

**THE FEDERALIST SOCIETY**

AND

**NORTHWESTERN SCHOOL OF  
LAW LEWIS & CLARK COLLEGE**

*presents*

**ENVIRONMENTAL LAW IN  
THE 21<sup>ST</sup> CENTURY**

**Thursday, October 25, 2001**  
**Northwestern School of Law, Lewis & Clark College**

**Portland, OR**

# SCHEDULE

**Land Use 2:30 p.m. - 4:00 p.m.**

**Mr. Rich Carson**

**Director, Clark County Community Development Dept.**

**Mr. John Charles**

**Director of Environmental Policy, Cascade Policy Institute**

**Mr. Carl Hosticka**

**Metro Councilor, City of Portland**

**Mr. Bill Moshofsky**

**Oregonians in Action Legal Center**

**Mr. Jim Burling**

**Pacific Legal Foundation (MODERATOR)**

THE FEDERALIST SOCIETY

ENVIRONMENTAL LAW IN THE 21ST CENTURY

LAND USE

(2:30 p.m.)

MR. BURLING: I'm going to have this panel run a little differently. Primarily, I want to bring a little more audience participation into it. I think it's a small enough group that we can be accommodating to that.

What we're going to talk about now is land use.

Oregon is certainly what I'd say is Ground Zero for the smart growth movement, and it's also Ground Zero for some of the reaction to the smart growth movement, with Measure 7. With that, you can ask the initial question, and that's what I hope the panel is going to be addressing -- one of the questions that smart growth and Measure 7 bring up. That is, exactly what is smart growth?

You know that earlier in the last century, in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), was the start of Euclidian zoning. But that was a case where the Supreme Court upheld zoning because

Chief Justice Sutherland did not like apartment buildings. He did not like high-density growth. His opinion was full of rant against high-density zoning and high-density growth. And so, he had the Euclidian zoning scheme, where areas would be residential, areas would be industrial, areas would be commercial, and never the 'twain would meet. What that has resulted in was the unanticipated growth of traffic. Indeed, much of the current opposition of people to growth today is an opposition to sitting in traffic for significant parts of their time.

We have the idea now with smart growth or new urbanism to increase the densities in urban cores to bring the residential and industrial and commercial districts closer together to avoid traffic. However, some people see smart growth as being another word for no growth, and the question is when does smart growth begin and where does it turn into no growth, and what is the demarcation?

Another question there is how much density is enough? The Sierra Club has put out certain proposals that some people allege is calling for density in the new

urban areas to be something along the lines of Calcutta.

Is that dense enough, and what are the collateral impacts of high-density growth and high-density development?

There may be less traffic, but perhaps more. There may be different levels of crime rates, different levels of services and tax rates. So, what are the consequences of high density, good and bad?

When we talked about traffic -- one of the things I mention that people don't like is traffic, and that raises questions. Do we want to take drastic action to get people out of their cars by increasing the cost of driving, increasing it directly through the gasoline taxes and road tolls or indirectly through deliberately not building highways or having traffic calming areas to increase traffic congestion and decrease flow in order to get people out of their cars? Do we want to take money out of road transportation and put it into mass transit?

Is that an effective way of moving people, or of discouraging them from going out into the hinterlands from new suburbs?

What is the impact on property rights? One of the things I like to do is sue government when they take

too much property from individuals and cause regulatory takings.

Finally, is this idea of having command-and-control what people really want? A way of putting that rather succinctly is, is it true that suburbs don't cause growth, but people cause growth? On the other hand, the only time that they're going to take the lawnmower out of my hand is when they pry my cold, dead fingers from that lawnmower. That is, of course, an extreme position.

Our panelists here today have certainly been in the forefront, in the thick of these issues. First we're going to hear from Rich Carson, who has 30 years of land use planning experience in Oregon, Washington, California and Alaska.

Since 1999, he has been the director of the Clark County Community Development Department in Vancouver, with 120 employees and a \$10 million annual budget. Before that, he was acting city manager and community development director for the City of Oregon, which had a rather large budget. He's a published writer, former editor of *Oregon Planner's Journal*.

And he currently maintains several Internet

websites, including Planning Utopia and Internet Planning Media site for the American Planning Association.

Indeed, if you want to see what smart growth is all about, look at the American Planning Association website and look at their smart growth links. They have a tremendous amount of detail and information on what that means for smart growth planning.

Next, we will hear from John Charles, who's the environmental policy director for the Cascade Policy Institute. That's the organization that John joined in 1997 as the environmental policy director. Prior to joining the Institute, John was the executive director of the Oregon Environmental Council for 17 years, and he's been on dozens of local, state and federal commissions and advisory boards.

He, too, has published extensively. One of the things that you do want to check out -- go to the Heritage Foundation and look at their *Citizen's Guide for Smart Growth*. John has an article in there, and there are a number of other very interesting articles. You can get that from the Heritage Foundation. Check out their website. It's an excellent little compendium on smart



growth.

Following John Charles, we will have Carl Hosticka, who is Metro Councilor of District 3 for Metro.

As I said, this is Ground Zero for smart growth, and we can hear it from one of the people responsible for smart growth right now and what it means from his perspective.

He has District 3, which is part of Washington and Clackamas Counties, City of Beaverton, Tigard and Tualatin, Sherwood, King, Durham and Wilsonville. And in his first term as metro councilor, he served as the chair of Natural Resources Committee and vice-chair of the Budget Finance and Regional Facilities Operations. He's on a Community Planning Committee. And formerly, he was a state representative from Lane County from 1993 to 1994. Also, he's a professor of public policy at the University of Oregon Portland Center, and he's been all over the country on some of these planning issues.

And finally, Bill Moshofsky, who you saw earlier today -- so I'll just briefly say that he's vice president of government affairs to Oregonians in Action, which is a pro-property rights oriented group.

The speakers will take approximately 10 minutes

apiece to tell you their initial perspectives. Then we'll have a panel discussion with questions from me and other panelists, and then we'll open it up to the audience.

So, I'd like to begin with Mr. Carson. Thank you.

MR. CARSON:

Let me restate the question that's in the program that I'm trying to answer. The question was, do we need more, fewer or different regulatory schemes -- in this case, I would take it, for land use? We have more prototypes than we need to choose from, although some of my more conservative friends believe that less is always better. That isn't going to change in our lifetime. So, my answer is, yes, we need a different regulatory scheme, and preferably it's my regulatory scheme.

I'm going to talk briefly about five policy areas -- land use planning, controlling growth, environmental regulation, property rights and transportation. I'll start with land use planning. My basic premise is that the best land use regulation is the one that's the most relevant to the people of a place and

the place itself. So, what's a place? I think I have two definitions of that.

Environmentally, the best building block is going to be watershed basins in terms of it being the most kind of relevant to the ecosystem. I think the best building block for the planning of human settlements is the economic region, or what Neal Pierce calls the citi-state.

I think that cities, counties, states, are kind of irrelevant subdivisions that do more harm than good. When it comes to planning, and especially coordinating for the future of an economic region, I should note that political subdivisions do serve one purpose; the larger the political subdivision, the easier it is for the lobbyists to take away decisionmaking from the local people.

For this reason alone, I think that Oregon state mandated land use planning system, which describes a highly centralized one-size-fits-all approach isn't a very good model. Quite frankly, the Washington state mandated regionalized approach is better, and I've worked on both sides of the river and have had to deal with both

systems.

Both Oregon and Washington are a litigation-driven type of system. But Washington doesn't have the same kind of central planning authority. Over here, you've got the Land Conservation Development Commission, which has powerful administrative rules; it's one agency for the entire state. The appellate body is LUBA, the Land Use Board of Appeals.

In Washington, they have three regionalized, geographic regionalized hearing boards and no strong central planning authority. So their decisions are often are often more localized to the area, even though they can be appealed on up to a single body.

I think that the metro government model -- I suppose I'm little biased both ways, because I was planning director there for four years, for it and against it. But I think that the Metro regionalized model is a much better one. They have the same legislative authority as the state but they are dealing with their own cities and counties and special districts and coming up with their own solutions. So, if I were going to move to a model, it would be a regionalized

model and not a statewide model.

Controlling growth -- I've defined kind of what place is, but how should it grow? I believe that smart growth like new urbanism is an intellectual and theoretical solution, but it's not a practical one.

In reality, smart growth only slows growth, and new urbanism supposedly makes increased density more enjoyable. But basically what's going to happen is that from Tijuana, Mexico to Vancouver, BC, even with urban growth boundaries, we are going to have one large megalopolis that will be person to person and nothing in between because urban growth boundaries move. They move slower than sprawl would, but they still move. It's just a matter of time before we reach that I-5 corridor up and down.

My personal belief is that what we should do is create metropolitan areas that have limits, and I mean have urban growth boundaries that they do not go any further beyond. You know, you could create satellite cities all up and down the I-5 corridor with buffers between them, but you have to be able to create these new cities.

I know that when I first moved to Portland, the thing I liked -- and this was like 30 years ago -- the thing I liked about Portland was that I knew where it ended. It went from Gresham to Forest Grove. I know where it stopped and started. And I admit, I came from California, but I don't see that urban growth boundaries are going to change any of that over time. It may take 10 years or 100 years or 1,000 years, but it is all going to expand and there will be no buffers in between it.

Dan Kemmis, the sage of Missoula, Montana, theorized in *The Good City and the Good Life*, that the city's optimum size should be determined by using the ancient Greek golden mean formula, which shows that if you took the earth's population of 5 billion people -- this is when he wrote the book -- that you would come up with 70,000 cities of 70,000 people, which just happened to be the population of Missoula, Montana. But I thought it was a great idea. A very good idea.

Christopher Alexander in *A Pattern Language*, also argued for this kind of hierarchy of size and space, as did Constantinos Doxiatis in his earlier book on ekistics. And I think there's a lot of credible evidence

that cities like Eugene, Oregon, Santa Fe, New Mexico or Missoula, Montana are very livable precisely because of their size and that sense of place.

Just quickly about environmental regulation --

(End side 1; continuing on side 2)

MR. CARSON: (in progress) The National Marine Fisheries Service has determined that we must protect the (inaudible), and that the best way to do it, which is the "best available science," is to apply what they call the 65-10 Rule.

The 65-10 Rule basically has only one outcome, which is sprawl and the undoing of land use planning in both states. The 65-10 Rule basically says that you will leave 65 percent of your site undisturbed. Let's say you bought property within an urban growth property and you're going to do a subdivision. It says that 65 percent has to remain undisturbed. You can't touch it. And you can build no more than 10 percent impervious surface anywhere on the property.

Now, if you apply that to reality -- and this has already happened at least in two projects on the other side of the river -- what happens is that you

either reduce the number of units you build by 60 percent or you end up having to increase the density to create the open space by 130 percent.

But basically, what it's saying is that if you reduce the number of units by 60 percent, you are creating large-lot zoning, so you might as well zone everything in the state for one- to two-acres and be done with it because that's the only way you're going to get around the 65-10 rule.

Actually, I was going to talk a little bit about property rights, but I'll leave that to Bill [Moshosky].

Transportation -- the State of Oregon and the City of Portland have spent a lot of time trying to regulate the car out of existence, or at least out of our daily lifestyle. The state killed the Westside bypass. The city banned "snout houses" -- not a very nice term. And both have diverted road funds to multi-modal projects. The reason that they do it is that they are phobic about the automobile and the automobile culture.

The problem is that they're in denial. A recent report by the Rocky Mountain Institute, which is



an environmental organization, said that in the future, the automobile will be cheaper, lighter, more fuel efficient, better for air quality and often built for one passenger, and it will proliferate much more than it is today. So to believe that we are going to take everybody out of their automobiles and put them on Max [Portland area light rail transit system] or put them on a bus or put them on a bike in the rain is not reality, but at least in this area they believe that's reality and they are trying to force that issue.

I'll stop there.

MR. BURLING: Thank you.

John Charles.

MR. CHARLES: Thank you very much. I'll start by just referencing a little article out of *The Oregonian* just a couple days ago, headlined "PGE Park Seeks a Deal on Parking for Bicycles". Managers want to compromise somewhat less than the 775 spaces required. It turns out there's a zoning ordinance in the town that because there are 31,000 seats at the PGE ball park and potentially 31,000 bodies there, and as Rich mentioned, the city is on this crusade to make the city kind of car-free, they

have this zoning code that's going to require the ball park to put in 775 bicycle spaces. The people in charge don't really like it too much. In fact, one of them says, "I think everyone knows it would be ludicrous to make them do this."

Well, that tells you a couple of things about land use planning and zoning. Since this is a zoning ordinance, one is that virtually all plans and zoning ordinances are divorced from reality because they're just sort of ginned up in some room somewhere, requiring a level of knowledge of the area out there that doesn't exist, no matter how smart or well intentioned people are who are adopting it.

Secondarily, what it tells you is that when these zoning ordinances are then applied to city bureaucrats themselves, they don't like them very much and they want out of them because PGE Park, of course, is owned by the city and they don't want to waste space on 775 bicycle racks that will never be used. They are happy to impose these potential regulations on private property owners.

I've published a lot of stuff on this, and some

of it is outside there, and I have a couple things here -  
- an outline and a longer paper -- you're welcomed to  
take because I'm only going to get, now, about eight  
minutes; I've probably used two of them already.

So I'll just speed along here and say, look,  
I've spent 20 years in the mainstream environmental  
movement living in what might be called the belly of the  
regulatory beast. And then I sort of outgrew that, and  
now I work at Cascade Policy Institute, a free market  
think-tank.

My conclusion is that ever since the *Euclid*  
decision that our moderator mentioned, going all the way  
through to what you have today and the goofy things we do  
in Portland, you have to conclude that planning and  
zoning is not about the public interest. It was never  
about the public interest. It's about power. Simply, the  
interests of certain well-organized political groups who  
want to impose their aesthetic and cultural preferences  
on everybody else through the police powers of the state.  
That's all.

And if you think that there's actually a public  
interest here, you know, I think you're just being naive.

You look at the minerals presentation earlier today -- you know, the eight-year process; \$66 million; etc. -- it's not about the environment. It's about power.

Rich mentioned the so-called snout-house ordinance in Portland. First of all, you have to demonize something and come up with a pejorative phrase for houses that have prominent garages and relatively less square footage of windows that some people might prefer. And then in the City of Portland, you prohibit on the notion this will make neighborhoods more livable or more walkable, or that people will sit in their living room window, now no longer obstructed by the protruding garage, and they'll look out on their neighbors and be more involved in the community or something, or some other fantasy.

That has nothing to do with livability. At the end of the day, the bureaucrats and politicians who adopt that, they get to go home and get the satisfaction of knowing they made some people bend to their will. Now, some people are motivated by money; some by fame; some by power; some by all three. And if you're a bureaucrat in the City, you're not going to be a

millionaire on your salary. But if you can make Ernie Platt or some other homebuilder do these things, that's what's in it for you. It's not about public interest.

My second point is that these ordinances cannot possibly work. You're applying static plans to a dynamic world. It doesn't matter how many workshops you have, whether you have the guy from the mining today -- 170 stakeholder handholding sessions or whatever. Look, there's a thing called window-shopping. You can ask me right now on a survey if I have a preference for some thing. And I can say, no, I don't even know what it is and so I don't want it.

Then I can leave here and go into downtown Portland and see that thing, and it's that really attractive price, and I suddenly decided that I do want it. I wasn't being dishonest when I said to the stated preference survey of the \$20,000 metro survey that asked me what I like. I was honest at that point, but now I changed my mind and I like it. Well, you know, that's what markets do. They allow you to change your mind and buy and sell as consenting adults, gain some trade. Land use plans -- no, sorry. This is it; it's in your box.

Their point is that the risk-reward problem with zoning, which is that the people imposing all these land use plans, there's no risk for them. They get to impose their preferences and if they bankrupt a few people, well that's their problem. It's not a problem for the bureaucrats and politicians. They have their notch on the belt. They've done their thing.

I wrote a magazine article -- it's outside on the table -- called "The Mythical World of Transit-Oriented Developments". And I profiled a couple of Portland's high-profile TODs. I went out and actually did things, like at six in the morning I counted the number of people walking to the train station versus walking to their cars. In one case, this was a \$31 million high-density, mixed-use project right on the light rail stopped \$13 million in subsidies, so the public has some interest in knowing whether the people who live there actually behave the way the planners thought they would behave.

When I called the Portland Development Commission bureaucrat who was in charge of this thing from beginning to end and asked her whether she thought

it was a success -- see, I had real data, so I was just curious if she had any data. And no, she's never been out there. Tri-Met has never monitored whether people use the train at all. They don't know if any transit use at that stop has gone up.

And I said, well, do you consider that project a success? And she said, yeah. And I said, well how do you measure success? And she said, well, we built it.

See, the reality of that place, if you interview people who live there and surround it -- I mean, if you observe how they live and see that it's not at all the way the TOD literature says people should behave.

She doesn't care. First of all, she spent your money to subsidize it, not her money. She has no equity in this. She's on to her next project. She's successful. She's getting promoted. Risk-reward -- there's a bad link there. All the bad risk is for the people stuck living there and all the neighbors who had the neighborhood kind of wrecked by this project.

And the fourth point is the total lack of morality of zoning, that somehow the government can

impose their preferences on you. And you're supposed to live that way just because you happen to be outside something called the growth boundary and you're unlucky enough to have soil quality that some other bureaucrat has named high-quality farmland. And you can't even build a single home on your own lot without jumping through a bunch of hoops to prove it, and it has to be related to farming.

That makes as much sense as the government picking your career for you just because they think you would be a good professor or lawyer or teacher, or the government deciding that because we have a higher rate of divorce they should arrange spouses for you. Now, as someone who was once married, I am willing to concede that it's quite possible that seven independent people could have picked a better spouse for me than I chose for myself. I was probably a little too emotional at the time to understand that. But that doesn't mean that there's a groundswell of support for government-arranged marriages. I don't think we're going to see that for very good reasons. We ought to be able to make our own decisions and live with the consequences. And the same



ought to be true of land use.

I want to briefly - I saw this stuff written up in a paper (inaudible) with my alternative vision, which is that, of course, prescriptive zoning is wrong. We should be getting rid of it. I know that's not going to happen, but we should stop trying to tweak it and make it smarter or dumber or whatever, and just admit that command-and-control doesn't work.

Performance zoning is a much better approach, which, as Lynn Scarlett, deal with outcomes. In performance zoning, you don't tell people what little box they're in. They can do anything they want with the property anywhere. They just have to measure the outcomes and make sure they don't harm other people. I'm not making this up; there's a whole body of literature on performance zoning that's actually been used and it's worth pursuing.

Privatized zoning, which was around long before municipal zoning, has to do with homeowner associations, deed restrictions, covenants, and the land uses in that area are all defined in the covenants. And basically, it's a private government. But that is the default

position, if you get municipal government out of the way, as noted by the fact that in Houston, the one major American city that does not have a centralized zoning code - although they do have some zoning - Houston has five of the nation's ten largest privatized communities, planned communities.

Privatized zoning is, in many cases, far stricter than what Portland has. People do actually want to control a zone with themselves and their neighbors. The best way to do it is through de-restrictions.

Trespass and nuisance law - take 20 or 30 of your planners, tell them to stop planning the future and just enforce nuisance laws. That would be a good step forward. Privatize infrastructure and user fees, so that people pay for what they want.

I'll just finish by answering a few quick questions and email we got from our moderator, which is "what is the ideal density for an urban neighborhood?" I have no idea. None of the planners do. And people should decide that on their own, although I will say the higher density you get, the more congestion you're going to get, which is why Portland is promoting high density.

The goal is to congestify the city and call that smart growth.

"Will a focus on renewed high-density downtown development require an expanded use of the power of condemnation?" Yes. Unfortunately, we're seeing that in Portland, the North Interstate Light Rail. They're going to kick out about 56 people out of their homes, bulldoze their homes and build high-density TODs, and turn it over to a developer to do that. That is a grotesque misuse of power.

"Should government have the goal of getting people out of their cars?" No, it's none of government's business how much I drive my car, although the City of Portland obviously thinks I should be skateboarding or something.

"Are suburbs good or evil?" Well, I have no preference. I am neither pro-sprawl, whatever that word means, nor anti-sprawl. I am all for choice. People should live the lifestyle they want at the density they want. And it's too bad that the City of Portland has bumper stickers that say "Honor Diversity", and yet they institutionalize discrimination, what might be called

"suburbism", by trying to make people live in little high-density areas.

Thank you.

MR. BURLING: Thank you, John. And now for perhaps what might be a different perspective, Carl Hosticka.

MR. HOSTICKA: Well, as Jim mentioned, I am member of the Metro Council, and the Metro Council is meeting right now to regulate garbage, so they may call me up and I'll have to forego some of this stuff in a minute if my phone rings.

When I was asked to speak on this, I didn't know exactly what we were going to be talking about. Part of my career, as was mentioned, is as a professor, and the other part of my career has been as an elected official. People ask me what's it like. And I said, well, when I was in the legislature, people asked me what I did in the real world, and I said I was a professor. And when I went to the university, they said it's a good thing Carl has real-world experience. So, anything I say is obviously unreal.

But it seemed to me that we could look at this

issue of smart growth, which I design as the opposite of dumb growth, whatever that is, from either a practical perspective or a philosophical perspective. I'm going to be very short and probably raise questions that I think would probably be more interesting to have some discussion on that simply stating a bunch of opinions.

From the practical perspective, we would ask questions like are we using our resources efficiently in order to achieve higher qualities of life. We would define our resources as land, air, water, the natural environment, people's time, etc. And quality of life is measured in a lot of ephemeral ways and some specific practical measures. But usually, it is measured by asking people, how do you feel about your quality of life?

I think on the practical level, managed growth of the Portland model here at Ground Zero has proved itself to be superior to unmanaged growth, as indicated in number of other communities. If you look at how well people have done in their jobs and incomes or how we have used our resources in terms of land, water, air and people's time, we have used less in Portland than we have

relative to those other communities. And people uniformly, when asked, say they enjoy the quality of life here.

Many think that the quality of life is superior to those communities. We could go into a lot of statistics; I have pages full of those. But I don't want to take up the time on that.

The other question, though, is a more philosophical question about, should we be self-conscious as a community about the way our community has evolved? And, should we be self-conscious about where growth will occur and how it will occur? And if we are going to be self-conscious about that, who should decide and how should they decided, and even at a more meta-political level, how do we decide who decides?

I would say on that basis, at least in a democratic system, the people of this area have voted upon themselves a system where they have said we decide that we want to have a government body -- in this case Metro government -- to plan growth self-consciously. When that question was put before them, a majority of them adopted a charter and said we want to do this.

We could also, then, ask about questions of rights. I welcome that discussion because I think that most of the discussions I've heard about property rights, I would call the sound of one hand clapping, when they talk about private property rights without talking about public property and public rights. So, I think if we want a balanced discussion, which I hope I'll provoke by those comments, we'll have that as we go through this.

We can talk about economics. Where we talk about the public activities that negatively impact private property, we can also talk about public activities that positively impact the value of private property and the public's right to condition its use or its provision of the kind of services that impact private property. And we can talk about private actions that diminish the value of public property. And we can talk about the right of the public, then, to protect its property from actions of the private sector.

So, like I said, if we're making inflammatory statements, I'll be inflammatory and hopefully provoke discussion.

In the end though -- I've spent approximately

20 years now as an elected official. Elected officials usually look at election results. Having looked at the election results - I'm sure Bill will talk about Measure 7. But with that major exception in the last 10 to 15 years, 20 years, in this area, we've seen people uniformly vote for managing growth, and we're starting to see them vote for no growth in increasing numbers at the state and local level, at least in this area.

The question on do we need more or less or different regulations - I made some notes on that. I agree that we need different regulations, and I applaud and share the idea of focusing on outcomes rather than prescriptions. The one thing - my biggest criticism now in dealing with land use regulation is that they're so excessively detailed in process that they've created this huge industry of process experts who control the process more than the people, the elected officials or even the planners, to a certain extent. The lawyers are the ones who are really involved and controlling the process. I would say if we could get more focus on outcomes and performance and less procedural and process detail, it would be better.



The other one -- this has been mentioned, also, since I was involved at the state level, in terms of writing laws -- is that I think we need to build in more what I call informed judgment into our system and less rigorous prescriptive detail.

As an example, I am now involved, as was mentioned, in trying to develop the Riparian habitat program. I'm not going to call it regulation because we don't know if we're going to do a regulation yet. But we want to talk about a program. We have so many steps we have to go through and so many prescriptive hurdles that we have to jump over that I'm constantly asking, though, the question when do I get to make a choice? I was elected to make choices. When do I get to make a choice?

I haven't quite figured that out yet, but it seems to me that if you're in a very diverse human and very diverse natural environment, people have to be able to make choices both within and without, and so our system needs to move in that direction.

And then finally - actually John and I do agree on something. We've worked together on a project on trying to allocate costs, so that if you do want to move

towards a more market-oriented system of allocating our resources, then you have to build a system in which the true costs are borne by the people who are using the resources and things like congestion pricing, time of day pricing, other kinds of things that might have to do with having people pay the full costs of the infrastructure as they add on to it. Those would be movements in the right direction because I think they could help us get to that area where we do have more informed judgment and more people involved in making their own choices.

I'm going to stop here. Hopefully, we'll have a lot of discussion on these issues.

MR. BURLING: Thank you.

Now we'll hear from Bill Moshofsky.

MR. MOSHOFKY: You know they say we have a land use planning system in Oregon. Actually, we don't have a planning system; we have a plan. And the plan has very little flexibility, and that's why we have these prescriptions.

What happened was, through the power that was vested in the Land Conservation and Development Commission, they came up with so-called goals - 19 of

them - that are really laws, that really prescribe what Oregon's future, in terms of land use, was going to be. This was done back in the '70s.

Let me just review quickly some of those goals, to give you an idea of why in this area we have this high-density build-up, not out. It's because of the concentration of these goals.

Rural zoning, farm and forest zoning - almost all land zoned in rural Oregon is zoned as either farm or forest, regardless of its productivity, which has greatly restricted development, and especially single-family homes. And then you have Goal 5, which is aimed at wildlife habitat and aesthetics, which is nice, but this goal is now being used to justify not cutting trees in urban areas and not disturbing the soil, etc., and there's no compensation for any of those overlays.

Then there's Goal 14, the urbanization goal. Basically what it says is that there will be no urban development outside of urban growth boundaries, which are drawn around every city in the state and it's almost like the Berlin Wall. It's very difficult to move.

Then you have the public facilities goal, Goal

11 - outlawed development of infrastructure that could provide for development. You can't have infrastructure outside an urban growth boundary. And even in a rural, unincorporated area, you can have very little infrastructure.

Transportation - it's almost impossible to build a highway or road outside of the cities under these rules.

Housing - the housing goal is aimed at providing housing only in urban areas.

Goal 9, the economic goal - you think, oh, golly, we've got some balance here. It's a joke. It says a few nice things, but nobody pays any attention to it. And it owns and aims for economic growth or activity only in urban areas; not in rural.

Goal 2 then comes into the picture. That's supposed to provide the flexibility, the so-called exceptions process. It's the land use planning goal. But the exceptions process, which is available to modify some of these goals and rules, is so rigid that it's very difficult to get an exception or change to this very rigid system.

And of course, there is no goal for property rights. The enabling legislation intended that landowners who suffered loss in value from regulations imposed either in urban or rural areas are to be compensated. But they never got around to adopting a compensation provision. Finally, during this last election, Measure 7 did pass, which requires compensation. But that's held up in the courts now. Whether we get through that, we don't know. But it's a reaction to the fact that there was a huge loophole left in the system as it was put together - no balance between property rights and land use controls. And then turn to urban areas. The goals force almost all development in urban areas, and they can't expand urban growth boundaries. You have to build up, not out, which means more scarce land, higher housing costs, more congestion of traffic. It doesn't have to be that way.

The Metropolitan area here that Carl helps to govern encompasses about half a percent - one half of one percent - of the land in the state, public and private. Over half the state is public. This means the Metro area occupies less than one percent of the private land -

there. There are gobs of land out there, but they say, oh, we can't use farmland for development.

The reality is that the land in farm zones, 16 million acres, less than 2 million acres are prime. Less than 5 million acres are actually farmed, cultivated. So there are huge areas out there of very low-productive land that could easily be built on.

There have been no new cities established since 1973, since this planning system or plan was put into effect. None. Rich mentioned the idea of satellite cities. You can't have them. The goals won't allow them and the exception process won't allow you to change the goals.

It doesn't make sense. Where do we go from here? I don't know. It's very difficult for the courts to do anything. We tried with Measure 7 to get a little fairness, a little flexibility, but it was attacked immediately and the implementation was enjoined. We are waiting for the courts to act.

But I think that we need to have planning. We need to somewhat manage growth. Carl, I don't agree that we just throw everything up. I'm not sure I go as far as

John Charles, with performance zoning because that would make every siting a major tussle to determine how much harm a development causes to its neighbors.

I think there's a role for some zoning. I certainly don't think we need it in rural areas, as to whether you have one house on 80 acres. That's the kind of zoning we've got. To get a house on EFU zoned land today, the future occupant has to prove that he has produced \$80,000 of gross farm income in the two prior years, or three the last five to get a house. It doesn't matter how big of farm you have, whether it's 5 acres or 100 acres. It doesn't matter whether there's water available or productivity. That's the kind of rigidity that just doesn't make sense. So, we've got a bad deal in rural and urban areas. We've got to re-do the whole thing, or at least bring some flexibility to it.

MR. BURLING: I'm going to begin with the first question and ask the panelists to address that, and then I would like to begin with a panelist asking questions of the other panelists, one at a time. It will go from my left to my right.

My first question deals with affordability. I

want you to address the role that government should play in promoting affordability and what the impact of land use zoning may have on affordability.

I specifically want to know if you have any comments about where we've come since the time that Bernie Siegan wrote *Land Use Without Zoning*. Professor Siegan compared a non-zoned city in Texas - Houston - with other zoned cities, and found as far as he could see that the land use patterns were pretty much the same, but the only difference was with cost because there were more regulatory costs in the zoned cities.

So, tell me a little bit about affordability and the role of government in land use planning and affordability. Let's start to my immediate left with Carl.

MR. HOSTICKA: Well, you can ring a lot of bells there. My general impression is that affordability is an issue as much of people's ability to afford housing as it is the cost of housing. And I guess my feeling is that you'll never solve the issue of affordability from just trying to hold down housing costs. You'll never get there. I would assume that land use planning probably



does add to the cost of housing.

MR. BURLING: John.

MR. CHARLES: Well, I would say that virtually any growth control policy will increase the cost of housing to some degree, and some of those policies may be appropriate. But the one that bugs me the most in Oregon is the fact that we've created a cartel of land owners - that is, people inside a growth boundary.

I was one of those people who - my property appreciated dramatically between '88 and '95. And then when I cashed out, I had this money and was able to move outside the growth boundary to get a bigger piece of property, where I'm happily part of the rural sprawl problem now, I guess.

But, you know, if you were to abolish growth boundaries and allow thousands of property owners who can't do anything with their property to build some homes, if you're a poor person, like my son - he didn't cash out; I cashed out. He's now 23 and a renter. If you hear someone like him wanting to become a homeowner, you want to be in a buyer's market.

A buyer's market means there's a flood of

houses out there, or housing stock, relative to you. And when you artificially constrain the land supply, you're going to increase the cost of housing. If you look at empirical studies in the airline industry and the trucking industry and what happened after deregulation, what you see is more choice, higher productivity and dramatically decreases cost in inflation-adjusted dollars for consumers.

And so, if you want more housing, stop creating artificial barriers, such as driving up the cost of raw buildable land through these urban cartels.

MR. MOSHOFSKY: I agree fully with John. What we've done here is have this very rigid urban growth boundary that you can't expand beyond, which means that available land inside has become more scarce and more expensive.

A cousin of mine owned 30 acres - a little farm - out in the west side here, and he sold it for \$6 million recently, \$200,000 an acre. You know good and well how many lots you can get on that.

That's another problem. The consequence of the high cost is that you have these tiny, postage-stamp size

lots that have little or no yards. And then you say, oh, we'll have some parks in the neighborhood we can go to. But I think people want a backyard where they can have their kids there. We're denied both. One, you just can find the houses you want, and then you can't afford them. It needn't be that way.

MR. BURLING: Rich.

MR. CARSON: One Metro councilor - and it wasn't Carl - said the solution to affordable housing was to print vouchers. Think about that for a while.

I think there's several things. One is land supply. If you don't move urban growth boundaries on a cycle like you say you will in the state, then it's going to reduce the land supply. That'll increase costs. Impact fees increase costs. Unfortunately, we've moved from a general tax-based system to an impact fee system and loaded it up all on the home buyer. And I think it should be the other way, but I don't think that's going to change.

There's something about the attractiveness of the area. This metropolitan areas, and most of the metropolitan areas in Oregon, are in the top ten least

affordable housing markets in the entire country. So, you have to ask yourself, what is so unique about this place? Is it because it's so wonderful or because it's so regulated that we're in such a miserable position in terms of affordable housing.

MR. BURLING: Do any of the panelists have any comments on any of the answers we've just heard?

MR. MOSHOFSKY: I'd like to just mention the counter-incentives that are developed by this system. These people who do have land inside, who have expected to get these high prices, are going to be a part of the political opposition to expanding the urban growth funding. So, we've built in pressures that resist common-sense change.

MR. BURLING: Carl.

MR. HOSTICKA: I was just wondering - I didn't understand what Rich was referring to as the other way, in terms of impact fees.

MR. CARSON: Well, the way that infrastructure used to be paid for was through general taxes at a state level or federal taxes. We have reduced federal and state taxes to such a level that we don't fund

infrastructure. And we have come up with this new, unique thing called impact fees that loads it on the home buyer.

It's kind of like, how you pay for electricity?

You pay for electricity and water through a rate, day in, day out. You can move from this house to this house; the rate's about the same. You don't get loaded up with the fees. You pay it through time. I would rather have it paid through time and not loaded up on the home buyer and say that you're loading it up on the developer. I would rather do it through a rate-based system, as opposed to an impact-based system.

MR. BURLING: Let me follow up with a comment or a question on that. California now has an increasing number of cities with impact fees on new homes. Build ten homes, then you also need to build one subsidized home sold to people at a certain rate based on their income levels - 80 percent of median income, for example, then there's a lower rate after that -- 50 percent of median income affordability. Would that be the solution or the reverse solution?

PANELIST: I think they're doing the same

thing in Aspen.

MR. BURLING: Carl, do you have a question for the panel?

MR. HOSTICKA: Yeah, I had a question for Rich, since he favors regional government. When are we going to annex Vancouver into metro?

MR. CARSON: I don't talk about the fact that I was metro's planning director in Vancouver.

MR. HOSTICKA: Well, you said that state -

MR. CARSON: Well, I favor a strong regional government, even if they make silly decisions or they make good decisions. I think it's a better model than state-imposed.

Fortunately or unfortunately, there's a river that runs through this region that divides it into two states, that has two separate sets of laws. I would like to see at some point - Vancouver already is a member both on the transportation and the land use policy and technical committees; I'm a voting member of it. It's just that metro doesn't have the authority to legislate how we live our lives on the other side of the river. But I think at some point that Vancouver and Clark County

should be part of metro. But because of the two states and the laws, it's going to be very, very difficult.

MR. MOSHOFSKY: I just want to mention that I have uneasiness about the regional government we have. Not because of Carl - a lot of stuff was done before Carl came. But we're doing something at Oregonians in Action to change the power of metro over the density.

We drafted a measure that we call the Neighborhood Preservation Act, which would take away from metro the power to mandate these higher densities. Also, if the cities and counties want to proceed with higher density, they had to give written notice to the people in the neighborhoods who are impacted by all this in-fill stuff going on. And third, there are to be impact studies before they proceed with higher density to check on what impact density has on infrastructure, to see that it works.

We hope that it will bring some better planning to the system, and maybe result in expanding the urban growth boundary, if in fact we're going to grow here.

MR. BURLING: Any comments, John, on the Jell-O effect of how big regional planning needs to be?

MR. CHARLES: Well, I'm obviously a critic of regional government. I prefer government at its smallest levels, and especially the notion of, at a regional level, deciding where buildable land will be expanding, growth boundaries, putting EFU zones. Any time you do that, you're just asking for trouble.

You're trying to impose preferences on people.

You have an intensely politicized process. That is what made me a critic of this whole thing, watching seven metro officials in the early '90s besieged by this army of process people who Carl talked about, all of whom have a keen interest in whether that line is moved one square foot anywhere. And I'm saying to myself, if I were up there as one of the seven -- you know, and I'm a virtuous, smart person -- could I do better than those other seven. I concluded no because the job is impossible.

I mean, you're asking for trouble making people potentially play God and sort of impoverish this whole group of people and transfer wealth and every decision. Not only does it require too much knowledge, but, as Carl said, a lot of times there is no discretion, even when



metro did expand the urban growth boundary - attempted to - for the people in Stafford basin, who appropriately should have been urbanized, the metro was sued successfully by people saying, no, it's zoned farmland.

I don't think regionalism is the answer. I believe you have to decentralize power back to landowners, frankly, and let them make choices. Then hold them accountable for their behavior for things such as trespass and nuisance law and paying real user fees for real infrastructure so that you don't subsidize either low density or high density, and maybe some performance zoning. As Bill alluded to, performance zoning can morph into a big regulatory nightmare, if allowed to, but it does have the potential to focus our attention on outcomes and not process, and I think that's the direction we need to go in.

MR. BURLING: Yes. Follow-up.

MR. CARSON: I think that there's an important role for regional government. In this region, there are 24 cities, 3 counties and 100 special service districts.

The best example I can give you of what a government could do right is, when we went through the last drought

because we had no system to move water from one city to the next. We had enough water, but we couldn't get it from this city to that city, and that's because the infrastructure system is not regionalized. It is controlled by a hundred different entities.

So for things like emergency response, delivery of water, sewer - they already do solid waste -- I think they are legitimate roles for a regional government to fulfill.

MR. MOSHOFSKY: Could I just add one point. I want to confess that I supported regional government 20 years ago or 25, whenever it came in. And that was what we had in mind, was matters of regional significance, such as water, garbage, etc.

And then, as often happens, something started grows. And then they conned the people into a charter amendment that got them into land use planning, by saying that the measure that changed the charter was reducing the power of metro, which was just the reverse. It was a fraud, and I kind of regret that I helped get this thing rolling in the first place, but that's what happened.

MR. BURLING: Thank you, Bill. Carl.

MR. HOSTICKA: Yes, just a couple of things. One is that there was a land use planning organization. The difference was that it was unelected, and I think it's better to have an elected rather than an unelected one, if we have to have one at all. So that's one thing I'll say.

The other thing about regionalism - and I continue to face this every day - is what's the alternative unless you go to the radical solution that John proposes, which I guess is virtually no level of government at all. But in my own personal example - and I know Rich can even expand on this - I sleep in Clackamas County, I spend most of my money in Washington County and I work in Multnomah County. And so, I'll ask you, where do I live?

I think that saying that people live where their postal address is, is sort of a misguided view of how people's lives actually work, and that that is the unit that they primarily relate to. So, I think that most of us actually, as a practical matter, live in the region. And so, if we're going to make decisions among ourselves about how we govern ourselves, which is another

question, should we be self-conscious or not about those decisions, I think that probably I would agree with Rich and believe that regional government is the most appropriate level to make those decisions.

MR. BURLING: John, do you have question for the other panelists?

(End side 2; continuing on side 3)

MR. CHARLES: Well, maybe because Rich was the planning director and Bill's been a long-time observer. Carl and I worked together on a commission looking at peak-hour road pricing and see a lot of value in moving away from the gas tax-financed system that we have Oregon to something where you pay more precise fees varying by time of day. And we also share a concern about the intense processification rather than outcomes.

My question -- Carl and the others can chime in -- but if you made those comments two years ago, they would have been comments as a professor, perhaps. Now they're comments as an elected official.

Now that you're experienced there, do you actually see a way through the thicket, where we could get some of these changes, and how would one do that?

How would you do it, if you want to move in those directions?

MR. HOSTICKA: Well, I agree with everyone in here. I mean, we all hate the level of government that's above us. I hate LCDC and LCD.

So, if we could find a way -- I agree with a lot of what Bill said, and what people have said as a critique of our land use planning system is that it tries to prescribe one solution or one procedural set of solutions for a highly diverse environment that ranged from downtown Portland to Malheur County, for that matter. So, it can't do it.

I don't know whether we'll see changes in the law that will try to take account of that diversity and devolve some of the power onto the local level. But I would say that we're advocates of that.

It turns out, though, that people who don't like the way elections come out at the local level usually go to the next level up to try to change things, and I think that's happened on some instances. As far as congestion pricing and things like that, I believe it's a matter of political will. If we can create the political

will, generally, then we have the tools we need to do it.

MR. BURLING: Yes.

MR. CARSON: Yes, I'll go with political will.

What metro has done successfully -- and I'm part of the problem -- was to create this process machine. And it will take the political will of the elected officials to say, okay, enough process; we're going to start doing some things. And once in a while, metro comes through with something actually pretty amazing. When we had problems with algae in the Tualatin, metro banned all phosphate detergents off of all the shelves in the entire region so that they wouldn't be pumped into the sewers. I thought that was a pretty bold action. It freaked a lot of people out.

But I would rather see more action from metro council than to kind of turn it over to the process folks and their legion in this area.

MR. BURLING: Bill, do you have a comment?

MR. MOSHOFSKY: Yeah, I see some prospect here for some coalition building in terms of dealing with LCDC with Carl. If you get some of your Democrat friends and I get some of my Republican friends, we could do

something with LCDC, and maybe with the new election coming up, reforms are possible.

I agree with John; the lower level, the better, in terms of government. I think that the most a state should be dealing with are matters of truly statewide significance -- maybe where airports go -- some big-ticket items. And if we have a metro government, only matters of metro concern. But there's no way we can get there with this system, which I described at the outset.

MR. BURLING: Bill, do you have a question for the panelists?

MR. MOSHOFSKY: Carl answered mine.

MR. BURLING: Rich?

MR. CARSON: I have one for John about markets, since I'm a 30-year government bureaucrat.

Markets will not protect people in a number of areas. You know, if left on its own -- one of the best examples was the former head of LCDC. LCDC (inaudible) was a farmer who would always say, do you want me to live next door to you? No, I don't. So, the markets will not protect people at every level at every time. So there needs to be some police powers, and for that reason, I

think there needs to be land use planning and zoning, and so I guess I would ask about markets.

MR. CHARLES: Well, market is just a highly evolved social institution that allows people to buy and sell and trade as consenting people for mutual gain, voluntarily. And if you don't support that, then what would you support?

The only other thing I can think of is coercive trade, and I'm not in favor of coercion. I'm in favor of voluntary exchange.

Then you go to the next question. What is the proper role of government in free society? The answer is, to protect our rights. Not plan my future, not pick my spouse, not pick my career, not zone me. It's to protect my rights, including protect my property from a hog farmer who comes next door to my residential house and grosses me out. So, my answer to someone like Sanford Hansel (phon.) is to say, well, do I care what my neighbor's doing in their bedroom at night? No. I don't even want to know about it. Just don't bother me.

If you want to put a hog farm next to me, that's a perfect example of nuisance law, trespass law



and performance zoning, to say fine, put a hog farm next to me. But you'd better control your odors and noise and run-off so that it doesn't bother me. If you can't do that, then I guess you'd better put it somewhere else or buy a big enough size acreage that you create a de facto buffer strip from your potential nuisance-causing activity and you have this big buffer strip around it that you pay for and pay taxes on, and that doesn't bother me. That's the way you internalize your externality. If you can do that, then I say I don't care what you're doing next to me.

The proper role of government is to get rid of all these planners, convert them to nuisance code enforcers and protect me from people who want to rip off my property. That's a good thing for government to do. I'm not an anarchist but I am in favor of government protecting my rights. Then they can stop doing all these other things like building roads and sewer systems and drinking water system and let entrepreneurs do that who will provide better service at lower cost.

MR. MOSHOFSKY: I agree with John. Basically, we may disagree with how we deal with these externalities

or harm concerns, but we should require compensation when government uses regulations to transfer rights from me to a neighbor.

It's like this rural zoning for farm and forest. If the government wants to limit people's use of their land to farming only, or growing trees only, and takes away their freedom to use their property in ways that won't hurt other people, the government should buy the land. And if they want to have stream-side buffers for aesthetic purposes unrelated to the quality of the water, then they should buy conservation easements to do that. In other words, we compensate people if government takes away their rights to provide benefits. But government can limit landowners if they're doing harm to others.

MR. BURLING: Carl, do you have a comment?

MR. HOSTICKA: Well, I was just saying, as Bill was speaking, I was glad that he was limiting that to aesthetic purposes because if there is a documented impact on the water quality and the water belongs to the people of the state, then I think people have an interest in protecting that.

MR. MOSHOFSKY: Good. We agree on more than we thought.

MR. BURLING: I'll make a comment on that, then move on to my last question. And then I'll open it up to the audience to ask questions.

My comment is that *Euclid v. Ambler* was justified just on that ground, talking about when you have an otherwise lawful or inappropriate use in the wrong place, such as a "pig in a parlor". And I guess we could extend that to a pig farm. And then we moved on from there to aesthetic zoning, and now in California you have zoning on the color of your house and various things like that. It seems to have gotten a little far afield.

My question is -- and let's start with you, Carl. You talked about, I think somewhat provocatively, public rights and public property. And I imagine you may be talking more than the public park down the street. But, are you referring to public rights in other people's otherwise private property, such as if they have a wetland, the public's right to make sure that wetland isn't filled or public rights over maintaining aesthetics?

MR. HOSTICKA: No. I was speaking directly from the attorney general's opinion regarding Measure 7, when he said that the public has a property right in the water, the air, fish and wildlife -- I forget, there was an additional one -- but at least those three, and then say, as we agree. If the public's property is being harmed, they have a right or an ability to either get compensation, which I think would be an interesting twist on Measure 7, or to protect their property. And so, that's what I was referring to.

MR. BURLING: John, do you have a comment on public rights?

MR. CHARLES: Well, I think that's the dividing line. I have no problem with somebody coming -- with regard, say, to land use, telling me that I can't do a certain thing because it's going to harm neighbors or a broader set of the public. I never had a right to do that in the first place, so telling me I can't do that isn't depriving me of my rights. That's really enforcing 700 years' worth of common law. But telling me I can't build a home on the property because somebody, somewhere designated it as "high-value farmland" -- I just

personally don't want a farm. There's no market out there. Farmer's have been suffering from too many commodities on the market for the last 80 years and I want to build a little home and bicycle somewhere, and I'm not going to bother anybody and I'm willing to pay for road access, etc., and you tell me I can't do it just because you think it should be farmland -- no, the public doesn't have any right to that. I haven't caused a nuisance for anybody.

That's the problem in Oregon, that you have these professional busybodies telling people where they can live, at what densities, as if that's a knowable fact -- the appropriate density. That's not a knowable fact. That's where they cross the line.

I think that Carl and Bill and Rich -- all of us would agree that when you are trying to free-ride on your neighbor or the public at large, especially by creating pollution -- dumping your crud into the common air shed or water -- that is absolutely appropriate to regulate for that because you never had -- that is not a property right. You never had a right to that. You should internalize that and then live and let live.

MR. MOSHOFSKY: Well, I'd like to say, too, regarding endangered species and wetlands. Many wetlands are really not wetlands; they're just damp areas. If the public wants them, the public should buy them.

When it comes to endangered species, if the public wants my land for habitat, for so-called endangered species, they ought to buy it and let the public bear the cost of that, rather than saddling it on the poor, unfortunate guy who happens to have a critter land on his property.

One other point I'd like to mention. I do support government involvement through zoning in cities where you do have large congregations of people, and need for public services. There is a role for government to make some decisions about what kind of development is appropriate.

Now, I think at the same time, though, the government should not stand in the way of developments where the private sector comes in and provides the services. But that isn't the way it works in Oregon. You can't do that; it's "their way or no way". So, I think that where government is providing services, they

should have greater say about development but they should not preclude alternatives where they're not providing the services.

MR. BURLING: Rich, comments?

MR. CARSON: Yes, but it's on something totally separate. I was just -- it was about compensation. In Compensation in Measure 7, folks talk about takings. The takings is caused by a government decision. I've always wondered if there shouldn't be something called a givings, where a government decision creates value -- say, adding land to an urban growth boundary where the developer would reimburse for the profit that they made, or some portion of the profit. So, it's just a strange thought.

MR. CHARLES: The problem is that the government created the cartel in the first place, so there wouldn't be no givings, if the government hadn't gotten into that in the first place.

MR. CARSON: Probably not in that -- I agree with your analysis there, but in the context of extending transportation systems and other public infrastructure, I think there are instances where there's value created by

government access.

MR. CHARLES: Right. And that's an excellent reason to get the government out of that, to privatize it so that then, just like my stock portfolio, which is getting hammered right now -- you know, I don't have a right to be compensated by anybody. I'm a grown person; I invest. Something happens. Well, with the privatized infrastructure, there will be windfalls and wipeouts, but that is just the nature of the business. You only have this problem with givings and takings when you have basically pork-barreling government investments picking the winners and losers, and then you get what we have in Oregon, where you have very intense winners and losers in wealth transfers.

MR. MOSHOFSKY: I'd like to say, too, in connection with the government recovering for increased value, they do anyway. They get taxes out of it, either property taxes or income taxes. At the same time, the government is not doing it to create value. It's doing it for another purpose, and it's an incidental result and therefore I don't think there should be windfall tax.

MR. BURLING: Any final comments before we go



to the audience?

Are there questions from the audience? Yes.

AUDIENCE PARTICIPANT: (Completely off the microphone; inaudible.)

MR. BURLING: Could you repeat the question.

PANELIST: Yes. The question was locational adjustments, whether in the urban growth boundary getting rid of those would make the system more rigid.

I think that there was a run at eliminating them. I don't think that that's going to succeed. There will continue to be some locational adjustments. I think that the concern was that so-called locational adjustments that come in under a theory of either trying to make more efficient use of infrastructure or correcting mistakes have been used or been attempted to be used to just swap values around in the way John talks about -- make one person at somebody else's expense. I don't think that that's what we want to do.

So, if there's a legitimate reason that it's in harmony with the reason why we did it in the first place, then, yes, locational adjustment is appropriate. But this is presuming -- and, which I presume that there's a

legitimate reason for having the urban growth boundary in the first place. So, if people don't buy into that, then they can buy into that on that ground.

MR. MOSHOFSKY: Well, I think the urban growth boundary was originally to be a planning tool, and I think I would go along with that in the sense that you guide growth. It isn't no growth or no expansion. It's when you expand, assure that the infrastructure is available, and that as you expand, it's connected with what's already in place. It's a planning tool.

But it didn't turn out to be that way. It became, as I said, a Berlin Wall. And I think metro is frustrated with it. They tried for how many years, Carl, to expand modestly and at a lot of expense, and then somebody sued in our litigious system and slapped it down. And then, they're starting over. It just doesn't make sense. It should be more flexible.

PANELIST: I guess I'll reveal my ignorance and ask for those people who have more history than I do to tell me -- we're required not to have enough land for today's urban needs, but to have a 20-year land supply within the urban growth boundary. Therefore, any

marginal changes we're making inside the urban growth boundary, when you're projecting out 20 years, which is what we're required to have, are relatively slight, it would seem to me. And then calling the 20-year land supply a straightjacket is another thing that I don't understand. So, if you could explain, first of all, why we have it, the 20-year land supply rule, and then, if you do have it in place, how you could say we're straight jacketing development. It doesn't make sense to me.

MR. MOSHOFSKY: Well, it's true. That came out of the statute -- the 20-year. The idea was that it would be a moving boundary to accommodate a continuing, 20-year supply in the future. I don't think that's necessarily a straightjacket, if it had been allowed -- but it wasn't allowed.

What happened, though, is because of the rigidity of the boundary now, it's forcing metro and the cities to look at every nook and cranny in the area to have granny flats, to have -- where there's an existing lot that's pretty large-- to allow people to divide it into three parcels and put apartments all over the place to accommodate the 20-year supply. I don't think that

was ever intended.

MR. BURLING: Well, what it does is it drives us into a numbers game. And maybe Rich could comment on the numbers game.

MR. CARSON: That's basically what I was going to say. If it was a 20-year land supply for the market that was out there, it would be fine. But what people have said is a 20-year land supply based on some ethereal densities on land that can't be developed, and it's not really a 20-year land supply.

Another thing I've got to correct Bill on is, it isn't the Berlin Wall. I used to have a planner in my office who had a picture of the Great Wall of China, and it said "urban growth boundary".

MR. CHARLES: This just shows how it gets gamed, because the people who support densification play this game you talk about. And the 20-year land supply is not -- it's not possible to determine it because it's not possible to figure out people's preferences for what density they live at.

As a result you drive around now -- try finding a new home in Portland or Suburbia that has more than

about a 6,000 square-foot lot that you can afford. You basically can't find it, so people make assumptions that a whole bunch of people want to live at six or eight units per acre. Well, that's not a fact. A lot of people like one home per acre, so the whole 20-year land supply thing gets jacked around and it's just a game.

PANELIST: I think another place where we could agree on is sort of the insanity of the hierarchy of land that you bring in, and then the inability to make decisions about the form. If we follow LCDC, we're going to build everything in the southeast part of the region, in Clackamas County, regardless of where people want --

MR. MOSHOFSKY: Or a longer light rail that doesn't work.

PANELIST: Let me put on my State of Washington hat. Recently, Congressman Blumenauer (phon.) said thank God for Clark County because they're the relief valve where everybody goes to live. He said that. I take offense at that because basically land use planning started in Oregon 25 years ago. It only started in Washington ten years ago, so we have more land and that's where everybody's coming to. They can't build

over here. They can't get a decent sized lot. I mean, you know, a 10,000 square-foot lot is now an antique.

PANELIST: I'm also asking for your help in the industrial land supply, though, too. That would help us quite a bit.

PANELIST: Yes. We also supposedly have half the industrial land in the whole Portland metropolitan area. We only have about a third (inaudible).

MR. BURLING: We'll go to another question from the audience.

AUDIENCE PARTICIPANT: (Completely off the microphone; inaudible.)

-- In order for a form of government to work, there's a social contract. People have to consent. And early on in this Oregon land use program, they did consent. In fact, they had what was called citizen's advisory committee. And everybody got a Global Watch t-shirt for getting in there and writing that.

There's been a couple of elections where people said, no, don't throw out the Oregon plan. But we have an election [on Measure 7]. How do we reconnect the people with these laws? They don't understand -- the

county planners in the last two weeks have said, you know, (inaudible). We have a language of our own. People don't know. They don't understand.

MR. BURLING: Do you all want to comment on that? Are the citizens connected to our land use planning? Do they know what's going on? And, is there a way of educating them?

PANELIST: First of all, LCDC was given way too much administrative authority. It was created by a citizen legislature, and the system was turned over to land use planners. In it, we have had 16 years of Democratic governors elected. That agency reports to one person -- the governor. And other than that, they are totally autonomous. I think it's time for the elected officials to take back some of the power from that agency, and give it back to the citizens. They are totally insulated in that building, within their own organization. They can do whatever the damn we please.

MR. BURLING: Bill, do you have a few seconds for --

MR. MOSHOFSKY: Yes. It's true. It's locked in. I think with the new governor, hopefully of a

different party or a different mindset, we can make some changes. Up to now, the citizens -- it doesn't matter what people say. People go to LCDC; 97 out of 100 say I want it this way; 3 say, that way. The 3 win.

MR. BURLING: John.

MR. CHARLES: I think change is going to come because people realized they've been duped, as I was. I was (inaudible). From 1980 to about 1992, I supported the status quo. I was radicalized by participating in the 20/40 process and seeing how intellectually, morally corrupt it was.

But I look at the last three elections on light rails in the Portland region -- one in Clark County, one in Portland, and one statewide -- all went down to defeat. And I look at Measure 7 passing, and I say, you know, people are beginning to catch on. They know they're disconnected. They don't understand it, but they know they've been had. And they know change will come.

MR. BURLING: Carl, final comment.

MR. HOSTICKA: Well, I'll put the elections in West Lynn and Bend and Salem up against the other elections. But I think that I don't have a lot of



optimism, to tell you the truth, because having spent 25 or 30 years in the political arena, most people aren't paying attention at all. They're living their lives.

To get them to pay attention, you have to condense your argument down to very powerful, symbolic, emotionally laden elements and you demonize one thing or another. You either demonize bureaucrats and outhouses or sprawl. You tell me what it is; it gets demonized. And it turns into a religious war more than a debate over what's a real use of the place. I haven't seen that that's improved, to tell you the true.

So, I wish I could end on an optimistic note.

SPEAKER: Gentlemen, I think if I've learned anything today, it's that while the road to Hell is paved in good intentions, process will be meticulously observed all the way.

Thank you very much on behalf of the Federalist Society for coming today, and thank you from the members of the audience on behalf of the Federalist Society for participating in our little discussion this afternoon, and for the entire day. Thank you.

(Whereupon, the panel was concluded.)

