT COMMISSION (OCC&DC) 1971-75, OR. COASTAL ZONE MGMT. ASS'N 1 (2004). Governor Hatfield had complained of the destruction of coastal beauty and the "[t]wenty [m]iserable [m]iles" of bad development at the coast. John Terry, *A Mark Hatfield Memory: The Governor and the Cub Reporter*, OREGONLIVE.COM (Aug. 13, 2011, 10:00 AM), [http://www.oregonlive.com/O/index.ssf/2011/08/a\\_mark\\_hatfield\\_memory\\_the\\_gov.html](http://www.oregonlive.com/O/index.ssf/2011/08/a_mark_hatfield_memory_the_gov.html). See *infra* note 64 (discussing Governor McCall).

49. 16 U.S.C. §§ 1451-56 (2012).

50. Email from Bob Bailey, Program Manager, Or. Coastal Mgmt. Program, Dept't of Land Conservation and Dev., to author (Oct. 5, 2011) (on file with author).

51. HENRY RICHMOND III, THE OREGON COAST AND THE OREGON COASTAL CONSERVATION AND DEVELOPMENT COMMISSION: THE FOX GUARDING THE CHICKENS? 49-55 (1973), available at <http://www.gpo.gov/fdsys/pkg/CZIC-tc224-o7-r53-1973/html/CZIC-tc224-o7-r53-1973.htm>.

52. The Oregon resources subject to coastal goals involve estuaries, beaches and dunes, coastal shorelands, and ocean resources. Email from Bob Bailey to author, *supra* note 50.

53. PETER A. WALKER & PATRICK T. HURLEY, PLANNING PARADISE: POLITICS AND VISIONING OF LAND USE IN OREGON 48 (2011) [hereinafter PLANNING PARADISE].

Relations Director, to get funding to study the issue.<sup>54</sup>

Logan's office also funded a publication and a series of public meetings over the land use alternatives for the fertile soils of the Willamette Valley. The 1972 publication by Lawrence Halprin called *Willamette Valley: Choices for the Future*<sup>55</sup> was both attractive and well-conceived; it gave rise to much public discussion of Oregon's planning future.<sup>56</sup>

The early 1970s were heady and hopeful times. The opposition to the Vietnam War and later to President Nixon galvanized the rising power of the baby-boomer generation, which also supported the new environmental movement. Books like Rachel Carson's *SILENT SPRING* (1962)<sup>57</sup> and Paul and Ann Ehrlich's *THE POPULATION BOMB*<sup>58</sup> were widely read. Planners and environmentalists were also taken by Ian McHarg's *DESIGN WITH NATURE* (1969),<sup>59</sup> which advocated development that was not in conflict with existing ecosystems.

On the legal front, tentative drafts of the MODEL LAND DEVELOPMENT CODE of the American Law Institute ("ALI CODE"),<sup>60</sup> which advocated a state role in planning, were available. The ALI CODE served as an important influence for the Florida planning program adopted in 1971. Finally, there was *THE QUIET REVOLUTION*<sup>61</sup> with its endorsement of mandatory planning, a

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54. *Id.* at 48, 59; e-mail from Arnold Cogan to author, *supra* note 45.

55. LAWRENCE HALPRIN & ASSOCIATES, *THE WILLAMETTE VALLEY: CHOICES FOR THE FUTURE* (1972), available at <http://ir.library.oregonstate.edu/xmlui/handle/1957/52>. See ROBERT K. LOGAN ET AL., OR. LOCAL GOV'T RELATIONS DIV., *THE OREGON LAND USE STORY* 6-9 (1973), available at <http://library.state.or.us/repository/2007/200704131021365/> (further discussing the project in Willamette Valley).

56. *Id.* The not-so-subtle message was that unless immediate actions were taken, Willamette Valley farmland would continue to be lost at an alarming rate. *Id.* at 7-8. The book contained two "scenarios," one considering the Willamette Valley if farmland were lost at the present rate, and another if much of the land were preserved for farm use. *Id.*

57. *Books Written by Rachel Carson*, *THE LIFE AND LEGACY OF RACHEL CARSON*, <http://www.rachelcarson.org/> (last visited Feb. 29, 2012) (listing Carson's publications).

58. See Paul R. Ehrlich & Anne H. Ehrlich, *The Population Bomb Revisited*, *ELEC. J. OF SUSTAINABLE DEV.* (2009), [http://www.populationconnection.org/site/DocServer/Population\\_Bomb\\_Revisited\\_Paul\\_Ehrlich\\_2009.pdf?docID=681](http://www.populationconnection.org/site/DocServer/Population_Bomb_Revisited_Paul_Ehrlich_2009.pdf?docID=681) (offering a more recent assessment of the population issue).

59. *EGU Awards and Medals: Ian McHarg*, *EUR. GEOSCIENCES UNION*, <http://www.egu.eu/awards-medals/awards-and-medals/award/portrait-ian-mcharg.html> (last visited Feb. 12, 2012) (discussing McHarg's impact on land use planning through his book).

60. Fred Bosselman was a reporter for the ALI MODEL CODE and presumably brought his views with him in participation in *THE QUIET REVOLUTION*. Daniel Mandelker, *Fred Bosselman's Legacy to Land Use Reform*, 17 *FL. ST. J. LAND USE AND ENVTL. LAW* 11, 19 (2001), available at [http://www.law.fsu.edu/journals/landuse/vol17\\_1/mandelker.pdf](http://www.law.fsu.edu/journals/landuse/vol17_1/mandelker.pdf).

61. *Id.* at 11-13.

strong state role in planning and environmental protection that so influenced Senator MacPherson in his drafts of SB 100.<sup>62</sup>

For a time, there was even the possibility that Congress would enact a National Land Use Bill advocated by Washington Senator Henry Jackson.<sup>63</sup> Although that bill failed, there was a shared openness in Oregon to the objectives of THE QUIET REVOLUTION, which would be tested during the 1973 Oregon legislative session.

### G. 1973 – That Magical Year

Notwithstanding the lack of an interim committee to propose state land use legislation, Senator MacPherson used the funding available through the Governor's Office, as well as the work done on the ALI CODE and THE QUIET REVOLUTION, to compose SB 100—the proposal for state participation in land use planning. Governor McCall rose to the occasion by dedicating a significant portion of his 1973 legislative assembly address to planning reform,<sup>64</sup> supporting the MacPherson proposal. MacPherson, a Republican, was a member of the minority party in the Senate; thus to help his proposal he enlisted the chair of the Senate Environment Committee, Ted Hallock,<sup>65</sup> a Portland Democrat, to co-sponsor the proposal.

MacPherson actually sponsored two related pieces of legislation to preserve farmland, his overall objective. In addition to SB 100, MacPherson also sponsored SB 101, which would modify the land use portions of the legislation that effected a tradeoff of preferential assessment of farmland in farm use—making it assessed at farm use instead of market value—in

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62. PLANNING PARADISE, *supra* note 53, at 25, 47.

63. See generally John R. Nolon, *The National Land Use Policy Act*, 13 PACE ENVTL. L. REV. 519 (1996); Jayne E. Daly, *A Glimpse of the Past—A Vision for the Future: Senator Henry M. Jackson and National Land Use Legislation*, 1995 PACE L. REV. 25 (1995) (discussing Land Use Bill).

64. McCall's speech was electric and attracted national attention. Among other things, he said:

There is a shameless threat to our environment and to the whole quality of life[ that threat is the] unfettered despoiling of the land. Sagebrush subdivisions, coastal "condomania" and the ravenous rampage of suburbia in the Willamette Valley all threaten to mock Oregon's status as the environmental model for the [N]ation. We are dismayed that we have not stopped misuse of the land, our most valuable finite natural resource.

David Kern, *On the Record About a Legend*, PORTLAND INSIGHT (Oct. 30, 2009), available at [http://www.portlandtribune.com/opinion/story.php?story\\_id=15797](http://www.portlandtribune.com/opinion/story.php?story_id=15797).

65. See *Senate Bill 100*, THE OR. ENCYCLOPEDIA, [http://www.oregonencyclopedia.org/entry/view/senate\\_bill\\_100](http://www.oregonencyclopedia.org/entry/view/senate_bill_100) (last visited Feb. 13, 2012) (providing background information and an explanation of Senate Bill 100).

exchange for limitations on nonfarm uses.<sup>66</sup> Thus, the legislation would provide a land use mechanism that could more effectively prevent conversion of farmland to “ranchettes” or other nonfarm uses, so that farmers were not forced to convert farmlands because property tax assessments made continued farming too onerous to contemplate.

The story of the passage of SB 100 has been related often.<sup>67</sup> Suffice it to say there were other strong personalities involved in that work, in addition to McCall and MacPherson. Former State Representative L. B. Day, a Salem Republican and Teamster Local official—thus committed to continuing agriculture to provide employment for his members—was given the job of working with the various interest groups and brokering a compromise among local governments, timber companies, homebuilders and others.<sup>68</sup> One proposal from both the ALI CODE and THE QUIET REVOLUTION also survived—the regulation of areas and activities of state concern—although not much activity occurred with respect to either for many years.<sup>69</sup> In addition, the legislation proposed state regulation of federal lands, if the federal government would ever allow this to occur.<sup>70</sup>

SB 100 originated in the more difficult chamber of the legislature and was the subject of intense testimony and debate.<sup>71</sup>

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66. *Long and Winding Road*, *supra* note 42, at 13-14.

67. See, e.g., *History of Land Use Planning in Oregon*, OR. DEP'T OF LAND CONSERVATION AND DEV., <http://www.oregon.gov/LCD/history.shtml> (last visited Feb. 13, 2012); *History of Land Use in Oregon*, OSU LIBRARIES, <http://oregonexplorer.info/landuse/OregonLandUse/LandUseHistory> (last visited Feb. 13, 2012); LOGAN ET AL., *supra* note 55, at 9-13; LEONARD, *supra* note 6, at 7-11; *Senate Bill 100*, *supra* note 65; DEGROVE & STROUD, *supra* note 39, at 9-14; *Long and Winding Road*, *supra* note 42, at 10-14 (discussing the increased concern over Land Use Planning in Oregon and the emergence of SB 100). See generally Edward J. Sullivan, *Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100*, 77 OR. L. REV. 813 (1998) [hereinafter *Symposium*] (discussing SB 100).

68. The League of Oregon Cities did not support the legislative proposal, but the Association of Oregon Counties supported it, as counties received the authority to coordinate the local governments within their boundaries. County coordination was preferable to coordination by Councils of Governments, as SB 100 originally proposed. S.B. 100, 57th Leg., 1973 Regular Sess. (Or. 1973). The process of passing the bill is described well in Kathleen Joan Zachary, *Politics of Land Use: The Lengthy Saga of SB 100 183-94* (1978) (unpublished Master's thesis, Portland State University) (on file with author).

69. Activities of statewide concern were in fact repealed by 1981 Or. Laws, Ch. 748, §56, and areas were not used until 2009, when the Metolius River Resort was terminated by legislative action. 1981 Or. Laws 997 (1981). See *infra* note 201 and associated text (discussing destination resorts in Oregon).

70. Such consent had effectively been given for many federal lands in the coastal areas under the Coastal Zone Management Act, 16 U.S.C. § 1456(c), so the prospect of additional consent was not out of the question. 16 U.S.C. § 1456(c) (1992).

71. Zachary, *supra* note 68, at 267-80.

When Day completed his work and had the commitments of the major players not to oppose the bill, MacPherson and Hallock moved the bill to the Senate floor. After a lengthy and dramatic debate, the bill passed the Senate by an 18-12 margin and went to the House.<sup>72</sup> The House was friendly to the bill but Senator Hallock warned another strong personality, State Representative Nancie Fadeley, that if there were any changes, the bill's re-passage in the Senate could be endangered. The bill passed the House without amendment<sup>73</sup> and was signed by Governor McCall.<sup>74</sup> As a result, a new agency, the Land Conservation and Development Commission ("LCDC") and its administrative staff, the Department of Land Conservation and Development ("DLCD"), was born and created a new model for state participation in planning and development.

Another major land use development in 1973 was the decision of the Oregon Supreme Court in *Fasano v. Board of County Commissioners of Washington County*,<sup>75</sup> which *inter alia* construed the 1947 and 1963 county enabling legislation to require conformity of zoning with the county comprehensive plan<sup>76</sup> and distinguished small tract zone changes from other actions, terming them to be "quasi-judicial" in nature and thus subject to greater judicial scrutiny.<sup>77</sup> With these legislative and judicial actions, Oregon was a world apart from other states in planning law and theory.

#### *H. The System Completed (1974-79)*

*Fasano's* conclusion that the county planning enabling legislation of 1947 and 1963 required conformity with the comprehensive plan was a fairly easy reading of the legislative text.<sup>78</sup> But in 1975, the Oregon Supreme Court reached the same result with respect to the 1919 Oregon city zoning enabling legislation, which required that zoning be "in accordance with a well[-]considered plan" if there were an existing plan.<sup>79</sup> Thus, two years following the passage of SB 100, which required conformity to plans, the Oregon courts had already construed city and county enabling legislation to reach the same result.

SB 100 required more than conformity of zoning regulations with the plan; it required that plans themselves incorporate state

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72. *Id.*

73. *Id.* at 280-86.

74. *Id.* at 287.

75. *Fasano*, 507 P.2d at 23.

76. *Id.* at 27-28.

77. *Id.* at 26-27.

78. *Id.* at 26.

79. *Baker v. City of Milwaukie*, 533 P.2d 72, 775, 779 (Or. 1975).

policies, called “goals” into their provisions,<sup>80</sup> so that there was a hierarchical relationship among goals, plans, regulations, and actions. The new state agency, LCDC, ultimately came up with nineteen such goals, fourteen of which applied statewide and were adopted in 1974;<sup>81</sup> another five applied to specific areas such as the Willamette River Greenway and the Oregon coast.<sup>82</sup> By statute, cities and counties had a year to conform their plans and regulations to the goals,<sup>83</sup> a huge miscalculation given the inability or unwillingness of local governments to undertake the time and expense of the effort. Even with state grants available, there were rivalries among local governments, especially over “coordination” authority, demonstrating the sheer complexity of the effort.<sup>84</sup> LCDC sought a process for official certification of compliance with the goals from the legislature and called that process “acknowledgment,”<sup>85</sup> which would relieve local governments from

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80. OR. REV. STAT. § 197.175(2) (2009). The goals could be divided into five groups:

1. Process Goals (Goals 1 and 2, Citizen Involvement and Comprehensive Plans).
2. Natural Resource Goals (Goals 3-5, Agricultural and Forest Lands, Specific Natural Resources).
3. Land and Environment Goals (Goals 6-8 and 13, Air, Land and Water, Natural Hazards, Parks and Recreation, and Energy Conservation).
4. Urban Goals (Goals 9-12 and 14, Economy of the State, Housing, Public Facilities and Services, Transportation and the Urbanization Process).
5. Goals for Specific Areas (Goals 15-19, Willamette River Greenway and Coastal Areas).

Oregon Dep’t of Land Conservation, OREGON.GOV, [http://www.oregon.gov/LCD/goals.shtml#Statewide\\_Planning\\_Goals](http://www.oregon.gov/LCD/goals.shtml#Statewide_Planning_Goals) (last updated Nov. 24, 2010).

81. *The Evolution of Oregon’s Statewide Planning Goals*, DEP’T OF LAND CONSERVATION AND DEV. (Mar. 12, 2010), <http://www.oregon.gov/LCD/docs/goals/goalsappendix.pdf#ga=t>.

82. *Id.*

83. OR. REV. STAT. §§ 197.245 and 197.250 (2009).

84. LEONARD, *supra* note 6, at 33, 39-45. Arnold Cogan, the first Director of the Department of Land Conservation and Development, states that DLCD staff knew the one-year period was unrealistic, but the LCDC Chair at the time, L. B. Day, who had acted as midwife for SB 100, insisted on that time limit to keep the pressure on local governments to complete their planning obligations. E-mail from Arnold Cogan, the first Director of the Department of Land Conservation and Development, to author (Feb. 21, 2012, 1:55 PM, PST) (on file with author). When it became apparent that most cities and counties would not meet the deadlines for many years, the legislature provided for planning extensions and a “continuance” process, to allow for meeting the goals through multiple submissions. See OR. REV. STAT. § 197.251 (2009) (providing a process to obtain a continuance).

85. OR. REV. STAT. §§ 197.015(1), .251 (2011). A similar process was applicable to state agencies under OR. REV. STAT. § 197.180 and OR. ADMIN. R. 660-030 (1986) and OR. ADMIN. R. 660.031 (1984), by which state agencies were generally required to meet the Goals and local acknowledged plans and implementing regulations.

the onerous task of making independent findings of compliance with every applicable goal in every land use decision.<sup>86</sup> The acknowledgment process for local governments was not completed until 1986.<sup>87</sup>

To make the new system work when he left office, Governor McCall co-founded 1000 Friends of Oregon, a watchdog organization that would advocate and litigate on behalf of the program.<sup>88</sup> There was resistance to the program by property rights groups and local government, which tested political support for the system. Three initiative measures went to the voters to repeal or severely scale back the system in 1976,<sup>89</sup> 1978,<sup>90</sup> and 1982.<sup>91</sup> Each was defeated and the acknowledgment process continued to its conclusion.

One last element of the current system was incorporated in 1979 and 1981 and related to the review of land use decisions<sup>92</sup>

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86. Sullivan, *supra* note 67, at 817.

87. DEP'T OF LAND CONSERVATION AND DEV., ACKNOWLEDGEMENT SCOREBOARD (Jan. 14, 1993). The acknowledgment process was lengthy and contentious; however, DLCD staff insisted that the Goal 2 Planning Process Goal be fully met, so that plan policies required an adequate factual base, were internally consistent, carried out statewide goals, were mandatory in their application, and implemented by regulations, including zoning regulations and maps. Interview with James Knight, former DLCD management staff (1974-2003), to author (Sept. 12, 2011) (on file with author).

88. See C. E. Beggs, *1,000 Friends of Oregon Keep Eye on Land Use, Growth*, L.A. TIMES, June 19, 1994, [http://articles.latimes.com/1994-06-19/local/me-5766\\_1\\_planning-law](http://articles.latimes.com/1994-06-19/local/me-5766_1_planning-law); LEONARD, *supra* note 6, at 20-25, 126-27. The organization was usually successful in court. PLANNING PARADISE, *supra* note 53, at 69-71. See generally Robert L. Liberty, *Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States*, 22 ENV. L. RPTR. 10367 (1992) (discussing the success of the Oregon program).

89. Oregon Ballot Measure 10, Repeals Land Use Planning Coordination Statutes (Or. 1976). See Justin Fuller, *A Statistical Analysis of Oregon's Land-Use Ballot Initiatives 20* (Apr. 14, 2008) (unpublished Master's thesis, Oregon State University), available at <http://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/8703/fuller.pdf?sequence=1>; LEONARD, *supra* note 6, at 35-39 (discussing all three initial efforts to kill or eviscerate the state land use program).

90. Measure 10 (Or. 1978). Fuller, *supra* note 89, at 20.

91. Oregon Ballot Measure 6, Retain Local Power over Land Use Planning (Or. 1982). Fuller, *supra* note 89, at 20. Arnold Cogan, the first Director of the Department of Land Conservation and Development, credits the extensive process of citizen involvement in the development of the statewide planning goals, wherein approximately 10,000 citizens of the state participated in "workshops" to formulate the goals and the development of a mailing list of 100,000, which was utilized by opponents of the three measures in their campaign for a "no" vote. E-mail from Arnold Cogan to author, *supra* note 84.

92. The new system of review by the Oregon Land Use Board of Appeals ("LUBA") commenced as an experiment in 1979 under Chapter 772, Or. Laws 1979, but became permanent in 1983 under Chapter 827, Or. Laws 1983.

and periodic review.<sup>93</sup> Before the review element was put in place, the local circuit courts reviewed land use decisions by way of the writ of review, a statutory form of certiorari.<sup>94</sup> This system was cumbersome and the development community particularly desired a faster and more efficient system. The legislature responded with the creation of the Land Use Board of Appeals (“LUBA”),<sup>95</sup> an administrative agency in which appeals must be filed within twenty-one days of the local land use decision,<sup>96</sup> and review of which was generally required to be complete within seventy-seven days of filing.<sup>97</sup> Although this element of the system has not been copied elsewhere, most commentators rate it a success.<sup>98</sup>

In any event, the ten-year period between the enactment of SB 10 in 1969 and the creation of LUBA in 1979 was undoubtedly the most creative period for the Oregon planning system. Nevertheless, as of 1979, the system still faced formidable challenges.<sup>99</sup>

### III. CRISES AND CONFLICTS – THE SYSTEM MATURES (1979-2011)

With the creation of LUBA in 1979, the current form of the Oregon planning program was fully in place. The difficult work of

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93. 1981 976 Or. Laws (1981) (codified as OR. REV. STAT. §§ 197.628-.646 (2011)).

94. OR. REV. STAT. § 34.030 (2011).

95. OR. REV. STAT. § 197.805-50 (2011).

96. OR. REV. STAT. § 197.830 (2011).

97. OR. REV. STAT. § 197.830(14) (2011). See Edward J. Sullivan, *Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program, 1979-1999*, 36 WILLAMETTE L. REV. 441, 447 (2000) [hereinafter Sullivan, *Reviewing the Reviewer*] (reiterating that final decisions must be made within seventy-seven days).

98. Sullivan, *Reviewing the Reviewer*, *supra* note 97, at 441-47. When the State of Oregon reviewed its land use system in 2005-09, most scenarios for change still involved LUBA in the review of local government decisions. BIG LOOK TASK FORCE CONSULTING TEAM, PART ONE EVALUATION REPORT 60 (2007), available at [http://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/9133/2458\\_BLTF%2520Final%2520Report%25206\\_29\\_07.pdf?sequence=1](http://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/9133/2458_BLTF%2520Final%2520Report%25206_29_07.pdf?sequence=1).

99. In September, 1978, the author posited five criteria for the evaluation of the Oregon program:

- (1) Local planning and development control;
- (2) Citizen participation in local planning;
- (3) Protection of the state and national interests;
- (4) Minimal state interference with local planning; and
- (5) Some certainty for citizens and landowners.

These broadly-based criteria reflected the hopes and expectations of Oregonians then and now; some criteria have been better met than others. See *Symposium*, *supra* note 67, at 823-40 (evaluating the program and accompanying criteria). From a perspective over this time, there appears to be less emphasis on the local aspects of planning and citizen and landowner participation and more emphasis on state control. For a contemporary evaluation of the system as of 1980, see DEGROVE & STROUD, *supra* note 39, at 22-31.



interpreting, applying, and revising the broadly worded goals had just begun. These were controversial tasks, marked by frequent litigation and legislative intervention. Because planning was now meaningful, it became a political act.

#### A. A Statewide Planning System

LCDC adopted the state's planning policies in the form of nineteen Goals<sup>100</sup> and these Goals had immediate impacts on local decision-making.<sup>101</sup> If the Commission could not be persuaded that a certain policy should be initiated or changed, an interest group frequently focused its advocacy on the Oregon legislature to effect the policy or change by statute.<sup>102</sup> Homebuilders, agricultural and forestry groups, environmentalists, and others all had lobbyists and witnesses at the ready during the biennial sessions of the legislature.<sup>103</sup> And as with any important issue, politics mattered.

While the program enjoyed broad legislative support in the 1970s, Republicans became increasingly identified with critics of—or advocates of changes to—the program while Democrats tended to support it.<sup>104</sup> The most recent Republican Oregon Governor, however, Victor Atiyeh, supported the program, as did all his Democratic successors; however, control of the houses of the legislature often alternated between the two parties.<sup>105</sup> When bills hostile to or weakening the program passed the legislature, they

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100. These Goals, as modified, are found at *Oregon Department of Land Conservation and Development*, OREGON.GOV, <http://www.lcd.state.or.us/LCD/goals.shtml> (last visited Feb. 7, 2012).

101. S.B. 100. Or. Laws 1973 Ch. 80, §§ 42-44 required that the goals be incorporated into local plans and be effective within a year of their adoption. 1973 Or. Laws 139-40 (1973).

102. See, e.g., OR. REV. STAT. §§ 215.213, 215.283 (2011) (permitting nonfarm uses in “exclusive farm use zones,” which have changed every biennial legislative session since 1963). *Long and Winding Road*, *supra* note 42, at 3 n.8, 29, available at [http://www.gsblaw.com/images/ps\\_attachment/attachment530.pdf](http://www.gsblaw.com/images/ps_attachment/attachment530.pdf).

103. Article III, § 10 of the Oregon Constitution required biennial sessions until 2010 when the state constitution was amended at the 2010 General Election through Measure 71 to provide for annual sessions. For a rundown of the vote, see November 2, 2010, General Election Abstracts of Votes: State Measure 71, OREGONVOTES.ORG, <http://www.sos.state.or.us/elections/doc/history/nov22010/results/m71.pdf> (last visited Feb. 29, 2012).

104. PLANNING PARADISE, *supra* note 53, at 62-64, 139-40.

105. From 1981 to 2011, the Oregon Senate had a Republican majority in the 1995, 1997, 1999, and 2001 sessions, while the House had a Republican majority in 1991, 1993, 1995, 1997, 1999, 2001, 2003, and 2005. *Oregon Blue Book: Senate Presidents of Oregon*, OR. BLUE BOOK, <http://bluebook.state.or.us/state/elections/elections33.htm> (last visited Feb. 29, 2012); *Oregon Blue Book: Speakers of the House of Representatives of Oregon*, OR. BLUE BOOK, <http://bluebook.state.or.us/state/elections/elections34.htm> (last visited Feb. 29, 2012). In the 2011 session, the House was evenly split.

were often vetoed by the governor of the day.<sup>106</sup> At the same time, there were frequent constitutional challenges to the program, all of which failed.<sup>107</sup> The result was that no change to the program could be effected without bipartisan consensus, which most often occurred through “Christmas Tree” legislation that satisfied the desires of multiple interest groups.<sup>108</sup> Where change did occur, it was most often through adoption or amendment of administrative rules, particularly with respect to interpretation of the broadly worded goals, which was immune from direct legislative review.<sup>109</sup>

### B. Life After Nirvana

By law, local government conformity with the goals was to occur within a year of their adoption in 1974 and 1975;<sup>110</sup> however, the last acknowledgment of plans and local regulations did not occur until 1986.<sup>111</sup> The reasons were many, including the

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106. Governor Kitzhaber, a physician who served as Governor from 1995-2003 and is the current Governor, was known as “Dr. No,” for his frequent vetoes of Republican-backed legislation, especially those he perceived would weaken the state’s land use program. Kitzhaber recorded a state record of 69 vetoes in 1999. *Gov. John Kitzhaber*, NATIONALJOURNAL.COM, <http://nationaljournal.com/pubs/almanac/2002/people/or/orgv.htm> (last updated May 29, 2001).

107. *See, e.g.*, *City of Pendleton v. Kerns*, 643 P.2d 658, 663 (Or. App. 1982); *Miller v. City of Portland*, 639 P.2d 680, 681-82 (Or. App. 1982); *Mayea v. LCDC*, 635 P.2d 400 (Or. App. 1981), *rev. allowed*, 644 P.2d 1126 (Or. App. 1981), *pet. dismissed as moot*, 647 P.2d 920 (1982); *Tillamook Cnty. v. LCDC*, 642 P.2d 691 (Or. App. 1981); *Meyer v. Lord*, 586 P.2d 367, 371 (Or. App. 1978) (rejecting constitutional challenges). As shown below, program opponents were unable to prevail in court and turned to the legislature and the ballot box.

108. This omnibus legislation, sometimes known as “BLUBs” (big land use bills) provided for the needs of multiple interest groups. For examples of this type of legislation, see 1981 Or. Laws 976 (1981); 1983 Or. Laws 1607 (1983); 1987 Or. Laws 1441 (1987); 1989 Or. Laws 1212 (1989); 1991 Or. Laws 1708 (1991); 1993 Or. Laws 2438 (1993).

109. There were attempts through the initiative process to amend the state constitution to provide for legislative review of administrative rules. In 1998, Measure 6 would have amended the Oregon Constitution, but failed. *Initiative, Referendum and Recall: 1996-1999*, OR. BLUE BOOK, <http://bluebook.state.or.us/state/elections/elections22.htm> (last visited Feb. 29, 2012). In 2000, Measure 2 proposed a constitutional similar amendment, but also failed. *Initiative, Referendum and Recall: 2000-2004*, OR. BLUE BOOK, <http://bluebook.state.or.us/state/elections/elections22a.htm> (last visited Feb. 29, 2012).

110. *See supra* note 84 and accompanying text.

111. *See Knight, supra* note 87 (explaining the lengthy DLCD acknowledgement process). *See also* Deborah Howe, *Land Conservation and Development Commission*, THE OR. ENCYCLOPEDIA, [http://www.oregonencyclopedia.org/entry/view/land\\_conservation\\_and\\_development\\_commission\\_lcdc/](http://www.oregonencyclopedia.org/entry/view/land_conservation_and_development_commission_lcdc/) (last visited Feb. 10, 2012) (attributing part of the delay to clarifying policies and resolving conflicts).

resistance to the program by some local governments, the underfunding of LCDC and local governments, the use and application of inconsistent standards, and the presence of frequent litigation in settling controversial issues.<sup>112</sup> However difficult the acknowledgment process proved to be, it paled in comparison to the problems raised in assuring that plans, regulations, and amendments thereto, met the goals.

Two processes were devised to deal with change. The first was “periodic review” of the plans and regulations of local jurisdictions.<sup>113</sup> This “review” would occur on a regular basis to insure plans and land use regulations accurately reflected state policy.<sup>114</sup> That process had two stages: (1) a work program submitted to DLCDC, the staff responsible to LCDC, which set out the tasks to be accomplished to assure continued compliance with the goals; and (2) the review of those tasks as they were completed.<sup>115</sup> Each of these steps had an internal appeals process and could be challenged in the appellate courts,<sup>116</sup> which added to the length and complexity of the process. As discussed below,<sup>117</sup> the ultimate failure of periodic review would be a significant flaw in the program.

The other available process to accommodate change, used much more frequently, was the post-acknowledgement plan amendment.<sup>118</sup> This process required notice by the local government to DLCDC before<sup>119</sup> and after<sup>120</sup> an amendment subject to the process was adopted with certain exceptions.<sup>121</sup> These amendments were not submitted to DLCDC or LCDC for action; instead they were subject to LUBA review if a public or private participant initiated that review<sup>122</sup> and were measured against the applicable goals and the standards for amendment of the local government.<sup>123</sup>

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112. For a look at these controversies, where they are dealt with at length, see *Preserving Forest Lands for Forest Use*, *supra* note 38, at 187-89; *Long and Winding Road*, *supra* note 42, at 10-11.

113. OR. REV. STAT. §§ 197.628-.644 (2011).

114. *Id.*

115. OR. REV. STAT. § 197.633 (2011).

116. OR. REV. STAT. § 197.644 (2011).

117. See *infra* notes 242-48 and accompanying text (explaining the significant flaw in the review program).

118. OR. REV. STAT. § 197.610 (2011). Actually, the process covered more than plan amendments—both the text and maps of implementing ordinances were included as well. *Id.*

119. *Id.*

120. OR. REV. STAT. § 197.615 (2011).

121. OR. REV. STAT. § 197.610 (2011).

122. OR. REV. STAT. § 197.620 (2011).

123. OR. REV. STAT. § 197.835 (2011). Some other places, such as California, have a limitation on the number of plan amendments allowed per year. CAL. GOV. CODE § 65358 (West 2011). Oregon allows an unlimited number of plan

Compounding the difficulties of change was a lack of funding for planning; while there was some funding available in the 1970s,<sup>124</sup> the adoption of a California-style property tax limitation<sup>125</sup> required the state to be responsible for most school funding, thus, reducing funds for other state programs.<sup>126</sup>

Funding was not the least of the problems faced by the program during the 1980s and 1990s. From the inception of the program, rural landowners resented the loss of their opportunities to divide and sell lands for rural residential use, which was necessary for the protection of farm and forest lands.<sup>127</sup> There were numerous battles over the acknowledgment of county plans and

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amendments, a fact that might detract from the use of overall plan revisions through the periodic review process, described above. OR. REV. STAT. § 197.835 (2011). Washington allows an unlimited number of amendments, but only once a year. WASH. REV. CODE § 36.70A.130 (2011).

124. From 1975 to 1985, the biennial budgets for LCDC were as follows:

1975 – 77: \$5,944,223

1977 – 79: \$10,274,288

1979 – 81: \$9,221,075

1981 – 83: \$6,65,395

1983 – 85: \$6,257,856

MITCH ROHSE, *LAND USE PLANNING IN OREGON* 9 (1987). Approximately \$25 million was invested in local planning through LCDC through its grant program. *Long and Winding Road*, *supra* note 42, at 11 n.66. To compare, in 2009, as the current fiscal crisis began, the legislature appropriated \$15,420,123 for the 2009-11 biennium under Or. Laws Chapter 62 (2009); S.B. 5531-A (Or. 2009). While in 2011, the legislature appropriated \$9,294,175 under Or. Laws Chapter 254 (2011); H.B. 5032 (Or. 2011). *See also* LEONARD, *supra* note 6, at 29 n.25 (Land Use planning funding).

125. Measure 5 passed in 1990 and became effective over the following five years. Essentially, it required the state legislature to find the funds to deal with schools, in lieu of that support coming primarily from local property taxes. *See* William G. Robbins, *Volatile Politics*, OR. HIST. PROJECT, <http://www.ohs.org/the-oregon-history-project/narratives/this-land-oregon/people-politics-environment-1945/volatile-politics.cfm> (last visited Feb. 29, 2012) (comparing Oregon's public school funding to that of California); OR. DEPT OF REVENUE, *A BRIEF HISTORY OF OREGON PROPERTY TAXATION* 2-7 (2009), available at <http://www.oregon.gov/DOR/STATS/docs/303-405-1.pdf?ga=t> (explaining the specifics of the tax system to meet the needs of the public schools); *Public Education in Oregon*, OR. BLUE BOOK, <http://bluebook.state.or.us/education/educationintro.htm> (last visited Feb. 11, 2012) (clarifying that most funds for public education now come from the general fund, which is mostly comprised of state income tax funds instead of local property taxes).

126. *See* Edward C. Waters, David W. Holland & Bruce A. Weber, *Economic Impacts of a Property Tax Limitation: A Computable General Equilibrium Analysis of Oregon's Measure 5*, 73 *LAND ECON.* 72, 79 (1997), available at <http://www.jstor.org/stable/pdfplus/3147078?acceptTC=true> (explaining that "the state is required to replace [school] property tax reductions . . . with other revenues from the state general fund").

127. LEONARD, *supra* note 6, at 61-89; *Long and Winding Road*, *supra* note 42, at 29-38.

regulations over minimum lot sizes,<sup>128</sup> non-resource uses,<sup>129</sup> and allowance of non-resource related dwellings.<sup>130</sup> For a time, LCDC attempted to provide guidance to local governments through the use of “policy papers;”<sup>131</sup> however, their nonbinding character and inconsistency of application resulted in remands of Commission action.<sup>132</sup> To meet this problem, LCDC began to adopt formal and binding administrative rules<sup>133</sup> that were effective, but that also raised the ire of rural landowners for that very reason. After the failure of an LCDC attempt to allow small-scale rural development,<sup>134</sup> the legislature established statewide resource lands minimum lot sizes,<sup>135</sup> which caused the program to allow even fewer dwellings on resource lands.<sup>136</sup> The only remaining alternative for landowners was the initiative process.

### C. Metro and Planning for the Portland Region

SB 100 generally provided that counties would, in a fairly weak manner, coordinate land use planning activities within their borders,<sup>137</sup> a compromise necessary for the passage of SB 100.<sup>138</sup>

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128. *Id.* at 42-43; *Preserving Forest Lands for Forest Use*, *supra* note 38, at 201-03.

129. *Id.* at 202; *Long and Winding Road*, *supra* note 42, at 28.

130. *Id.* at 32-40; *Preserving Forest Lands for Forest Use*, *supra* note 38, at 224-29.

131. *Id.* at 195.

132. *Id.* at 198, 204, 207 n.112.

133. *Id.* at 207-09.

134. *Long and Winding Road*, *supra* note 42, at 23.

135. *Id.* at 43.

136. See *Urban & Rural Issues*, OREGON.GOV, [http://www.lcd.state.or.us/LCD/urbanrural.shtml#Farm\\_and\\_Forest\\_Reports](http://www.lcd.state.or.us/LCD/urbanrural.shtml#Farm_and_Forest_Reports) (last updated Sept. 30, 2011) (showing reports on the number of dwellings, land divisions, and other land uses allowed in Oregon).

137. See Ch. 80, § 19, 1973 Or. Laws 132 (1973) (revised current version at OR. REV. STAT. § 195.025(1) (2009)) (explaining that counties are “responsible for coordinating all planning activities affecting land uses”). For the Portland metropolitan area, Metro now coordinates for all urban areas. See OR. REV. STAT. § 195.025(1) (2011) (explaining that Metro coordinates for the three counties the Portland metropolitan area consists of: Multnomah, Clackamas, and Washington).

138. See H. MacPherson & N. Paulus, *Senate Bill 100: The Oregon Land Conservation and Development Act*, 10 WILLAMETTE L.J. 414, 416-17 (1974) (demonstrating that because ninety percent of land use decisions would be made and enforced at the local level under the Model Land Development Code, SB 100 needed to take that same approach to be passed). The original version of SB 100 would have delegated even stronger coordination authority to regional planning agencies which would be modeled along the lines of the “A-95 Review Process.” D. Myhra, *A-95 Review and the Urban Planning Process*, 50 J. URB. L. 449, 449-57 (1973). In the end, political reality gave the powers for a weakened version of coordination to counties. E-mail from Steve Schell to author, *supra* note 42. For the Portland Region’s dominance in population in the state, see PORTLAND DEV. COMM’N, PORTLAND METROPOLITAN REGION

For the Portland Metro Region, composed of three counties and twenty-four cities, there were very different planning problems. In 1973, along with the passage of SB 100, the legislature set up a process to establish a regional planning agency.<sup>139</sup> That agency became known as the Columbia Region Association of Governments.<sup>140</sup>

That Association was governed by locally elected officials, had little effective power, and was unpopular.<sup>141</sup> In 1977, the state legislature provided a means to form a metropolitan government with powers over certain regional issues if the urban area voted for its establishment.<sup>142</sup> The region did vote to establish that government<sup>143</sup> and subsequently established a charter by which regional “home rule” was provided.<sup>144</sup> Ultimately, Metro, the new entity, became a third kind of local government subject to the statewide planning goals.<sup>145</sup>

Metro has a combination of legislative duties<sup>146</sup> and powers

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FACT BOOK 8 (2004), available at <http://www.claritasconsortium.com/claritas-gallery/portfolio-pdfs/reports-publications/pdc/pdx-reg-factbook.pdf> (showing Portland’s significantly larger population than the other cities).

139. Ch. 482, §§ 1-14, 1973 Or. Laws 1003-08 (1973) (repealed by Ch. 665, § 24, 1977 Or. Laws 620 (1977)); see also MICHAEL HUSTON, THE COLUMBIA REGION ASS’N OF GOV’TS, THE AGENCY AND ITS ACCOMPLISHMENTS, NATIONAL PERSPECTIVE, HISTORY, LEGAL STATUS 35-43 (1977), <http://rim.oregonmetro.gov/webdrawer/rec/158159/view/General%20Administrative%20Records%20%28GAR%29%20-%20P~Agency%20and%20its%20Accomplishments,%20National%20Perspective,%20History,%20and%20Legal%20Status.PDF> (displaying the original language of 1973 Or. Laws 1003 (1973), as codified in OR. REV. STAT. § 197). In particular, Section 9 of the legislation authorized the new agency to adopt and enforce regional planning goals and objectives, designate and regulate areas and activities of regional significance, coordinate land use planning activities, and review land use regulatory ordinances to assure conformity with regional goals and objectives. This was the kind of regional planning agency originally proposed in SB 100; however, it was unpalatable to much of the state, so this legislation limited regional review and enforcement to the Portland Metropolitan Area.

140. See Carl Abbott, *Columbia Region Association of Governments (CRAG)*, THE OR. ENCYCLOPEDIA, [http://www.oregonencyclopedia.org/entry/view/columbia\\_region\\_association\\_of\\_governments\\_crag\\_](http://www.oregonencyclopedia.org/entry/view/columbia_region_association_of_governments_crag_) (last visited Feb. 29, 2012); LEONARD, *supra* note 6, at 98-99 (discussing CRAG).

141. *Id.* See also *Metro Regional Government*, THE OR. ENCYCLOPEDIA, <http://www.oregonencyclopedia.org/entry/view/metro/> (last visited Mar. 2, 2012) (noting the ballot title to authorize the formation of Metro read: “Reorganize Metropolitan Service District, Abolish CRAG,” and had some role in the approval of the measure).

142. 1977 Or. Laws 632 (1977).

143. *Metro Regional Government*, *supra* note 141.

144. *Metro: Timeline and History*, OREGONMETRO.GOV, <http://www.oregonmetro.gov/index.cfm/go/by.web/id=2935> (last visited Mar. 2, 2012).

145. THEODORE R. KULONGOSKI, GOV. OF OR., OREGON’S LAND USE PLANNING PROGRAM 2 (2008), available at <http://www.oregon.gov/LCD/docs/publications/regdiff.pdf?ga=t>.

146. OR. REV. STAT. § 268.380-.393 (2011).

under its charter<sup>147</sup> for planning and plan implementation in the Portland region. That charter provides for an elected part-time council and full-time presiding officer,<sup>148</sup> who set regional planning policy. That policy includes the establishment and change of a regional urban growth boundary (“UGB”),<sup>149</sup> the adoption and implementation of “functional plans” for the region,<sup>150</sup> and the adoption and implementation of regional “goals and objectives.”<sup>151</sup>

Much of the planning controversy in Metro is the biennial decision to grow “up” or “out,” i.e., to increase in density or to expand the UGB.<sup>152</sup> Increasing density in urban areas, like most places in the United States, is unpopular.<sup>153</sup> However, UGB expansion is often contested,<sup>154</sup> so the two-year process for

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147. *Full Text of the Metro Charter*, METRO, Ch. 2, § 5, <http://www.oregonmetro.gov/index.cfm/go/by.web/id=629> (last visited Mar. 2, 2012).

148. *Id.* Ch. 4, § 16.

149. OR. REV. STAT. § 268.390(3)(a) (2011); *Full Text of the Metro Charter*, METRO, Ch. 2, § 5(2)(b), <http://www.oregonmetro.gov/index.cfm/go/by.web/id=629> (last visited Mar. 2, 2012). To avoid disputes over Metro’s planning authority, the Oregon legislature specifically granted Metro the power to establish an urban growth boundary. *Id.*

150. OR. REV. STAT. § 268.390(2) (2011). The statute provides:

A district may prepare and adopt functional plans for those areas designated under subsection (1) of this section to control metropolitan area impact on air and water quality, transportation and other aspects of metropolitan area development the district may identify.

*Id.*

151. OR. REV. STAT. § 268.380(1)-(2) (2011). The nature and extent of Metro’s planning responsibilities has not been fully explored. While Metro has asserted itself on transportation issues in the region, it has been more circumspect in economic development issues.

152. OR. REV. STAT. §§ 197.296, .299 (2011). *See generally* Homebuilders Ass’n of Metro. Port. v. Metro, 57 P.3d 204 (Or. Ct. App. 2002) (noting that the statute did not require Metro to have quasi-judicial procedures to bring into force UGB amendments).

153. In 2002, Oregonians in Action, a property rights group, placed an initiative on the ballot for the Portland Metro area to limit density increases in residential neighborhoods (Measure 26-11). Metro placed a competing measure on the ballot (Measure 26-29), which appeared to do much the same thing, but was much less drastic. The Metro measure received the greater number of votes and was adopted. ETHAN SELTZER & SHAYNA REHBERG, INST. OF PORTLAND METRO. STUDIES, PLANNING AT THE BALLOT BOX: BETTER DECISIONS OR THE END OF PLANNING? 4 (2002), *available at* [http://dr.archives.pdx.edu/xmlui/bitstream/handle/psu/4805/ims\\_ballotboxplanning.pdf?sequence=1](http://dr.archives.pdx.edu/xmlui/bitstream/handle/psu/4805/ims_ballotboxplanning.pdf?sequence=1). This is further discussed in “Damascus Debacle,” below. Discussion, *supra* Section III(D)(8).

154. *See generally* City of W. Linn v. LCDC, 119 P.3d 285 (Or. Ct. App. 1985); City of Sandy v. Metro, 115 P.3d 960 (Or. Ct. App. 2005); Citizens Against Irresponsible Growth v. Metro, 38 P.3d 956 (Or. Ct. App. 2002); 1000 Friends v. Metro, 26 P.3d 151 (Or. Ct. App. 2001); Residents of Rosemont v. Metro, 21 P.3d 1108 (Or. Ct. App. 2001); D. S. Parklane Dev., Inc. v. Metro, 994 P.2d 1205 (Or. Ct. App. 2000); Benjfran Dev., Inc. v. Metro. Serv. Dist., 767 P.2d 467 (Or. Ct. App. 1989); Home Builders Ass’n v. Metro. Serv. Dist.,

completion of that decision may not be complete before the next two year “up or out” decision must be made.<sup>155</sup>

Another potential headache for Metro is the establishment and change of urban and rural reserves, which deal with longer-range planning, but raise local concerns nonetheless. Urban reserves are designed to include those lands that will be candidates for addition to the UGB within a fifty-year period.<sup>156</sup> Rural reserves, on the other hand, are those lands to be kept in resource use for a fifty-year period.<sup>157</sup> The decisions on lands placed in either category are important to the landowners whose lands were placed in those categories—or not—as well as to their neighbors. Time will tell whether this attempt to add more predictability to urbanization will be successful.

#### *D. Recent Planning Controversies (1981-2011)*

Aside from the constant issues of funding and the pressure to loosen resource land rules to permit additional dwellings outside UGBs, a number of other issues emerged after the final acknowledgments of local governments and had significant impacts on Oregon planning. A number of those issues are noted below.

##### *1. The Rajneeshpuram Controversy*

In 1981, followers of the Indian Guru Bagwhan Shree Rajneesh bought 64,000 acres of ranch land in rural Wasco and Jefferson County in Central Oregon near the small City of Antelope, intending to incorporate the City of Rajneeshpuram there.<sup>158</sup> The Wasco County Court<sup>159</sup> approved the proposal, which

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633 P.2d 1320 (Or. Ct. App. 1981) (contesting UGB expansion).

155. OR. REV. STAT. § 97.299 (2011). In 2007, the Oregon Legislature allowed Metro to take a “breather” and extended the time for the next review to 2009. 2007 Or. Laws 1075 (2007).

156. OR. REV. STAT. §§ 195.137-.145 (2011) (defining “rural reserve” and “urban reserve” and providing rules for such reserves); OR. ADMIN. R. 660-027 (2011).

157. See OR. REV. STAT. § 195.141 (2011) (designating rural reserves and urban reserves pursuant to intergovernmental agreement and providing rules for such reserves); OR. ADMIN. R. 660-027 (2008).

158. The history of the Rajneesh movement in Oregon is described in *Rajneeshes in Oregon: The Untold Story*, OREGONLIVE.COM (Apr. 15, 2011), <http://www.oregonlive.com/rajneesh/>; see also OREGON HIST. PROJECT, [http://www.ohs.org/education/oregonhistory/historical\\_records/dspDocument.cfm?doc\\_ID=0005BC54-3BC4-1E94-891B80B0527200A7](http://www.ohs.org/education/oregonhistory/historical_records/dspDocument.cfm?doc_ID=0005BC54-3BC4-1E94-891B80B0527200A7) (last visited Feb. 1, 2012) (summarizing a book written about Bhagwan Shree Rajneesh); see also *Rajneesh: Life on the Ranch*, OREGONLIVE.COM (Apr. 1, 2011), [http://photos.oregonlive.com/photo-essay/2011/04/rajneesh\\_-\\_life\\_on\\_the\\_ranch.html](http://photos.oregonlive.com/photo-essay/2011/04/rajneesh_-_life_on_the_ranch.html) (depicting life on Rancho Rajneesh); see also Sven Davisson, *The Rise and Fall of Rajneeshpuram*, ASHE, <http://www.ashe-prem.org/two/davisson.shtml> (last visited Feb. 1, 2012) (explaining the growth



set off five years of confrontation and litigation.<sup>160</sup> While challenges to the incorporation were pending, the new city went through the process of adopting its plan and regulations<sup>161</sup> and also contested the plans and regulations of the two counties for their lands outside the city.<sup>162</sup>

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of Rajneesh's movement); *see also* *Osho, Formerly Known As Bhagwan Shree Rajneesh*, ONTARIO CONSULTANTS ON RELIGIOUS TOLERANCE, <http://www.religioustolerance.org/rajneesh.htm> (last visited Feb. 1, 2012) (discussing the history, beliefs and practices of Bhagwan Shree Rajneesh and his followers). The more recent history of the site is described in *The Rajneesh Ranch Reborn*, OREGONLIVE.COM (Sept. 5, 1999), [http://www.oregonlive.com/news/oregonian/steve\\_duin/index.ssf/1999/09/the\\_rajneesh\\_ranch\\_reborn.html](http://www.oregonlive.com/news/oregonian/steve_duin/index.ssf/1999/09/the_rajneesh_ranch_reborn.html); *The Lay of the Land Newsletter*, CTR. FOR LAND USE INTERPRETATION, <http://www.clui.org/newsletter/spring-1997> (last visited Mar. 2, 2012).

159. In Oregon, each county once had a "county court" that dealt with judicial, as well as administrative functions for the county. In most counties, those functions have been transferred to other agencies. However, some rural counties, such as Wasco, retain a county court, where a "county judge" has juvenile and probate functions and, with two county commissioners, undertakes administration of other county matters. *See County Courts*, OR. BLUE BOOK, <http://bluebook.state.or.us/state/judicial/judicial37.htm> (last visited Mar. 2, 2012) (explaining the history and role of county courts in Oregon).

160. The litigation on the incorporation spanned from 1981 to 1987 and included rejection of a challenge to the incorporation order by writ of review, *1000 Friends of Oregon v. Wasco County Court*, 659 P.2d 1006 (Or. Ct. App. 1983), and the rejection of a challenge to the order by declaratory judgment. *1000 Friends of Oregon v. Deva*, 669 P.2d 1183 (Or. Ct. App. 1983).

On the challenges to the incorporation before the Land Use Board of Appeals ("LUBA"), there was reversal of a dismissal by LUBA for lack of jurisdiction, *1000 Friends of Oregon v. Wasco County Court*, 659 P.2d 1006 (Or. Ct. App. 1983), affirmance of LUBA's dismissal of a challenge to the election results on the incorporation vote, *1000 Friends of Oregon v. Wasco County Court*, 666 P.2d 299 (Or. Ct. App. 1983), initially reversing LUBA's order on the merits remanding the incorporation order, *1000 Friends of Oregon v. Wasco County Court*, 679 P.2d 320 (Or. Ct. App. 1984), but on reconsideration, affirming that order, *1000 Friends of Oregon v. Wasco County Court*, 686 P.2d 375 (Or. 1984), which decision was affirmed on remand by the Oregon Supreme Court, *1000 Friends of Oregon v. Wasco County Court*, 703 P.2d 207 (Or. 1985). LUBA had upheld the order on remand and that determination was reversed by the Oregon Court of Appeals in *1000 Friends of Oregon v. Wasco County Court*, 723 P.2d 1039 (Or. 1986) and *1000 Friends of Oregon v. Wasco County Court*, 723 P.2d 1034 (Or. Ct. App. 1986), but reversed by the Oregon Supreme Court in *1000 Friends of Oregon v. Wasco County Court*, 742 P.2d 39 (Or. 1987).

161. *See* *1000 Friends of Oregon v. Land Conservation & Dev. Comm'n*, 708 P.2d 1147, 1147 (Or. Ct. App. 1985) (remanding LCDC continuance order on Rajneeshpuram plan and regulations). In addition two efforts of the new city to annex adjacent lands were successfully challenged in *Perkins v. City of Rajneeshpuram*, 686 P.2d 369 (Or. Ct. App. 1985), *aff'd*, 708 P.2d 1147 (Or. 1985).

162. *See generally* *Rajneesh Med. Corp. v. Wasco Cnty.*, 694 P.2d 996 (Or. Ct. App. 1985) (remanding county action for failure to coordinate with a city, where a challenge to its incorporation was pending); *Rajneesh Med. Corp. v.*

Much of this controversy was centered on land use. The Rajneeshees deliberately antagonized their neighbors and public officials as a way of promoting internal cohesion.<sup>163</sup> Their chief enemy in the land use controversy was the land use watchdog 1000 Friends of Oregon, which skillfully used its anti-Rajneesh stance to assist in fundraising and in suggesting there was a need for a state role in planning and development.<sup>164</sup> When the Rajneeshees turned to violence and criminality,<sup>165</sup> the State of Oregon successfully took action to enjoin the city from operating.<sup>166</sup> Bagwhan Shree Rajneesh was deported<sup>167</sup> and the city collapsed.<sup>168</sup> If there was good from all this, it was an appreciation of a state role in planning and land use regulation so

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Wasco Cnty., 706 P.2d 948 (Or. 1985) (holding that, while that challenge to incorporation was pending, the county must coordinate with the city).

163. CATHERINE ANN COLLINS, *Ma Anand Sheela: Media Power through Radical Discourse*, in ANDREW KING, *POSTMODERN POLITICAL COMMUNICATION: THE FRINGE CHALLENGES THE CENTER* (1992). See also LEWIS F. CARTER, *CHARISMA AND CONTROL IN RAJNEESH PURAM: THE ROLE OF SHARED VALUES IN THE CREATION OF A COMMUNITY* (ASA Rose Monograph Series 1990); Tim King, *Amazing Images of Rajneeshpuram, Oregon's 'Bhagwan Period,'* SALEM-NEWS.COM (Jan. 29, 2010), [http://www.salem-news.com/articles/january292010/rajneesh\\_tk\\_qm.php](http://www.salem-news.com/articles/january292010/rajneesh_tk_qm.php) (describing images of Rajneeshpuram). One result of the controversy was a sign now at the entrance to the City of Antelope, Oregon, which the Rajneeshees had briefly taken over via the ballot box. See *Good Riddance Rajneesh Mini-Memorial*, ROADSIDEAMERICA.COM, <http://www.roadsideamerica.com/story/14880> (last visited Feb. 1, 2012) (discussing the "City of Rajneesh" sign).

164. As was said about 1000 Friends of Oregon: "The organization launched an aggressive, but not always successful, legal campaign to blunt creation of the city. Its fundraising literature soon bore the picture of Sheela, and donations and membership soared." Les Zaitz, *25 Years After Rajneesh Commune Collapsed, Truth Spills Out*, OREGONLIVE.COM (Apr. 14, 2011), [http://www.oregonlive.com/rajneesh/index.ssf/2011/04/part\\_one\\_it\\_was\\_worse\\_than\\_we.html](http://www.oregonlive.com/rajneesh/index.ssf/2011/04/part_one_it_was_worse_than_we.html).

165. See *Items with Tag "rajneesh,"* OREGONLIVE.COM, <http://topics.oregonlive.com/tag/rajneesh/index.html> (last visited Feb. 1, 2012) (showing search results for "rajneesh"). See generally Marion S. Goldman, *Averting Apocalypse in Rajneeshpuram*, 70 SOC. RELIGION 311 (2009); L. K. Grossman, *The Story of a Truly Contaminated Election*, 39 COLUM. JOURNALISM REV. 6 (2001), available at <http://www.rickross.com/reference/rajneesh/rajneesh4.html> (discussing Rajneesh involvement in Oregon land use history). A fine collection of the Rajneesh era in Oregon is found in the University of Oregon Library. *Guide to the Rajneesh Artifacts and Ephemera Collection 1981-2004*, NW. DIGITAL ARCHIVES, <http://nwda-db.wsulibs.wsu.edu/findaid/ark:/80444/xv60199> (last visited Feb. 1, 2012).

166. *State of Or. v. City of Rajneeshpuram*, 598 F. Supp. 1208 (D. Or. 1984).

167. See Chris Deziel, *The Last Days of Bhagwan Shree Rajneesh's Commune in America*, SUITE101.COM (Apr. 8, 2010), <http://chrisdeziel.suite101.com/rajneesh-in-america-a222942#ixzz1o5jnyGCS> (discussing the deportation of Rajneesh).

168. Mary Garden, *Memoirs of a Spiritual Refugee*, THE HUMANIST, Nov.–Dec. 2009, available at [http://www.thehumanist.org/humanist/09\\_nov\\_dec/Garden.html](http://www.thehumanist.org/humanist/09_nov_dec/Garden.html).

well-illustrated in this controversy.

## 2. *The Columbia River Gorge National Scenic Act*

In 1986, the work of Senator Mark Hatfield to designate a National Scenic Area for the Columbia River Gorge<sup>169</sup> came to fruition. Congress passed the Columbia River Gorge National Scenic Act,<sup>170</sup> which established a bi-state Commission to plan and regulate lands within the Gorge<sup>171</sup> under state legislation approved by Oregon<sup>172</sup> and Washington.<sup>173</sup> Under the compact, those lands in the gorge area outside cities were subject to the Commission's powers.<sup>174</sup> The Achilles heel of the program is its funding—as both states must provide an equal budget appropriation—which made the Commission subject to the more parsimonious of the two states and always subject to defunding at any time. The work of the Gorge Commission has always been controversial to local governments and affected landowners,<sup>175</sup> but has generally been judged to be successful.<sup>176</sup>

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169. See Carl Abbott, *Columbia River Gorge National Scenic Area*, THE OR. ENCYCLOPEDIA, [http://www.oregonencyclopedia.org/entry/view/columbia\\_gorge\\_national\\_scenic\\_act/](http://www.oregonencyclopedia.org/entry/view/columbia_gorge_national_scenic_act/) (last visited Feb. 1, 2012) (discussing legislation protecting the Scenic Area).

170. Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (1986).

171. *Id.* at § 544c. The Gorge Commission followed the Oregon model of adopting a plan and requiring conformity by the six counties affected by that plan. 16 U.S.C. § 544m. Richard Benner, the first Executive Director of the Gorge Commission, was a former attorney for 1000 Friends of Oregon, who later became Director of DLCD. Press Release, Department of Land Conservation and Development, DLCD Director Dick Benner Leaves Agency with a Legacy of Accomplishments (July 10, 2001), *available at* <http://www.oregon.gov/LCD/docs/newsandevents/bennerleavesdlcd.pdf?ga=t>.

172. OR. REV. STAT. §§ 196.105-.125 (2011).

173. WASH. REV. CODE §§ 43.97.025, 43.97.035, 35.63.150, 36.32.550, 36.70.980, 90.58.600 (2011).

174. See *National Scenic Act*, COLUMBIA RIVER GORGE COMM'N, [http://www.gorgecommission.org/national\\_scenic\\_act.cfm](http://www.gorgecommission.org/national_scenic_act.cfm) (last visited Mar. 2, 2012) (noting that “[t]hirteen urban areas (about 30,000 acres) designated by Congress are not subject to NSA regulation, and are solely under the jurisdiction of the applicable city or county government.”).

175. See *Vancouver Columbian Columbia River Gorge Balancing Act*, THE COLUMBIAN (Aug. 23, 2011), <http://www.columbian.com/news/2011/jul/02/columbia-river-gorge-after-25-years-how-are-gorge/> (describing the numerous political and legal challenges that the Commission has faced throughout the years). After 25 years, the Gorge Commission remains controversial. *Id.*

176. See THE INST. FOR NATURAL RESOURCES, OR. STATE UNIV., FINAL REPORT, COLUMBIA RIVER GORGE VITAL SIGNS INDICATORS PROJECT 11 (2008), *available at* <http://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/14285/Columbia%20River%20Gorge%20Vital%20Signs%20Indicators%20Project.pdf?sequence=1> (stating that the Gorge Commission has “received consistently high marks from the majority of participants who responded to the survey”).

### 3. Minimum Lot Sizes in Resource Areas

A longstanding issue during the acknowledgment process was the means by which two of the resource goals, Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands), would be implemented in the face of strong pressures to divide and sell such lands for rural residential use.<sup>177</sup> A significant decision, *Doughton v. Douglas County*,<sup>178</sup> declared that a local determination that a dwelling was “in conjunction with farm use”<sup>179</sup> was discretionary in nature and required the opportunity for a hearing and review by LUBA and the appellate courts.<sup>180</sup> A progression of cases had the effect of tightening minimum lot sizes in farm and forest zones, although those cases involved much contentious administrative and judicial time.<sup>181</sup> The resolution of the rural residential lands controversy was accomplished in 1993 in a compromise bill that: (a) established a default minimum lot size in agricultural and forest areas of eighty acres, with a 160 acre minimum in ranchland areas;<sup>182</sup> (b) allowed for a lesser lot size if the local government could persuade LCDC that certain criteria were met;<sup>183</sup> (c) allowed for non-resource dwellings in certain circumstances as an offset for the minimum lot sizes established in (a) and (b) (e.g., if the lot or parcel was created before a certain date,<sup>184</sup> existed in an area substantially parcelized already,<sup>185</sup> or was sufficiently large as not to pose a threat to the resource economy).<sup>186</sup>

While this legislative action did not resolve all the pressure for rural land dwellings,<sup>187</sup> it placed a legislative limit on those activities.

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177. *Long and Winding Road*, *supra* note 42, at 28-38; LEONARD, *supra* note 6, at 77-80.

178. *Doughton v. Douglas Cnty.*, 728 P.2d 887 (Or. Ct. App. 1987), *review denied*, 734 P.2d 354 (Or. 1987).

179. OR. REV. STAT. §§ 215.213(1)(f), .283(1)(e) (2011). These provisions establish land uses that are permissible in any area zoned for exclusive farm use. *Id.*

180. *Doughton*, 728 P.2d at 890.

181. *Long and Winding Road*, *supra* note 42, at 29-38.

182. *Id.* at 41-44.

183. OR. REV. STAT. § 215.780(2) (2011).

184. OR. REV. STAT. § 215.705(1) (2011); OR. ADMIN. R. 660-033-0130(3) (2011).

185. *See* OR. REV. STAT. § 215.750(1) (2011); OR. ADMIN. R. 660-006-0027(1)(f) (2011) (residences under this heading are often called “template dwellings”).

186. *See* OR. REV. STAT. § 215.740 (2011); OR. ADMIN. R. 660-006-0027(1)(e) (2011) (listing provisions giving minimum acreage and lot size amounts for the regulation).

187. Measures 7, 37, and 49 will be discussed in Discussion, *infra* Section III(D)(6) below.

#### 4. *Destination Resorts*

Before 1973, Oregon had a number of resorts outside UGBs: Salishan Lodge and the Inn at Spanish Head on the Oregon Coast near Lincoln City; Black Butte Ranch, the Inn at the Seventh Mountain; and Sunriver Resort in Central Oregon.<sup>188</sup> These pre-existing resorts were both commercial and aesthetic successes that generated profit for their owners and tax revenues for the local governments in which they were located.<sup>189</sup> In the 1980s, entrepreneurs complained that the Goals would not allow replication of those resorts without an exception to the statewide planning goals,<sup>190</sup> which was a doubtful undertaking.<sup>191</sup> Those entrepreneurs and some county governments pressed the legislature for a mechanism to allow for “destination resorts” so that an exception would not be required.<sup>192</sup>

The legislature responded by adopting a statutory means for this end through Goal 8 Recreation—a previously weak goal.<sup>193</sup> As modified over time, this mechanism had certain characteristics: (a) distant from certain UGBs;<sup>194</sup> (b) not located on prime farm or forest lands;<sup>195</sup> (c) not interfering with other natural resource values;<sup>196</sup> and (d) requiring the resort to be directed to overnight accommodations, rather than second homes.<sup>197</sup>

Destination resorts continue to be controversial; they are the source of frequent litigation<sup>198</sup> and particularized legislative

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188. See Memorandum from Bob Rindy, Bob Cortright & Doug White, Informational Briefing and Public Hearing Regarding Destination Resorts (Oct. 3, 2008), available at [http://www.oregon.gov/LCD/docs/rulemaking/101508/item4\\_dr\\_sr.pdf?ga=t](http://www.oregon.gov/LCD/docs/rulemaking/101508/item4_dr_sr.pdf?ga=t) (discussing amendments to statewide planning goals over the years).

189. See Jeff Evans, Commentary, *Destination Resorts in Oregon Cause a Stir*, DAILY J. OF COMMERCE (PORTLAND, OR.) (Dec. 2, 2008) (discussing benefits of destination resorts argued by developers).

190. See *Friends of Marion Cnty. v. Marion Cnty.*, 233 Or. App. 488, 490-91 (Or. Ct. App. 2010) (showing the court dealing with the former Goal system that yielded complaints from entrepreneurs).

191. J. Richard Forester, *Mediating Land Use Cases*, MEDIATE.COM, <http://www.mediate.com/articles/forester.cfm> (last visited Feb. 12, 2012).

192. At the direction of the legislature in OR. REV. STAT. § 197.435-.467, LCDC has provided a program for destination resorts without an exception by amending Goal 8, Recreation Uses. See *Oregon Statewide Planning Goals & Guidelines: OAR 660-015-0000(8)*, OREGON.GOV, <http://www.oregon.gov/LCD/docs/goals/goal8.pdf?ga=t> (last visited Mar. 3, 2012) (proposing changes in order to satisfy recreational needs and provide destination resorts).

193. See *Symposium, supra* note 67, at 824-25 (analyzing Goal 8).

194. OR. REV. STAT. § 197.455(1)(a) (2011).

195. OR. REV. STAT. § 197.455(1)(b) (2011).

196. *Id.*

197. OR. REV. STAT. §§ 197.435(5), (8), .445(4), (7), (9) (2011).

198. See Jan Wilson, W. Env'tl Law Ctr, *Oregon Destination Resort Case Law*, PIELC.ORG (Feb. 27, 2009), <http://www.pielc.org/2009/materials/Wilson%20DR%20Caselaw.pdf> (listing the numerous cases litigated

action.<sup>199</sup> In one case, the legislature used the “areas of critical statewide concern” process,<sup>200</sup> unused since the passage of SB 100 in 1973,<sup>201</sup> to frustrate the construction of a resort in Jefferson County.<sup>202</sup> The pressure from environmental and land use watchdog groups to limit these resorts is often countered by local governments and rural interests arguing for economic development and the need for local government revenues to support a resort economy.<sup>203</sup>

##### 5. Regional Problem-Solving

Jackson County in southern Oregon contains a mixture of property rights activists, strong and opinionated municipal governments in Jacksonville and Ashland, and environmentalists. As a result, there has been a lack of consensus as to how that county should develop.<sup>204</sup> The Oregon program requires that local plans be “coordinated” so that the needs of each such government are accommodated to the maximum extent possible.<sup>205</sup> Agreement

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over destination resort case law in Oregon).

199. OR. REV. STAT. §§ 197.435-467 (2011) have been adopted or revised six times, beginning in 1987.

200. OR. REV. STAT. §§ 197.405-430 (2011). Upon a recommendation from the Department of Land Conservation and Development, the state legislature in OR. REV. STAT. § 197.416 (2009) LCDC had adopted administrative rules in 2009 to deal with the proposed area of critical state concern for the Metolius River Basin area. OR. ADMIN. R. 660-043 (2011). The LCDC process for the designation is found at *Metolius River Basin ACSC*, OREGON.GOV, [http://www.oregon.gov/LCD/metolius\\_river\\_basin\\_acsc.shtml](http://www.oregon.gov/LCD/metolius_river_basin_acsc.shtml) (last visited Feb. 12, 2012).

201. OR. REV. STAT. §§ 197.405-.430 (2011). In 1978, there was an LCDC recommendation to the Oregon legislature to designate Yaquina Head as an area of critical state concern, due to conflicts between aesthetic and natural values and quarrying of rock; however that effort failed. DEPT OF LAND CONSERVATION AND DEV., OREGON COASTAL MANAGEMENT PROGRAM 11 (1987), available at <http://www.gpo.gov/fdsys/pkg/CZIC-ht393-o7-o83-1987/pdf/CZIC-ht393-o7-o83-1987.pdf>. Nevertheless, the federal government went on to acquire the area through the Bureau of Land Management. *Id.*

202. See Ethan Lindsey, *State Panel Sets Metolius Off-Limits to Resorts*, OR. PUB. BROAD., <http://news.opb.org/article/state-panel-sets-metolius-limits-resorts/> (last updated June 16, 2009, 11:59 PM) (describing the county’s rejection of the resort).

203. See Robin Doussard, *Once-golden Destination Resorts Face Uncertain Future*, OR. BUS., <http://www.oregonbusiness.com/articles/87-july-2010/3702-once-golden-destination-resorts-face-uncertain-future> (last visited Feb. 29, 2012) (describing the conflicting findings of developers and environmentalists); see also Ethan Lindsey, *Destination Resorts Become Hot-Button Issue In Central Oregon*, OR. PUB. BROAD., <http://news.opb.org/article/destination-resorts-become-hot-button-issue-central-oregon/> (last updated June 17, 2010, 12:02 AM) (describing the costs and benefits of destination resorts).

204. For a to-date discussion of the Jackson County Regional Problem Solving Process, see PLANNING PARADISE, *supra* note 53, at 204-09.

205. Oregon Revised Statute Section 197.015(5) defines a “comprehensive

over allocation of population, provision of public facilities and services, transportation, and other planning matters is rather contentious in those circumstances.

In 1995, Democratic gubernatorial candidate, John Kitzhaber, proposed a solution for this standoff, which he saw through the legislature upon his election—the Regional Problem Solving Process.<sup>206</sup> That process required inclusion of affected local governments,<sup>207</sup> a negotiation process that included DLCD and affected state agencies,<sup>208</sup> and an end result that met the purpose, if not the letter, of the statewide planning goals.<sup>209</sup>

In Jackson County, this process is still ongoing after fifteen years and has just submitted a joint proposal to LCDC for a determination of “substantial compliance” with the Goals.<sup>210</sup> Thus, its success has yet to be determined.

#### 6. “Just Compensation” for Land Use Regulations I

As noted above, rural landowner and property rights groups were unable to get both the legislature and governor to agree on

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plan” as one which is “coordinated” and describes “coordinated” as follows: “A plan is ‘coordinated’ when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible.” OR. REV. STAT. § 197.015 (2011).

206. PLANNING PARADISE, *supra* note 53, at 212-14.

207. OR. REV. STAT. §§ 197.652(4)(b), (8), .654(2), (3) (2011).

208. When Candidate Kitzhaber became Governor Kitzhaber, he formulated a “Community Solutions Team” of state agency executives, which later became the “Economic Revitalization Team” and included DLCD, the Department of Transportation, the Department of Environmental Quality, the Department of Housing and Community Development, and the Department of Economic Development to provide meaningful state assistance to local governments. Email from Arnold Cogan to author, *supra* note 84. OR. REV. STAT. § 197.639 (2011). *See also Economic Revitalization Team (ERT)*, OREGON.GOV, [http://www.oregon.gov/Gov/ERT/about\\_us.shtml](http://www.oregon.gov/Gov/ERT/about_us.shtml) (last updated Jan. 22, 2011) (describing ‘who is the ERT?’).

209. OR. REV. STAT. § 197.656(2) (2011) provides:

Following the procedures set forth in this subsection, the commission may approve changes to comprehensive plans and land use regulations that do not fully comply with the statewide land use planning goals, without taking an exception under ORS 197.732, upon a determination that the changes:

- (a) Conform, on the whole, with the purposes of the goals, and any failure to meet individual goal requirements is technical or minor in nature;
- (b) Are needed to achieve the regional goals specified by the participants; and
- (c) In combination with other actions agreed upon by the participants, are reasonably likely to achieve the regional goals.

210. A previous attempt to use the Regional Problem Solving Process ended in failure when LCDC decided that withdrawal of one of the original parties terminated the process. *Polk Cnty. v. Dep’t of Land Conservation & Dev.*, 112 P.3d 409, 413 (Or. Ct. App. 2005). The Oregon Court of Appeals affirmed. *Id.*

their proposals without a compromise with other groups and were also unsuccessful in their constitutional challenges to the program. As a practical matter, another means was required—the use of the initiative process—which had failed these groups in frontal assaults against the program previously.<sup>211</sup> In addition, two efforts to require review of administrative rules had also been met with failure.<sup>212</sup> It was time for a new strategy in the use of the initiative.

That strategy was unveiled in the November 2000 general election with Measure 7, a proposal for a state constitutional amendment that would require either payment of the differential in property value for land with and without land use regulations or the waiver of those regulations as of the time of the acquisition of the property by the “current owner.”<sup>213</sup> The constitutional amendment passed<sup>214</sup> but was immediately challenged—successfully as it turned out<sup>215</sup>—and it never took effect.<sup>216</sup>

In November 2004, the voters approved a second and similar initiative in the form of Measure 37, a statutory, rather than constitutional, amendment.<sup>217</sup> Again, a challenge was made,<sup>218</sup> but this time the challenge was unsuccessful.<sup>219</sup> Predictably, the result was chaos.<sup>220</sup> Ultimately there was much voter reaction to the breadth of the language that the legislature sought to rectify in the form of Measure 49,<sup>221</sup> which limited the scope of exceptions from the regulations of the land use system.<sup>222</sup> Nevertheless, Measure 49 also left open the possibility of a claim for

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211. See *supra* notes 89-91 and accompanying text (discussing all three initial efforts to kill or eviscerate the state land use program).

212. See *Initiative, Referendum, and Recall: 2000-2004*, *supra* note 107 (listing the ballot title and the amount of votes received). Because many of the particulars of the land use program were contained in its binding interpretive rules, these initiatives were especially attractive to those who desired legislative involvement in the program.

213. Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 36 ENVTL. L. 131, 137 (2006).

214. *Id.*

215. *League of Or. Cities v. State of Or.*, 56 P.3d 892, 911 (Or. 2002).

216. *Id.*

217. *Sullivan*, *supra* note 213, at 137.

218. See E. Sullivan, Comment to *MacPherson v. Dept. of Administrative Services*, (Marion County Circ. Ct. Case No. 00C15769, Oct. 14, 2005), LAW.WUSTL.EDU, [http://law.wustl.edu/landuselaw/cases/MacPherson\\_v\\_DAS\\_Trial\\_Comment\\_Sullivan.htm](http://law.wustl.edu/landuselaw/cases/MacPherson_v_DAS_Trial_Comment_Sullivan.htm) (last visited Mar. 2, 2012).

219. *MacPherson v. Dep't of Admin. Services*, 130 P.3d 308, 308 (2006).

220. Edward J. Sullivan & Jennifer M. Bragar, *The Augean Stables: Measure 49 and the Herculean Task of Correcting an Improvident Initiative Measure in Oregon*, 46 WILLAMETTE L. REV. 577, 587-88 (2010).

221. OR. REV. STAT. ANN. § 195.305 (West 2007), amended by 2007 Or. Laws 1138 (2007) (H.B. 3540).

222. *Id.* §§ 6, 7, and 9.



compensation if regulations went “too far.”<sup>223</sup> As of 2012, this compromise seems to have held and there have been no recent proposals to change the balance.

### 7. *The “Big Look” That Wasn’t*

Oregon had not formally examined its planning system since its inception in 1973, and the passage of Measure 7 in 2000 had caused many to call for such a review.<sup>224</sup> In 2005, the legislature approved the process and funding for such a review as the “Big Look” at the program, with a report to the 2009 session of the legislature.<sup>225</sup>

The project was doomed almost from the start because the legislation required unanimity for appointment of Task Force members, and there was a leadership division among the Republican House Speaker, a Democratic Senate President, and a Democratic Governor.<sup>226</sup> This resulted in a delay in the appointment and that none of the “usual suspects” who had both expertise and the ability to represent their constituencies and get things done—whether they be homebuilders, foresters, or environmentalists—were appointed.<sup>227</sup> While this prevented

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223. OR. REV. STAT. ANN. 195.310-.314 (West 2007). *See also* Ch. 424 §§ 55-11, 2007 Or. Laws 1142-48 (2007), and Ch. 855, §§ 2-9, 17, 2009 Or. Laws 2988-90, 2994 (2009).

224. Ed Sullivan, *A Look Back at How the ‘Big Look’ Went Dark*, DJCOREGON.COM (Oct. 11, 2007 1:00 AM), <http://djcoregon.com/news/2007/10/18/a-look-back-at-how-the-8216big-look8217-went-dark/>. The Oregon Chapter of the American Planning Association undertook its own review of the state planning program in 2001-02, which undertook interviews of selected participants in the planning process following the passage of Measure 7 and made recommendations to improve the program. *See* DR. SUMNER SHARPER, OREGON CHAPTER OF THE AMERICAN PLANNING ASSOCIATION, AN EVALUATION OF PLANNING IN OREGON, 1973 - 2001: A REPORT TO OAPA FROM COPE (Feb. 8, 2002) [hereinafter COPE REPORT], *available at* [http://centralpt.com/upload/342/2407\\_COPEreport.pdf](http://centralpt.com/upload/342/2407_COPEreport.pdf) (hoping that the report would lead to a full-scale evaluation of the program). That effort did not gain traction in the 2003 Oregon legislative session, but as shown below, did pass in the 2005 session—not coincidentally following the enactment of Measure 37 in 2004. *See supra* notes 219-21 and accompanying text.

225. OR. TASK FORCE ON LAND USE PLANNING, FINAL REPORT TO THE 2009 OREGON LEGISLATURE (Jan. 2009), *available at* <http://library.state.or.us/repository/2009/200901230940315/>.

226. Press Release, State of Oregon, State Appoints Oregon Task Force on Land Use Planning (Jan. 26 2006), *available at* [http://www.oregon.gov/LCD/docs/30\\_year\\_review/land\\_use\\_task\\_force\\_press\\_release\\_012606.pdf?ga=](http://www.oregon.gov/LCD/docs/30_year_review/land_use_task_force_press_release_012606.pdf?ga=).

227. The members were not appointed until January 26, 2006, well after the close of the 2005 session and got a very late start on their work. *See* THE BIG LOOK TASK FORCE, OREGON TASK FORCE ON LAND USE PLANNING - FINAL REPORT JAN 2009: LAND USE PLANNING MEMBERS (2009) [hereinafter BIG LOOK FINAL REPORT 2009], *available at* <http://webserver.lcd.state.or.us/BigLook/pg=15252.htm> (last visited Feb. 13, 2012) (identifying the members of the Task Force).

domination by strong personalities or adept participants, it also limited the ability of the various constituencies to “sell” the results of the review.<sup>228</sup> In addition, there was a lack of funding for the review,<sup>229</sup> a suspension of its activities during the Measure 49 campaign,<sup>230</sup> and the inordinate influence over the task force by its staff.<sup>231</sup> The net result was a weak set of proposals<sup>232</sup> and even less results in the review of those proposals by the legislature.<sup>233</sup> The need for deep introspection by program participants and stronger review of the program itself remains.

#### 8. *The “Damascus Debacle”*

While the fractious process of Metro regional UGB expansion may be somewhat predictable, it pales in comparison to the difficulties that the agency faced in dealing with adding the Damascus Area to the regional UGB. Metro “played it by the book” in choosing to add the land adjacent to the former UGB, land that

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228. Important constituencies for reforms included the agricultural and forestry interests, the environmental community, local governments, and planners.

229. See 2005 Or. Laws 1976 (2005) (allowing for an indefinite amount of funds, to come from grants and other sources, with no direct state funds originally contemplated).

230. See Press Release, Oregon House Republicans, Shutting Down Big Look Task Force (Sept. 10, 2007), available at <http://oregoncatalyst.com/839-Shutting-Down-Big-Look-Task-Force.html> (suspending funding of the Task Force during the Measure 49 campaign in 2007, which resulted in political charges that they were not open to proper reforms).

231. PLANNING PARADISE, *supra* note 53, at 140-53. Perhaps staff influence resulted from the fact that there were no effective leaders, no propelling vision, and no continued support from the Governor, the legislature, or the DLCDC Director, causing the Task Force to reach the unsurprising conclusion that people have different views about land use planning and to make recommendations that were uninspired and uninspiring. E-mail from Tom Hogue, Oregon Department of Land Conservation and Development, to author (Oct. 5, 2011, 3:42 PM PST) (on file with author).

232. The very broad recommendations of the Final Report (2009) are found at BIG LOOK FINAL REPORT 2009, *supra* note 225, at ii-iv. One of the oldest issues in the Oregon program is the charge that it employs a “one size fits all” approach. See, e.g., COPE REPORT, *supra* note 224, Recommendation 3 (“Consider[ing] whether state standards should be differentiated for varied physical and geographical circumstances.”). DLCDC takes the position that the program accommodated regional, soils, and other differences. KULONGOSKI, *supra* note 145.

233. Those Task Force recommendations that were adopted include the adoption of four nonbinding “overarching principles” for land use law, recognition of the diversity of localities in the state and the need for regionally-oriented approaches, charge LCDC with making recommendations on improvements to the land use system and conducting an “audit” of state land use laws, dealing with “mapping errors” in designating resource lands, and making minor revisions to the Regional Problem Solving Process. None of these changes are profound. 2009 Or. Laws 3097 (2009).

was of lesser resource value and already parcelized.<sup>234</sup> Clackamas County, one of the three Portland region counties, was amenable to urbanization of that area at six residential units per acre.<sup>235</sup> However, the Damascus community wanted control over its own destiny and incorporated as a new city with its own mechanisms for planning and land use control.<sup>236</sup> The new city adopted ordinances and charter provisions to require votes for many different matters, including fees, and approval of plans and land use regulations.<sup>237</sup> The point of these actions was to discourage urbanization without approval of the electorate. As of 2011, urban densities are not a prospect for Damascus in the near future and, apparently, public relations reasons have made both Metro<sup>238</sup> and LCDC<sup>239</sup>—both of which have enforcement mechanisms—reluctant to use them.<sup>240</sup> While statutory enforcement remedies exist,<sup>241</sup> they take much political effort so that, after some enforcement actions in the early years of the program, these statutes are now largely unused.<sup>242</sup>

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234. There is a list of statutory “priorities” for adding land to an urban growth boundaries, with suitable farm and forest land at the lowest priority level. Damascus had parcelized “exception” lands, which were of higher priority for addition to the Metro urban growth boundary. OR. REV. STAT. § 197.298(1) (2011).

235. Under OR. ADMIN. R. 660-007-0035(2), urban areas of Clackamas County were obliged to set residential density at eight units per acre.

236. PLANNING PARADISE, *supra* note 53, at 167-70.

237. *Id.* at 171-79.

238. OR. REV. STAT. §§ 268.390(4) to (7) (2011).

239. OR. REV. STAT. §§ 197.319-.335 (2011).

240. PLANNING PARADISE, *supra* note 53, suggest that Oregon planners are not slow learners; rather, they suggest: “A kinder and probably more accurate interpretation is that deep dedication to the long-successful model of planning that Oregon’s planners created in the 1970s has made the community perhaps overly conservative and resistant to change.” *Id.* at 240. Perhaps as a means of providing for expansion of the Metro UGB without the use of a “soils-based system” otherwise required by OR. REV. STAT. § 197.298, the Oregon legislature enacted enabling legislation for urban and rural reserves. *See supra* notes 151-57 and accompanying text (stating that because first priority lands for inclusion in the UGB are urban reserve lands, Metro could claim that it need not categorically exclude prime resource lands from consideration in amending the boundary).

241. OR. REV. STAT. §§ 197.319-.335 (2011); OR. ADMIN. R. 660-045 (2011). The process provides for hearings at two stages—one, to determine whether a hearing should be held and two, the hearing itself. As a result of the hearing, LCDC may order corrective action and may require withholding of permits to applicants and sequestration of state-shared revenues. *See, e.g.*, *Mayea v. LCDC*, 635 P.2d 400, 401 (1981) (discussing LCDC authority based on two-stage process).

242. *See* DEPT OF LAND CONSERVATION AND DEV., PUTTING THE PEOPLE IN PLANNING (Aug. 2, 2000), <http://www.oregon.gov/LCD/docs/publications/cititinenforceorders.pdf?ga=t> (showing thirty-nine such orders as of 1998). The system has not been in the courts since *Washington Cnty. v. LCDC*, 954 P.2d 178 (Or. Ct. App. 1998).

### 9. The Failure of Periodic Review

Periodic Review was enacted to assure that city, county, and regional plans would continue to meet the statewide planning goals.<sup>243</sup> That process proved to be much lengthier and expensive than anticipated, so the legislature assured that its interests in state policy would be met by enacting a new statute. This statute required that new statutes, goals, and rules would become effective immediately—unless they had a specific alternative date—regardless of whether the local government incorporated those requirements in their plans and regulations.<sup>244</sup>

With that statute, one of the more compelling reasons for periodic review evaporated. The time and expense of periodic review caused the period to be lengthened,<sup>245</sup> limited,<sup>246</sup> suspended,<sup>247</sup> and ultimately effectively ended for most local governments.<sup>248</sup> It is now possible for most non-metropolitan local governments (i.e., outside the Portland region, the Salem-Keizer area, and the Eugene-Springfield area) to be working from plans initially acknowledged in the 1980s.<sup>249</sup>

A sidelight of the failure of periodic review is the failure of many counties to use the results of the decennial census figures to allocate population among the cities and the unincorporated areas of the county.<sup>250</sup> Moreover, population allocations may well set off

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243. The original version of periodic review dates from 1981. *Supra.* note 93. The current version of the periodic review statutes dates from 1991. The original periodic review obligation was every four to ten years. 1991 Or. Laws 1148 (1991).

244. OR. REV. STAT. § 197.646 (2011).

245. Ch.622, § 10(1)(c) 1999 Or. Laws 1484 (1999) (changing the obligation to every five to fifteen years).

246. *Id.* § 10(1)(a). Most cities with a population of 2500 or less and counties of 15,000 or less would be exempt from periodic review. *Id.*

247. Ch. 793, §§ 7-10, 2003 Or. Laws 3126 (2003).

248. 2005 Or. Laws 2431 (2005). See generally LAND CONSERVATION AND DEV. COMM'N., REPORT TO THE 2005 LEGISLATURE ON THE EFFECTIVENESS AND EFFICIENCY OF THE PROCESS FOR PERIODIC REVIEW OF LOCAL COMPREHENSIVE LAND USE PLANS WITH RECOMMENDATIONS FOR REFORM (2005), available at <http://www.oregon.gov/LCD/docs/publications/periodicreviewfinalrpt040505.pdf?ga=t> (reporting on the periodic review program as it existed in 2005 and making recommendations for additional legislation and implementation in regards to periodic review).

249. All Oregon cities and counties, as well as Metro, have acknowledged plans. However, OR. REV. STAT. §§ 197.628-.629 (2011) now require few periodic reviews unless requested by a local government, which is usually in no financial position to undertake.

250. That obligation is imposed generally on Metro and counties under OR. REV. STAT. §§ 195.025, .036 (2011). The failure occurs because county leaders perceive the inherent political difficulties in such allocation choices and find there is little political downside in doing nothing. To remedy this situation, the legislature has allowed cities to make their own forecasts within certain limitations. OR. REV. STAT. § 195.034 (2011). Nevertheless, this exception

other goal requirements to be addressed, all of which take up time, money and political capital.<sup>251</sup>

#### 10. “Just Compensation” for Land Use Regulations II

The Measure 37 controversy, though currently resolved,<sup>252</sup> may have had the effect of inhibiting planning and land use regulatory activities because of the possible claims against local treasuries.<sup>253</sup>

The combination of the failure of periodic review, possible claims under Measure 49 and simple planning fatigue, may be the greatest threats to the Oregon planning program in the near future.

#### IV. HOW’S THAT PLANNING THINGEE WORKING OUT FOR YA, OREGON?

Bosselman and Callies had a bold vision for the course of planning and plan implementation in the United States, a vision that emphasized planning as the standard for land use regulation, included a strong environmental component, and emphasized the role of the state in both planning and plan implementation.<sup>254</sup>

Forty years has passed and that vision has been realized, in part, in a number of states, including Oregon, where plans are meaningful and enforceable,<sup>255</sup> have required content,<sup>256</sup> and play

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removes one more obligation to coordinate among local governments.

251. Because population estimates are just that—estimates—their accuracy is often challenged. *See, e.g.,* City of W. Linn v. Metro, 119 P.3d 285, 291-94 (Or. Ct. App. 2005) (discussing the adequacy of Metro’s population estimates and the alleged errors in Metro’s analysis of regional needs), 1000 Friends v. Metro, 26 P.3d 151, 158-62 (Or. Ct. App. 2001) (reviewing the Land Use Board of Appeals decision concerning the Metropolitan Service District’s amendment to the Metro Urban Growth Boundary and the dispute of which numbers should have been included in its reports).

252. Sullivan & Bragar, *supra* note 220, at 587-88. Measure 37 and its baneful effects on Oregon planning and land use regulation are discussed *supra* note 220.

253. *See Year Zero, supra* note 213, at 156-58 (noting the damage to the Oregon land use program and the planning freeze resulting from the threat of Measure 37 claims).

254. THE QUIET REVOLUTION, *supra* note 1, at 314-26.

255. OR. REV. STAT. § 197.175 (2011).

256. OR. REV. STAT. § 197.015(5) (2011) provides:

“Comprehensive plan” means a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs. “Comprehensive” means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. “General nature” means a

a major role in land use decision-making.<sup>257</sup> In this way, the state plays a significant role in land use policy-making and implementation.

However, there are consequences of the dilemma of answered prayers. Interest groups have a single point of pressure to influence land use policy-making in the state legislature and take advantage of it. Despite the history and sophistication of planning in Oregon, two measures that would have extreme deleterious impacts on the planning system have been passed by the voters<sup>258</sup>—even though the impact has been blunted subsequently, this problem still exists. While cities must do mind-numbing analyses to justify additional industrial and commercial lands within their UGBs and additional transportation facilities in urban areas, the program favors their approval, despite the length and cost of the process.

However, in counties dealing with rural development, the system is tilted toward denial of most non-resource based uses. County officials are often tasked with explaining the reasons for those denials on grounds they may not understand and with which they may not agree. Although most cities desire to grow, some like Damascus do not, and pressure to bring growth may bring much adverse political reaction.

With the passage of a ballot measure necessitating funding of public schools and restricting local property tax receipts, planning cannot hope to compete with law enforcement, social services or education for funds necessary to meet future needs. With certain exceptions,<sup>259</sup> there is very little reporting done on the

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summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is “coordinated” when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible. “Land” includes water, both surface and subsurface, and the air.

257. See OR. REV. STAT. § 197.175 (2011) (laying out the goals and responsibilities of the cities and counties in Oregon in respect to planning and zoning); *Fasano*, 507 P.2d at 27 (Or. 1973) (discussing the requirement for the county planning commission to adopt a plan for land use pursuant to ORS 215.050); *Baker v. City of Milwaukie*, 533 P.2d 772, 776-79 (Or. 1975) (holding that the City of Milwaukie adopted a comprehensive plan and this plan was the controlling land use plan for the city).

258. See *supra* notes 213-20 and accompanying text (discussing descriptions of Measures 7 and 37).

259. One of the better reporting requirements relates to implementation of farm and forest goals and rules at the local level under OR. REV. STAT. § 197.065 (2011). See *Long and Winding Road*, *supra* note 42, at 32 n.216 and accompanying text; *Preserving Forest Lands for Forest Use*, *supra* note 38, at 242-43, nn.302-04 and accompanying text (discussing implementation). In addition, Metro (but not other entities) must report biennially to LCDC on housing and growth under OR. REV. STAT. § 197.301 (2011) and governments involved in the Regional Problem Solving Process must report periodically to

implementation or monitoring of the program. Much of the planning “action” in Oregon is in post-acknowledgment plan amendments or in occasional periodic reviews; however, there is little evaluation of their individual or cumulative effects. While the Goals do provide policy direction, there is no state planning process or oversight to deal with such issues as settlement patterns, infrastructure financing, or the expected influx of “climate refugees,”<sup>260</sup> all of which are of great importance to the state.

Finally, the demise of periodic review and the possibility that local governments may be financially liable for the consequences of their planning and plan implementation decisions, leaves little local “ownership” in plans with much antagonism with the state. The only certainty in the planning program seems to be uncertainty.

The old adage warning that we should be careful what we wish for certainly applies to state involvement in land use planning and plan implementation. Moving planning decisions to a higher political authority may be a mixed blessing. Moreover, there may no longer be either the felt need to plan and provide for the future nor the progressive political optimism that existed in Oregon or the nation forty years ago when Bosselman and Callies originally presented their vision. Reaction to “the government” as an entity remote from the people and the planning rules enacted, as well as the tedium of planning detail, is a world apart from that which existed in 1971.

Planning in Oregon will not likely end with the bang of a frontal assault; however, it may end with the whimper of incremental erosion. Introspection, identification of problems and solutions, and a pragmatic political process—all hallmarks of THE QUIET REVOLUTION—are as necessary to the future of Oregon planning as the vision, optimism, and enthusiasm were to the first forty years.

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LCDC under OR. REV. STAT. § 197.652(7) (2011).

260. See Carrie Sturrock, *Are Climate Refugees in Our Future?*, OREGONLIVE.COM (July 15, 2011), [http://blog.oregonlive.com/pdxgreen/2011/07/are\\_climate\\_refugees\\_in\\_our\\_fu.html](http://blog.oregonlive.com/pdxgreen/2011/07/are_climate_refugees_in_our_fu.html) (discussing how climate changes may affect settlement patterns and potential issues related to climate refugees).