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PRESERVATION OF COASTAL SPACES A DIALOGUE ON OREGON'S EXPERIENCE WITH INTEGRATED LAND USE MANAGEMENT

*Eugene C. Bricklemyer, Jr., Shelby Smith,
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SERIES PREFACE

This is one in a series of papers appearing in this volume prepared by a multi-disciplinary, multi-cultural and multi-national team of scholars from Mexico, Canada and the United States. Writing on six different topics, we are investigating management issues relating to the coastal zones of North America. These places are increasingly becoming most representative of all our efforts, for better or worse, to balance the continuing desire for development with the dawning understanding of the need to protect air and water quality and the need to retain some terrestrial and estuarine places where progress is defined as keeping such places as they are or returning them to the wild.

I. INTRODUCTION

In the United States, Oregon and California have the longest histories of environmentally progressive land use controls. The focus of this paper is on how Oregon has managed its coastal zone through its implementation of a statewide program that integrates a state and local partnership, which depends on input from local citizens, with a federal law that encourages rational coastal land use and conservation. Our research is heavily based on a literature survey and personal conversations – a dialogue – with

* This is the fourth in a series of six related papers appearing in this volume. For biographies of the individual authors of this paper, please see 9 OCEAN & COASTAL L.J. 174 (2004).

numerous long-involved citizens, representatives of non-governmental organizations and state agency personnel.

II. BACKGROUND

A. Coastal Zone Management in the United States

For many, coastal zone management in the United States first brings to mind the Coastal Zone Management Act (CZMA) passed by Congress and signed into law by President Nixon in 1972.¹ The CZMA is a framework statute, with guidelines and funding mechanisms aimed at improving control and protection of coasts and adjacent waters. The CZMA is predominantly a "process" law, with few explicit standards. Overall, the CZMA has resulted in the creation of management programs in thirty-four of the eligible thirty-five coastal states, which are where management action agendas are developed and implemented.² Each of these state programs was initially subject to federal approval.³ Today, each program must meet federal requirements (as assured through reviews conducted on a periodic basis) in order to continue to receive federal funding.⁴

The CZMA's national core objectives, upon which the law's effectiveness can be judged, include protecting estuaries and wetlands; protecting beaches, dunes bluffs and rocky shores; and providing public access to such areas.⁵ There are those who believe that the law, and the state programs created as a result, have been successful in achieving these objectives. A recently published article in the journal *Coastal Management* summarizes the CZMA's effectiveness over more than a quarter of a century and finds that its mandates have been met successfully in most cases.⁶ However, the authors of the article caution that their assessment relies on incomplete data and, importantly, that their conclusion is at least partially based on the effectiveness of the *process* for protection.⁷ They emphasize that the report is not one on "the [physical] state of the coast."⁸

1. Coastal Zone Management Act, 16 U.S.C.A. §§ 1451-1465 (2000 & Supp. 2003).

2. Marc J. Hershman et al., *The Effectiveness of Coastal Zone Management in the United States*, 27 COASTAL MGMT. 113, 114-115 (1999) [hereinafter Hershman]; Telephone interview by Eugene C. Bricklemeyer, Jr., with Marc J. Hershman, professor and former director of the School of Marine Affairs, University of Washington, Seattle, WA (Jan. 10, 2005). Currently, Illinois is the holdout. *Id.*

3. 16 U.S.C.A. § 1455.

4. *Id.* § 1458.

5. *Id.* § 1452(2); Hershman, *supra* note 2, at 114.

6. *See id.*

7. *See id.* at 121.

8. *Id.* at 127.

Thus, the question remains: Has the CZMA resulted in a meaningful, "as-the-eye-can-see," conservation of the coast? Has it saved wild places and natural areas, both those with public access and those without? Perhaps there is an even more seminal question: Why do we care in the first place? One answer: Included among the plethora of "environmental services" that undisturbed ecosystems provide is a habitat central to the survival of a treasure trove of biological diversity that is critically important to a myriad of species, both resident and transitory, that fly, swim and are terrestrial. Humans, one of the terrestrial species, need, among other things, experiences that nurture the soul and remind us of the simple awe of being alive. Like inspiring music, wild places of dramatic natural interface often can provide this. The coast, ocean against the land, both moved and moving, has long been recognized as a source of solitude, solace and rejuvenation. For these reasons alone, some significant parts of this complex and diverse coastal environment should be preserved in each region of the country so that future members of all species can benefit from their existence. Has the CZMA really been effective in achieving this?

Were you to drive along the coasts of almost any part of the country with the exception of Oregon, Washington and parts of California, you would find persistent development – completed, ongoing and proposed. Coastal populations, fueled in part by the second home and retirement phenomena, continue to grow. During a southern car trip by the first author in late 2001, even in Alabama and Mississippi, the most economically depressed regions of the Deep South, it appeared that nearly every square foot of unoccupied oceanfront had a 'for sale' sign on it or a building going up.

The reality of this impression is borne out by recent reports of the impacts of continued development. The United States Department of Commerce's National Ocean Services (NOS) recently released a national eutrophication report detailing the effects of nutrient enrichment in over ninety percent of the estuarine surface of the United States and the Mississippi River Plume.⁹ Of those waters surveyed, the NOS found that over sixty-five percent suffered from moderate to high degradation due to nutrient enrichment.¹⁰ Most discouraging was the study's conclusion as to current trends. According to the study, continuing development combined

9. Bricker et al., United States Department of Commerce, *National Estuarine Eutrophication Assessment: The Effects of Nutrient Enrichment in the Nation's Estuaries* (1999). Eutrophication is the process whereby nutrients, primarily nitrogen and phosphorus, when added to a water body, stimulate algae growth and decrease oxygen availability. The process is often caused by inadequate treatment of human wastes.

10. *Id.* at 9.

with the present level and types of controls will only lead to a worsening situation in the future.¹¹

Thus, it is not surprising that professional coastal conservationists are concerned. Given the experience of many years of study and the observation of development along the Charleston-area coast, Dana Beach, executive director of the South Carolina Coastal Conservation League, has recently finished an assessment from the front lines for the Pew Oceans Commission.¹² A summary of Mr. Beach's observations and recommendations gathered from the vantage point of work with a heavily stressed coastal zone may be useful in setting the stage for our discussion. Mr. Beach's basic conclusion was that, while federal law and ensuing state CZMA programs may be helpful, they have not stopped the destruction because the CZMA programs do not focus on the core problem. While such programs can determine at the site level the appropriateness, for instance, of a berm or dock permit, they generally do not provide large-scale regional growth management, development control or zoning regulation. Human occupation density on the coast is already five times that of the interior of the United States, and all indications point toward a continuing increase, especially with the added pressures of affluent retiring baby boomers. Comprehensive planning for smart (or, in some places, no) growth is imperative.¹³

What is necessary, as Mr. Beach points out, is a multi-level effort that uses nature – the watershed – to delineate the area that land use controls regulate.¹⁴ Planning and growth decisions could then be made to conserve,

11. *Id.* at 43. No less arbiter of public opinion than the New York Times has repeatedly stated editorially that the results of studies conducted by the Pew Oceans Commission and the U.S. Commission on Ocean Policy confirm that, among a handful of the most serious problems threatening the health of oceans and the ecosystems they support, overdevelopment of the coast is a major culprit. See *Still at Sea*, N.Y. TIMES, Jan. 8, 2005, at A14; *Blueprints for Healthier Oceans*, N.Y. TIMES, May 8, 2004, at A28.

12. See Dana Beach, South Carolina Coastal Conservation League, *Coastal Sprawl: The Effects of Urban Design on Aquatic Ecosystems in the United States*, available at http://www.pewoceans.org/reports/water_pollution_sprawl.pdf (last visited May 26, 2004).

As an interesting historical aside, before and while the CZMA was being passed, there was a simultaneous but failed attempt to pass a Henry Jackson-sponsored and President Nixon-supported Land Use Policy Act and Planning Assistance Act, S.268, 93rd Congress, 1st Session (1973). This was an attempt to adopt a national focus to protect and plan for any development of land of critical environmental concern, including coastal and estuarine zones. Such land was to be managed by the Department of the Interior. The law was intended to be process-oriented and programmatic. See Baird B. Brown, *The Recent Trend in Federal Land Use Regulation*, 10 WILLAMETTE L.J. 464 (1974) [hereinafter Brown, *The Recent Trend in Federal Land Use Regulation*].

13. Brown, *The Recent Trend in Federal Land Use Regulation*, *supra* note 12, at 13.

14. *Id.*

or to sustainably develop as appropriate, within this geographic unit. That would mean that participation in the region's progress at the state, local, and, if applicable, federal levels (*e.g.*, funding for transportation infrastructure) should all be conducted in concert. Finally – and this would be the heart of the *matter* – wise and absolute decisions must be made as to where to constrain development and where to allow development to occur. This must include a determination of what kind of development is appropriate and where and how it should be carried out in order to minimize environmental impacts.¹⁵ Remarkably, this multi-level approach (*sans* the use of the watershed) was the theory behind the integrated program of land use management Oregon devised three decades ago.

B. Coastal Zone Management in Oregon

*“No . . . selfish interest should be permitted, through politics or otherwise, to destroy or even impair this great birthright of our people.”*¹⁶

– Oswald West, Oregon Governor, 1911–1915 (1873–1960).

*“Growth for the sake of growth is the ideology of the cancer cell.”*¹⁷

– Edward Abbey, Author (1927–1989).

Oregon is green with a capital “G.” The state has long been held out as the model for progressive and effective land use planning in the United States. For thirty years Oregonians have demonstrated their commitment to growth management and livability by creating goals that reflect the importance of renewable resource use and the preservation of open space. They have implemented those goals through the passage of laws that require planning for growth and development. As a state, Oregon has embraced the fact that sustainability equals livability and that open space and renewable resource-based industries are central to the health of communities and to the culture and identity of the state. The journey, however, has been difficult and controversial. After almost three decades of the promulgation of laws constraining rural development, regulating urban growth boundaries (UGBs) and requiring natural resource invento-

15. *Id.*

16. Oswald West, *Seashore Conservation*, OREGON DAILY J., Aug. 8, 1949, at editorial page.

17. EDWARD ABBEY, *ONE LIFE AT A TIME, PLEASE* 21 (Henry Holt & Co., 1988) (1978).

ries, it now seems appropriate to discuss the effectiveness of the plan Oregon first put into action in 1973.

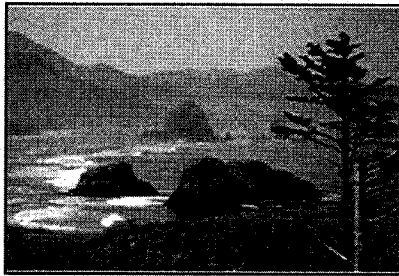
Oregon's history with land use planning has been the result of a combination of unique factors.¹⁸ The state is home to a small population, often characteristically "Western" – independent, self-sufficient and folksy. Oregon is demographically homogenous, and most of the population resides in the fertile Willamette River Valley. The climate is wet and cool, conducive to the tremendous productivity of the temperate rainforest, but not to the development pressures experienced by other coastal states such as California and Florida. Good decisions by early state leaders established a network of state parks and protected areas, including miles of shorelines, leaving an environmental legacy that has contributed to the attachment Oregonians typically have to open space, especially open space along the state's rugged coast. Oregonians are proud of their landscape, and the state culture is deeply rooted in the intrepid, resource-based industries that have historically sustained the state's economy, such as fishing, logging and farming. Critical moments in times of rapid growth have intersected with remarkable and visionary leadership in the state government, resulting in a landmark set of planning and protection laws.

Now Oregonians find themselves at a crossroads once again, as on-the-ground planning outcomes are not matching up with the vision formed nearly three decades ago. Many are now wondering whether Oregon can balance progress and development with preserving those natural resources that make Oregon Oregon. This paper seeks to serve as a synopsis of land use planning history in Oregon, focusing specifically on issues of coastal conservation and management, with the hope that the Oregon experience can be instructive for others trying to preserve their own coastal resources.

18. Oregon's history began when Caucasians began to settle in the area in appreciable numbers in the early 1850s. The region officially became a state in 1859. Formal land use planning began with passage of enabling legislation for city planning commissions in 1919. 1919 Or. Laws 568, ch. 311. The legislature authorized county planning and zoning in 1947. 1947 Or. Laws 948, ch. 537; 1947 Or. Laws 1029, ch. 558. Special planning districts developed for the purpose of coordinating local planning and zoning were established in 1969. 1969 Or. Laws 889, ch. 494. Senate Bill 10, the precursor to Senate Bill 100, was also passed in 1969 and gave the governor the authority to take control of the planning process of any county that was either not completely zoned, subject to a comprehensive land use plan or not making significant progress toward meeting such requirements by December 31, 1971. 1969 Or. Laws 578, ch. 324.

III. THE OREGON COAST

A. *An Overview*



*“No landscape is more sacred to Oregonians than the coast. A reverence toward the coast has been evident from the day in 1911 when Governor Oswald West declared Oregon beaches a public highway. Yet, the seeming fast pace of development on the coast . . . leaves in its wake a profound sense of loss of cherished landscape.”*¹⁹

– Richard Benner, Director, Oregon Department of Land Conservation and Development, 1991–2001.

Early in Oregon’s state history, Governor Oswald West declared the state’s beaches a state highway and charged the Department of Transportation with their care.²⁰ The enduring legacy of this decision is that a majority of the beaches in Oregon are public property below the mean high tide line.²¹ Although beach areas above the mean high tide line are often privately owned, the Beach Bill of 1967 declared it the public policy of the state to acquire shorefront and to provide permanent public easements to

19. Richard Benner, *Growth and the Northwest Landscape*, 1 *Open Spaces Quarterly* 8, 18 (1998) [hereinafter Benner, *Growth and the Northwest Landscape*].

20. Act of Feb. 13, 1913, ch. 47, 1913 Or. Laws 80 (codified at OR. REV. STAT. § 390.615 (2003)). Governor West, who was only thirty-seven years old when he took office, was the first of a number of conservationist governors that have served Oregon. West is considered the “Father of Oregon beaches.” Early in its history, Oregon sold off tidelands, wet sand lands between the lowest and highest tides, but by 1899, the state had passed a law requiring that at least a portion of the shorefront between the Columbia River and Clatsop County be retained as a highway. Governor West saw this as a precedent he could use, and he got the legislature to go along with declaring the state’s entire 362-mile shoreline as a highway that “shall forever remain open to the public.” See KATHRYNA. STRATON, *OREGON BEACHES: A BIRTHRIGHT PRESERVED* (Oregon State Parks and Recreation Branch 1977).

21. Peter L. Sleeth & Foster Church, *Oregon’s Crowded Coast*, *THE SUNDAY OREGONIAN*, July 6, 1997, at A1. To date, fifty-four percent of the Oregon coast is publicly owned.

dry sand beaches.²² Always an important landscape to Oregonians, laws and policies implemented to protect the state's beaches and public access to them have validated and reinforced this importance. Healthy, wild beaches are sacred landscapes not just for coastal residents, but for all Oregonians.

Oregon's coastal zone encompasses the area stretching from the Pacific Ocean to the top of the Coast Range, and from Oregon's borders with Washington to the north and California to the south. (Fig. 1). This zone encompasses five counties in their entirety and parts of two others that front the ocean. It also includes portions of five inland counties. There are thirty-three incorporated cities in the zone. The most densely populated area of this 362 mile north-to-south run is a corridor, nearly twenty miles wide, extending inland from the ocean beaches. This narrow strip of land (henceforth, the coast) is the permanent home of approximately 225,000 people, about 6.5 percent of the state's estimated 2003 total population of thirty-five million.²³ In the two decades between 1970 and 1990, the coast gained 40,000 new residents; in the last decade, the coast has gained another 25,000.²⁴ This area is served by the famous and often scenic coastal highway U.S. 101 (U.S. 1 in California) and numerous east-west roads. To the east, outside the zone but nearby, is Interstate 5, the major north-south West Coast highway.

Public lands owned and managed by the state include 675,000 acres of coastal forests, parks and estuaries. Three Oregon State Forestry Department holdings total 600,000 acres, and over 100 parks add another 35,000 acres. Another 1.7 million acres of the coast, almost one-third of the entire area, are in federal ownership, and include the one-million acre Siskiyou National Forest.²⁵ While both state and national parks are subject to logging, all of these lands are protected from development.

22. See OR. REV. STAT. § 390.610 (2003). Ownership of the shore from ordinary high tide to extreme low tide, except any portions that may have been disposed of prior to 1947, is vested in the state and declared a state recreation area for the free and unfettered use of the public. *Id.*

23. See Oregon Department of Land Conservation and Development, available at http://www.lcd.state.or.us/coast/visiting/popul_demig.html (last visited Mar. 2, 2004); U.S. Census Bureau, *Oregon Quick Facts*, available at <http://quickfacts.census.gov/qfd/states/41000.html> (last visited Mar. 1, 2005).

24. Peter L. Sleeth & Foster Church, *Oregon's Crowded Coast*, THE SUNDAY OREGONIAN, July 6, 1997, at A1; 1000 Friends of Oregon, *Managing Growth on the Oregon Coast* 5 (1993).

25. Oregon Department of Land Conservation and Development, *A Citizen's Guide to the Oregon Coastal Management Program* at 28 (2001), available at <http://egov.oregon.gov/lcd/docs/publications/citzgid.pdf> (last visited Jan. 9, 2005) [hereinafter *Citizen's Guide*].

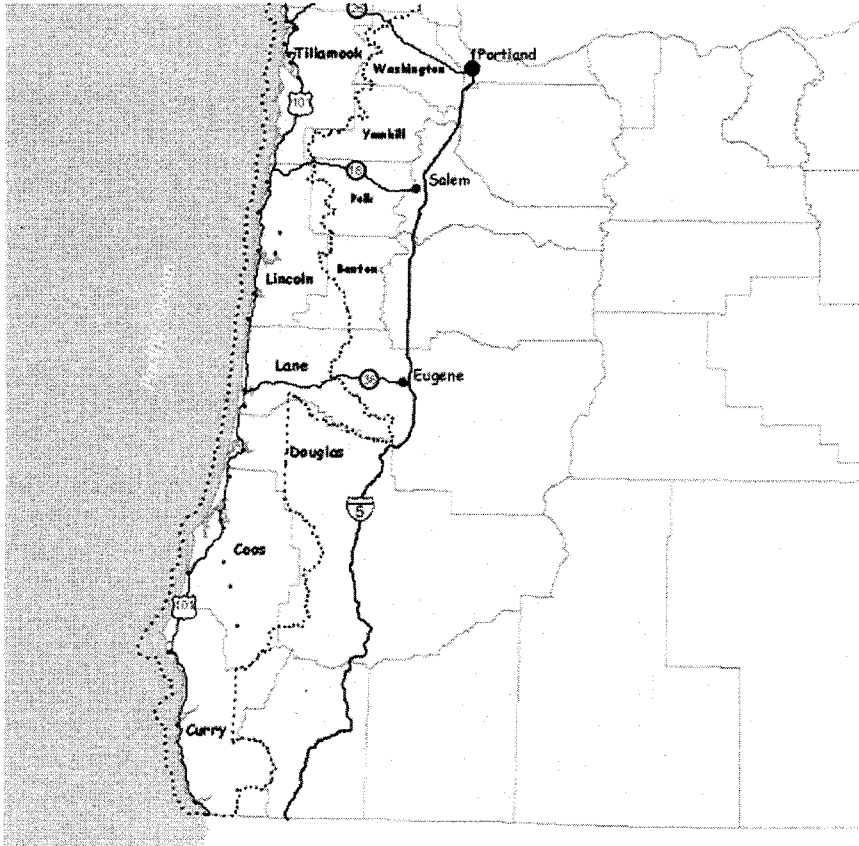


Figure 1. Map of Western Oregon. The dotted lines demarcate the Oregon Coastal Zone. The solid dark lines demarcate coastal highway U.S. 101, Interstate 5 and other major transportation routes. Map courtesy of Oregon Coast Management Program, Salem, Oregon.

Historically, the coast has been a very resource-dependent area where communities have relied heavily on farming and the timber and fishing industries for economic stability. As resources have grown scarce, dependent industries have slowly been squeezed into smaller and smaller sectors of the economy, and young families have been replaced with people in the middle to older age groups. With this “graying” of its population, a significant percentage of Oregon’s coastal residents now rely on pensions, or “transfer payments,” where income is transferred from banks often located in different cities or different states. These individuals do not depend on resource extraction or the local economies for income. As a result, the ambience created by open space and environmental integrity – those qualities that inspire people to move to the coast – is becoming the

coast's most valuable resource, notwithstanding the fact that the actions of the state's decisionmakers do not always reflect this understanding.²⁶

B. *The Birth of Oregon's Land Use Planning Laws*

"The interests of Oregon for today and in the future must be protected from the grasping wastrels of the land. We must respect another truism – that unlimited and unregulated growth, leads inexorably to a lowered quality of life."²⁷

– Tom McCall, Oregon Governor, 1967–1975.

In the 1960s and 70s, Oregon's population was booming. The state was growing at 2.3 percent annually, twice the national average.²⁸ Poorly planned and poorly regulated development throughout the Willamette Valley and along the Pacific coast was causing serious industrial and residential pollution. On the coast, mill effluents and untreated sewage prompted closure of shellfish beds and beaches. Everywhere, rampant growth was producing unimagined sprawl. In his 1973 address to the Oregon legislature, the spreading housing developments and strip malls inspired Governor Tom McCall to bemoan what he called "[c]oastal condomania, sagebrush subdivisions and the ravenous rampage of suburbia."²⁹ Oregonians began to feel increasingly anxious as they watched treasured farmlands and beaches being lost to development. It was clear that without drastic action, the way of life that they so treasured would rapidly disappear.³⁰

26. Telephone interview by Shelby Smith with Robert J. Bailey, Ocean Program Administrator, Oregon Department of Land Conservation and Development (Nov. 16, 2001) [hereinafter Telephone interview with Bailey (Nov. 16, 2001)]. As of the writing of this paper, Bob Bailey served as Coastal Program Manager of the Oregon Ocean-Coastal Management Program, a component of the Oregon Department of Land Conservation and Development (DLCD).

27. Governor Tom McCall, Message to the Fifty-Seventh Legislative Assembly, State of Oregon (Jan. 8, 1973) (transcript available in the Oregon State Archives) [hereinafter McCall Message]. See also Partial transcript of Governor Tom McCall's Opening Address to the 1973 Legislative Assembly (Jan. 8, 1973), available at <http://www.friends.org/resources/mccall.html> (last visited Jan. 14, 2005).

28. Benner, *Growth and the Northwest Landscape*, *supra* note 19, at 9.

29. McCall Message, *supra* note 27.

30. *Id.* The most often quoted paragraphs of Governor McCall's address, cited below, displays the Governor's passion as a protector of Oregon's environment, a passion he kept his entire life. According to Governor McCall:

There is a shameless threat in our environment and to the whole quality of our life and that is the unfettered despoiling of our land. Coastal condomania, sagebrush

During that same period, the first author toured the West Coast by automobile with his wife. On a dazzling mid-week day in the early summer of 1972, the couple crossed into Oregon from Washington on Interstate 5. At the time, the couple had heard of the James G. Blaine Society and its desire to stop growth in the state, but the couple was nonetheless quite surprised to find the southbound I-5 welcome station closed. A handwritten sign (clearly non-standard issue) was posted at the locked door to the “visitor information” area bearing a version of the Society’s only partly tongue-in-cheek moto: “Oregon: A wonderful place to visit; but you are not invited to stay!”

At the same time, the nation at large was also experiencing a growing concern about the effects of decades of environmental degradation. Congress had passed and President Nixon had signed into law the first set of serious environmental laws: the National Environmental Policy Act,³¹ the Endangered Species Act,³² the Clean Water Act,³³ the Clean Air Act³⁴ and the Coastal Zone Management Act.³⁵ Buoyed by a wave of national environmentalism, Oregon was ripe for a piece of extraordinary and landmark legislation. In 1973, the state legislature passed the Oregon Land Use Planning Act, Senate Bill 100 (SB 100). At the time, the legislation was the most progressive statewide land use planning law in the country. Governor McCall signed the legislation into law on May 29, 1973.³⁶

The passage of SB 100 was no cakewalk. Development of the legislation was incredibly controversial, and broad bipartisan support was needed to bring it to life. Resource dependent communities feared that,

subdivisions and the ravenous rampage of suburbia, here in the Willamette Valley, all threaten to mock Oregon’s status as the environmental model of this nation.

We’re dismayed that we have not stopped misuse of the land, which is our most valuable finite natural resource . . . We’re in dire need of state land-use policy, dire need of new subdivision law and new standards for planning and zoning by the counties and cities of our state.

The interests of Oregon for today and in the future must be protected from the grasping wastrels of the land. We must respect another truism – that unlimited and unregulated growth, leads inexorably to a lowered quality of life.

Id. See also Robert Liberty et al., *The Battle to Keep Oregon Lovable and Livable: The Story of Tom McCall, Senate Bill 100 and How Oregon Planned Its Growth*, available at <http://www.friends.org> (last visited May 26, 2004).

31. 42 U.S.C. §§ 4321–4370f (2000 & Supp. 2003).

32. 16 U.S.C. §§ 1531–1544 (2000 & Supp. 2003).

33. 33 U.S.C. §§ 1251–1387 (2000 & Supp. 2003).

34. 42 U.S.C. §§ 7401–7671q (2000 & Supp. 2003).

35. 16 U.S.C. §§ 1451–1465 (2000 & Supp. 2003).

36. Senate Bill 100, 1973 Or. Laws 127, ch. 80 (codified at OR. REV. STAT. §§ 197.005–197.430 (2003)).

rather than supporting the sustainability of their livelihood, SB 100 would undermine the very way of life that they so treasured. Developers and real estate interests were convinced that the legislation would put them out of business and drive prospective businesses and industries away from Oregon.³⁷ Proponents of SB 100 knew that it was going to take work to win the support of communities that felt that planning would hinder their ability to be economically self-sufficient. Citizen participation and citizen "ownership" would be critical in the design and implementation of the planning process. In an attempt to garner bipartisan support, SB 100 was crafted to allow maximum control at the local level. Rather than setting specific policy to regulate planning and development, SB 100 required that land use laws be designed to support statewide goals and guidelines for planning. The goals and guidelines would then be interpreted, implemented and enforced at the local level.

To that end, SB 100 created the Land Conservation and Development Commission (LCDC).³⁸ The bill also established the Department of Land Conservation and Development (DLCD), within which is lodged the LCDC and the director and staff of the DLCD.³⁹ The latter is charged with running the statewide land use planning effort.⁴⁰ A first task of the LCDC was to establish "statewide planning goals" to guide growth and development over the first two years after the passage of SB 100.⁴¹ Working with considerable citizen input, the LCDC adopted a set of fifteen Statewide Planning Goals and Guidelines.⁴² From the outset, Goal 1 (Citizen Involvement) was memorialized as the linchpin of the planning process because it presented the opportunity for all citizens to be involved in all

37. A full decade later, a pair of respected Portland attorneys specializing in land use were still criticizing the regulatory hallmark of SB 100, urban growth boundaries (UGBs). According to the practitioners, "Oregon's land use planning laws enacted in 1973 established a pattern of centralized urban development that could cripple the state's economy. The adverse effects of the present land use planning scheme can be attributed, in large part, to the placement of urban growth boundaries around each city in the state." Terry D. Morgan & John W. Shonkwiler, *Urban Development and Statewide Planning: The Challenge of the 1980s*, 61 OR. L. REV. 351 (1982). For the perspective of the National Association of Homebuilders after over two decades of experience with SB 100, see Jon A. Chandler, *The State of Planning in the State of Oregon*, 12 LAND DEV. 15-21 (2000).

38. Or. Rev. Stat. § 197.030 (2003). The LCDC is composed of seven members appointed by the governor and confirmed by the state senate for terms lasting four years.

39. *Id.* § 197.075.

40. *Id.* See also *id.* § 197.090.

41. *Id.* § 197.040; OREGON LAND CONSERVATION AND DEVELOPMENT COMMISSION, STATEWIDE PLANNING GOALS AND GUIDELINES (1974) [hereinafter LCDC 1974]; OR. ADMIN. R. 660-015-0000 - 0005 (2003).

42. *Id.* See also *id.* § 197.090 (defining director's duties).

phases of the planning process.⁴³ This action successfully fortified the support of diverse constituents throughout the state and allowed the new planning process to begin in earnest.

At the same time that statewide planning goals and the land use planning program were emerging in Oregon, the earlier mentioned first wave of federal environmental laws were also being implemented.⁴⁴ The CZMA, passed in 1972, requires each coastal state to create a management plan that meets or exceeds the federal requirements for coastal planning, resource conservation and development.⁴⁵ Under the CZMA, once the federal government approves each state's plan, financial support, policy support and legal tools are provided by the federal government in order to help states effectively manage their coastal zones and coastal resources.⁴⁶ "Under the CZMA all three levels of government, federal, state and local, are given important roles to play and considerable flexibility in defining those roles."⁴⁷ In 1976, Oregon folded the requirements of the CZMA into its statewide land use planning program by adding four goals – Goals 16–19 – that deal specifically with coastal issues.⁴⁸

The imprint of this statewide land use planning program is now evident in Oregon's landscape. Richard Benner, until recently the director of the DLCD, wrote of his ten-year term with land use planning, "Oregon indeed looks different from other western states."⁴⁹ Mr. Benner continued, "It is very close to the image conjured by the 'founders' in the late 1960s and early 1970s Today, Oregon is the closest thing America has to a deliberate place."⁵⁰

But despite its innovation, obvious successes, and Mr. Benner's optimism, some aspects of Oregon's land use planning program have been significantly less than totally effective. 1000 Friends of Oregon (1000 Friends), founded by former Governor Tom McCall, is a prominent statewide nonprofit conservation group focusing on land management, planning and growth issues. It believes that Oregon faces "unprecedented threats to its quality of life and scenic beauty" and notes that in a nation-

43. OR. REV. STAT. § 197.040f (2003); LCDC 1974, *supra* note 41; OR. ADMIN. R. 660-015-0000(1) (2003).

44. See text accompanying *supra* notes 31–35.

45. 16 U.S.C. § 1452 (2003); Hershman, *supra* note 2, at 115.

46. 16 U.S.C. § 1455 (2003).

47. Hershman, *supra* note 2, at 115.

48. OR. ADMIN. R. 660-015-0010(1)–(4) (2003); Oregon Land Conservation and Development Commission, *Statewide Planning Goals and Guidelines* (2000), available at <http://www.lcd.state.or.us> (last visited Feb. 4, 2004) [hereinafter *Planning Goals 2000*].

49. Benner, *Growth and the Northwest Landscape*, *supra* note 19, at 11.

50. *Id.* at 16.

wide survey, Scenic America, a national conservation organization, named Oregon one of the ten “most endangered scenic places in America.”⁵¹

Even Mr. Benner acknowledged 1000 Friends’s concerns when six years ago he wrote:

[G]rowth is invading our cherished landscapes . . . and growth near these places penetrates deeply into the Oregon psyche The impending loss of these most important symbols of the Northwest way of life along with blemishes on our sacred landscapes bring Oregonians to the brink of an identity crisis. If these Oregon icons disappear as we watch, will Oregon be exceptional any longer?⁵²

In 1997, 1000 Friends published a statewide evaluation of the land use planning programs in Oregon. State action directed at coastal, natural, and scenic resource protection was given a “D”—the lowest grade the group accorded any management effort in the state.⁵³ About the same time, Mr. Benner described the situation this way: “Oddly just as the founders’ image is coming into focus, just as the land use program is graying at the temples, the consensus behind it is fraying at the edges. The statewide land use planning program is basking in unprecedented national recognition. But Oregonians themselves are having doubts.”⁵⁴

What has happened to the most progressive land use planning laws in this country? What has led advocates to feel that this integrated program has failed to protect some of Oregon’s most valued landscapes? Are the state’s treasured coasts, as many believe, on the brink of serious decline, and if so, what path should Oregon take at this critical crossroads? In our attempt to answer these compelling questions, we begin with a closer look at the mechanics of Oregon’s land use planning program.

C. The Basics of Oregon’s Statewide Planning and Coastal Management Program

SB 100 requires each city and county to develop a comprehensive plan based on the law’s Statewide Planning Goals, which are intended to

51. Press Release, 1000 Friends of Oregon, *Oregon Rated ‘Most Endangered Landscape’ In Nationwide Competition* (Nov. 15, 2001), available at <http://www.friends.org/issues/press.html> (last visited Feb. 5, 2004).

52. Benner, *Growth and the Northwest Landscape*, *supra* note 19, at 17–19.

53. 1000 Friends of Oregon, *Protecting Oregon’s Coast and National Scenic Resources*, LANDMARK, Feb. 1997, at 7 [hereinafter *Protecting Oregon’s Coast*].

54. Benner, *Growth and the Northwest Landscape*, *supra* note 19, at 16.

balance natural resource conservation and economic development.⁵⁵ As a precursor to the plan, baseline information must be gathered. Inventories of biological communities, habitat, renewable and non-renewable resources, geologic and hydrologic hazards, economic needs, land use, development trends, and aesthetics must be conducted.⁵⁶

While all goals require inventories, Goal 5 requires that every comprehensive plan include a section that identifies natural resources and resource values, such as open spaces, scenic and historic areas, beaches and estuaries, and a section that outlines protection mechanisms.⁵⁷ Goal 5 is augmented by information required by, among others, Goals 3, 4, and 15–19, which pertain to agricultural and forest lands, the Willamette Valley, and estuarine resources, coastal shorelands, beaches and dunes, and ocean resources.⁵⁸ Comprehensive plans required by Goal 2, which forms the basis for specific local planning and zoning ordinances, must be adopted by the appropriate governing bodies at the local level and approved at the state level as consistent with the statewide goals.⁵⁹ State action must also be consistent with the goals.⁶⁰ All of Oregon's coastal counties and cities presently have such plans in place.⁶¹

Oregon's Ocean-Coastal Management Program (OCMP) is the administrative arm of the DLCD that deals with Oregon's coastal zone.⁶² Its mission is to "provide the public with sustainable coastal natural

55. OR. REV. STAT. §§ 197.175, 197.250 (2003). The original fourteen goals, first adopted on Dec. 27, 1974, included (1) Citizen Involvement; (2) Land Use Planning; (3) Agricultural Lands; (4) Forest Lands; (5) Natural Resources, Scenic and Historic Areas and Open Spaces; (6) Air, Water and Land Resource Quality; (7) Areas Subject to Natural Hazards; (8) Recreational Needs; (9) Economy of the State; (10) Housing; (11) Public Facilities and Services; (12) Transportation; (13) Energy Conservation; and (14) Urbanization. OR. ADMIN. R. 660-015-000(1)–(14) (2003). Four additional goals relevant to our discussion were adopted on Dec. 18, 1975, to meet the mandates of the CZMA as necessary to get the state program federally approved. The additional goals, which became effective on June 7, 1977, include: (16) Estuarine Resources; (17) Coastal Shorelands; (18) Beaches and Dunes; and (19) Ocean Resources. OR. ADMIN. R. 660-015 0010(1)–(4) (2003). A full description of the rules' intent and how they are to be met is set out in OR. ADMIN. R. 660-001 – 660-045 (2003). See also The Oregon Landuse Information Center, available at http://darkwing.uoregon.edu/~pppm/landuse/land_use.html (last visited Feb. 4, 2004). Several in-depth analyses of the rules have also been written. See, e.g., Robert L. Liberty, *Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons For Other States*, 22 ENVTL. L. REP. 10,367 (1992).

56. OR. REV. STAT. § 197.040(2)(b) (2003).

57. OR. ADMIN. R. 660-016 & 660-023 (2003).

58. *Id.* 660-033, 660-006, 660-020, 660-017, 660-037, 660-036.

59. OR. REV. STAT. § 197.175(2)(a) (2003).

60. *Id.* § 197.040(2)(e); OR. ADMIN. R. 660-030 (2003).

61. *Citizen's Guide*, *supra* note 25, at 2.

62. See OR. REV. STAT. §§ 196.405–196.515 (2003).

resources,"⁶³ and maintain vital, accessible, abundant resources that are free from pollution and that can be developed where appropriate. In addition, in order to create a coordinated approach to coastal management, the OCMP assists in integrating the Statewide Planning Goals with city and county comprehensive plans and with activities of other state agencies that administer coast-related natural resource laws. The OCMP strives to manage the health and integrity of whole ecosystems by maintaining or restoring diversity, stability, complexity and productivity. Priorities of the OCMP include conservation of renewable resources, the use of renewable resources over non-renewable resources and non-consumptive uses over consumptive uses. To achieve its mission, the OCMP promotes local government capacity building, implements natural resource conservation and restoration programs, conducts education and public outreach and conducts environmental monitoring and research.⁶⁴ A major problem with the OCMP, however, is its regulatory authority. While it can enforce certain state laws, such as dredge-and-fill activities on the coast, the OCMP has no direct review authority over completed comprehensive plans or local decisions as to their implementation. And, while coordination is sought, the OCMP does not have control over other state agencies that formulate and enforce policies that can affect coastal environments, such as those relating to agricultural and forestry practices.⁶⁵

D. Challenges to Effective Coastal Planning

Nearly three decades of planning are beginning to reveal some shortcomings in the Oregon experience with land use planning and coastal management programs. Changes are stressing city and county comprehensive plans, and local control is often manipulated to reflect the short-term economic interests of a powerful minority. Commentators charge that less than vigorous comprehensive plans drawn under different circumstances a number of years ago, combined with development pressure, poor zoning decisions, local politics, misinformation, short-term perspectives about growth and development in general, and a significant decrease in citizen participation, now form a recipe for sprawl. Following is a discussion of

63. Oregon Department of Land Conservation and Development, *Ocean-Coastal Management Program*, available at <http://www.lcd.state.or.us/coast/whoware.html> (last visited Apr. 27, 2004).

64. *Id.*

65. The lack of a strong, overarching regulatory body has long been a recurring frustration for Oregon conservationists. Telephone interview by Eugene C. Brickleyer, Jr., with Fran Recht, Director, Ocean Shores Conservation Coalition (Apr. 28, 2002) [hereinafter Telephone interview with Recht (Apr. 28, 2002)].

some of the challenges facing those who aim to conserve Oregon's coastal zone.

1. Comprehensive plans, urban growth boundaries and local politics.

On-the-ground outcomes indicate to some reviewers that comprehensive plans approved for the coastal cities and counties have proven too weak, with poor resource protection and lax development regulations. According to Fran Recht, former president and now a director of the Ocean Shores Conservation Coalition (OSCC), because a majority of comprehensive plans were developed and submitted during the mid-1980s when Oregon was experiencing its worst economic recession since the Great Depression, cities and counties were nervous about including strict rules and regulations regarding development in their comprehensive plans. They felt, not unreasonably, the need to build in safety valves that would allow for emergency measures necessary for economic survival. Even the Statewide Planning Goals and Guidelines were often overlooked at both the local and state levels because the politics of enforcing them were too painful. Comprehensive plans were approved in obvious disregard for the goals and guidelines.⁶⁶

In fact, Robert Liberty of 1000 Friends has concluded that the plans for the coastal cities are often weaker than for other communities, and they are often poorly implemented, often with dire results. Mr. Liberty further argued that piecemeal plan amendments have resulted in too much land being available for development, and he emphasized that, unlike California, which has vested powers in its Coastal Commission, Oregon has no state-level coastal agency with the authority to review local plan implementation decisions.⁶⁷

66. *Id.*

67. Robert Liberty, *The Future of the Oregon Coast: Can It Be Saved From Sprawl?*, available at http://www.friends.org/resources/spch_coast.html (last visited Apr. 26, 2004) [hereinafter Liberty, *The Future of the Oregon Coast*]. See California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-30900 (1996 & Supp. 2004).

According to Mike Weber, a longtime marine and coastal conservationist, activist, environmental writer and native Californian, "[a]nyone born and raised in California shudders to think what our coast would look like were it not for the Coastal Commission." He concluded that California has been largely successful in its conservation efforts in the face of enormous pressure because of the Coastal Commission's ability and willingness to go head-to-head with development interests. The effectiveness of the Coastal Commission comes as a result of its adequate statutory powers, which it has used to rigorously enforce conservation-focused rules and decisions. That the Commission has used its powers, Mr. Weber believes, is largely the result of it having had a strong, dedicated and long-serving executive director. While noting that any state could benefit from a body similar to the

In contrast, Bob Bailey, manager of the OCMP and a professional long involved in coastal and land use programs, disagrees that Oregon's plans are weak. Mr. Bailey believes that certain plans may not be as strong as some people would like, but points out that there are other residents that think the plans are too restrictive. According to Mr. Bailey, the plans "are the result of a complex political process where the ideal [for either of the opposing sides] is never achieved."⁶⁸ Therefore, it is reasonable to conclude that plans drafted twenty-five years ago were so affected by the economic slump that they might be seen as less than rigorous when judged by today's conservation standards.

For much of the last thirty years, one key land use planning element throughout Oregon has been the establishment of urban growth boundaries (UGBs) around incorporated cities, as outlined in Goal 14: Urbanization.⁶⁹ UGBs were a novel idea in the 1970s, and while they also found early (and, perhaps, first) local use in California, Oregon was the first to require them by state statute.⁷⁰ Drawing UGBs requires cities to estimate the amount of land they will need for future growth and development, normally over a twenty year period. They then establish, in conjunction with the county in which they are situated, a UGB. The UGB separates urban and potentially urban land for uses such as housing, industry, commerce, public facilities and infrastructure from rural land for agriculture, forestry, and open and recreational space.⁷¹ A UGB demarcates the area within which a city must concentrate and contain development, and it ensures preservation of open space. Many planners believe UGBs are the single most significant factor in preventing sprawl and maintaining livability; others believe, however, that UGBs are a disaster.⁷²

Coastal Commission, Mr. Weber is not optimistic that one could be created in today's conservation climate. Telephone interview by Eugene C. Bricklemeyer, Jr., with Mike Weber (May 24, 2004) [hereinafter Telephone interview with Weber (May 24, 2004)].

68. E-mail from Robert J. Bailey, Ocean Program Administrator, Oregon Department of Land Conservation and Development, to Shelby Smith (Dec. 27, 2001) (on file with Eugene C. Bricklemeyer, Jr.) [hereinafter E-mail from Bailey (Dec. 27, 2001)].

69. OR. ADMIN. R. 660-015-0000(14) (2003); LCDC 1974, *supra* note 41, at 38.

70. E-mail from Ron Heckart, Librarian, Institute of Government Studies Library, University of California – Berkeley (Apr. 27, 2004) (on file with Eugene C. Bricklemeyer, Jr.); e-mail from Maggie Kauffman, California Department of Housing and Community Development (Apr. 27, 2004).

71. OR. ADMIN. R. 660-015-0000(14) (2003); *Citizen's Guide*, *supra* note 25, at 9.

72. According to the LCDC, a UGB has two functions: (1) to encourage high density land utilization within its boundaries to assure orderly, economic and energy efficient growth and (2) to preserve the land outside its boundaries from urban spillover and speculation that drives out traditional rural land uses. Compliance Acknowledgment Order, App. B at 7–8, *In re Metro Serv. Dist. Regional Urban Growth Boundary* (Or. LCDC Jan. 16, 1980). This is a complex and controversial subject. For a more in-depth explication, see PETER

Until the mid- to late-1980s, most coastal comprehensive plans were untested by significant population increases and development pressures. With the return of growth to Oregon's coastal areas, unanticipated sprawl is beginning to show the inadequacies of policy, planning, rules, and enforcement. It has been reported that some coastal areas have a poor record of focusing growth inside UGBs (e.g., Brookings and Tillamook Counties); that several coastal communities have sought extensive expansions of their UGBs long before infill was complete; and that there are 80,000 acres of land in the coastal region that can be developed as rural residential, commercial, or industrial, otherwise excepted from strict UGB controls.⁷³

Periodic reviews by the LCDC are required for each comprehensive plan and are supposed to occur every five to fifteen years, although their frequency depends upon population.⁷⁴ Furthermore, if communities are below a certain population size, as many coastal communities are, no review is required.⁷⁵ Local governments can also request amendments to their plans, and many such amendments occur every year.⁷⁶ With each periodic review there is an opportunity to update the natural resource inventory or update or modify the comprehensive plan, but, historically, according to conservationists, the review process has been uninspired, yielding few changes and insignificant results.⁷⁷ In addition, the process has recently been streamlined to concentrate on housing, employment and transportation, as well as public facilities and services, none of which help to protect and conserve fragile coastal ecosystems.⁷⁸ According to Mr. Liberty of 1000 Friends:

Unfortunately, periodic review has become a narrow, technical process, which is hostile to public participation and which results in minimal changes to plans and regulations. Why? Part of the

CALTHORPE & WILLIAM B. FULTON, *THE REGIONAL CITY: PLANNING FOR THE END OF SPRAWL* (2001); CALIFORNIA SENATE OFFICE OF RESEARCH, *AN ECONOMIST'S PERSPECTIVE ON URBAN SPRAWL* (2003); Chengri Ding et al., *Managing Urban Growth With Urban Growth Boundaries*, 46 J. OF URB. ECON. 53 (1999); California Department of Housing and Community Development, *Publications Related to Urban Growth Boundaries Issues*, http://www.hcd.ca.gov/hpd/ugh02_02.pdf (last visited May 2, 2004). See also *supra* note 37 and accompanying text.

73. *Protecting Oregon's Coast*, *supra* note 53, at 7-8.

74. OR. REV. STAT. §§ 197.629 (2003); OR. ADMIN. R. 660-025 (2003).

75. OR. REV. STAT. § 197.629 (2003); OR. ADMIN. R. 660-025-0030-0020 (2003).

76. OR. REV. STAT. § 197.610 (2003); OR. ADMIN. R. 660-018 (2003); *Citizen's Guide*, *supra* note 25, at 5 (an average of 4,000 per year).

77. Telephone interview with Recht (Apr. 28, 2002), *supra* note 65.

78. *Id.*

reason is money; doing a broad revision of plans and regulations costs money. Another reason is that re-thinking old strategies and objectives generates controversy, something most elected officials want to avoid. And, of course, many property owners and developers have a stake in keeping plans weak and flexible. But none of these are problems with the laws governing periodic review; they are problems with how that law is applied and problems of funding.⁷⁹

There is an often-repeated truism that “when the power rests in the hands of local planners and politicians, the best and worst of planning will occur.”⁸⁰ Local knowledge and control allow for creative and tailor-made solutions to environmental planning challenges; but, unfortunately, local governments are also often myopic. Mr. Bailey, an OCMP veteran, believes that “local control can equate to no control” However, he acknowledges that, “on the other hand, all politics is local, and we in Oregon defer to the local level for many decisions (which are often messy and not the ones that some would advocate). There is definitely a role for the state . . . [and] that’s why we have statewide goals and policies.”⁸¹

Bailey’s perspective is that local control means that ecosystem-wide management is challenging and can be less than well coordinated. Too often, local planners and politicians lack sufficient knowledge of the natural systems for which they are responsible.

Ninety-five percent of planning is just the nuts and bolts of reviewing applications, permitting proposals and dealing with infrastructure. It’s the same on the coast as it is in eastern Oregon; coastal communities just happen to be located in coastal areas. Local planners generally don’t look at the larger context into which their work fits – or at least they didn’t 15–20 years ago when the original comprehensive plans were created.⁸²

Additionally, local governments sometimes become attached to projects or proposals, which may be contrary to the statewide planning goals and guidelines, but are believed to be essential to the vitality of a small community.⁸³ Mr. Liberty of 1000 Friends adds that:

79. Liberty, *The Future of the Oregon Coast*, *supra* note 67.

80. Interview by Eugene C. Bricklemeyer, Jr., with Alfredo Ortega, Chair, Department of Studies in the Sustainable Development of the Coastal Zone, University of Guadalajara, in Melaque, Jalisco State, Mexico (Jan. 11, 2002).

81. E-mail from Bailey (Dec. 27, 2001), *supra* note 68.

82. Telephone interview with Bailey (Nov. 16, 2001), *supra* note 26.

83. Liberty, *The Future of the Oregon Coast*, *supra* note 67.

[t]oo many county officials who are charged with implementing state land use laws have worked to apply, interpret, or ignore existing laws, plans and regulations, in ways that undercut the objectives of the planning program. Far too many of the decision-making criteria used in these local plans are subjective and vague, lending themselves to highly political and ad-hoc decision-making.⁸⁴

Mr. Bailey acknowledges that it is true that coastal development projects that are unpopular or even ecologically or aesthetically damaging and that may benefit a particular landowner or developer are often approved. However, he does not believe that this is:

anything new, unexpected, or particularly stressing. If anything, I think you could find many, many . . . cases on the Oregon coast where local comprehensive plans and their processes have led to the defeat or significant modification of proposals by 'powerful minority interests' that would not have been possible without the planning framework that the state program provides.⁸⁵

2. Incomplete natural resource inventories and poor zoning.

As noted, an inventory of areas with important natural or historic values, as set out in the Goals (especially 3, 4, 5, 16–19), was a backbone prerequisite for the development of local comprehensive plans.⁸⁶ However, some observers believe many of the inventories are too general to identify important resources and critical habitats and that certain land categories (e.g., wetlands) were either determined to be of little consequence or not inventoried at all.⁸⁷ Sites that do not appear on an inventory or are inadequately quantified are not protected by plans and may be lost to development.⁸⁸

Fran Recht of the Oregon Shores Conservation Coalition (OSCC) and a member of the planning commission for her coastal town of Depot Bay, feels that this problem is a very large and important shortcoming of the program. Ms. Recht believes that some counties have never done an adequate inventory at all, and she notes that, in some circles in those

84. *Id.*

85. E-mail from Bailey (Dec. 27, 2001), *supra* note 68.

86. *See text accompanying supra* notes 56–57.

87. Telephone interview with Recht (Apr. 28, 2002), *supra* note 65.

88. *Citizen's Guide*, *supra* note 25, at 13.

counties, golf courses are considered adequate "open space" to meet statewide goals and plan requirements.⁸⁹

While OCMP's Bob Bailey generally agrees that resource inventories in local plans may be out of date and incomplete, he emphasizes the positive outcomes of the requirement as to estuarine protection. According to Mr. Bailey:

As a direct result of these inventories, local governments were required to plan and zone their estuaries specifically to protect habitats and only where a clear and specific justification could be made for development were they allowed to plan for something other than protection. As a result, there has been almost no development-related alteration of any Oregon estuary since the early 1980s There are many examples where this protection has enabled the restoration of estuarine habitats to wild conditions.⁹⁰

Thus, again it would appear that the problem is not with the law, but with how and how well the law is implemented. It should be noted that, as our discussion is one about achieving *integrated* coastal management, just preventing dredging, filling, or diking does not guarantee estuaries are protected. In its 1997 report rating the Oregon's land use management plan, 1000 Friends noted that "Oregon's 21 major estuaries and numerous coastal streams and lakes . . . face growth-related challenges including pollution from industrial and human wastes, which has limited shellfish harvesting."⁹¹ Protection must be an ongoing process.

Under the Goals and Guidelines and resultant comprehensive plans, zoning of rural lands is generally determined by the suitability of the land for forestry or farming and by the existing pattern of rural development. Generally, "lands that are forested or that can be farmed must be zoned for forestry or agriculture."⁹² Also, "[w]hen resource lands are clearly committed to non-forest and non-farm uses, they may be appropriate for other uses, for example, rural housing."⁹³ Permissible zoning decisions in these latter areas are based on parcel size, proximity to existing forestlands or farms, availability of services, and consideration of natural boundaries, and are commonly referred to as "exception areas" or "legacy land"

89. Telephone interview by Shelby Smith with Fran Recht, Director, Oregon Shores Conservation Coalition (Nov. 27, 2001).

90. E-mail from Bailey (Dec. 27, 2001), *supra* note 68.

91. *Protecting Oregon's Coast*, *supra* note 53, at 8.

92. *Citizen's Guide*, *supra* note 25, at 10.

93. *Id.*

because they have been “excepted” from state land use goals intended to protect farm and forest lands.⁹⁴ Unincorporated rural communities exist outside UGBs and are zoned for continued residential development and limited commercial and industrial development.⁹⁵ As noted earlier, 80,000 acres are now designated “excepted areas” along Highway 101.⁹⁶ Development here could occur in a way that certainly does not fit general notions of preservation of open space and wildlife habitat.

Inappropriate zoning has resulted in coastal development in hazardous ocean-edge locations, fostered by amendments to beach setback lines, that can then result in the necessity of authorizing riprap or seawalls to protect houses now threatened by their proximity to an eroding shore.⁹⁷

According to Ms. Recht, a lack of awareness of cumulative environmental impacts and poor long-term planning have led planners to zone areas around park boundaries for high-density residential and commercial development. This has led to the construction of time-share condominiums, commercial hotels and resorts immediately adjacent to park boundaries along the coast. Nowhere is proper zoning more important than on the edges of state parks and protected areas. Over 100 state parks and scenic waypoints dot the Oregon coast. Close proximity allows these developments to treat state parks and natural areas as their own backyard, often subjecting them to over-use and abuse.⁹⁸

Unchecked visitation by high volumes of people can cause damage to fragile ecosystems and coastal resources and results in a sense of crowding on Oregon’s beaches that is both unplanned and unwanted. As Ms. Recht explains in discussing a large time-share development at Gleneden Beach:

Tourists who come in and only have a week are going to maximize their use of the beach. They have neither a sense of community and place nor knowledge of how a complex beach/tide pool ecosystem is sustained. They also have no long-term reason to protect the resource. Whereas a resident might not take her dog to the beach the next day after she discovers a seal pup on the shore, or allow dogs to chase shorebirds, such might not be a typical response of a time-share guest. The resident almost certainly

94. *Id.* See also *Planning Goals 2000*, *supra* note 48, at Goal 14: Urbanization; Robert L. Liberty, *Oregon’s Comprehensive Growth Management Program*, 22 ENVTL. L. REP. 10,367 (1992); Liberty, *The Future of the Oregon Coast*, *supra* note 67.

95. *Citizen’s Guide*, *supra* note 25, at 10.

96. *Protecting Oregon’s Coast*, *supra* note 53, at 8.

97. *Id.* at 7–8. Such obstructions of the littoral drift are detrimental, among other things, to the lateral flow of sand and thus natural beach nourishment and sustenance.

98. Telephone interview with Recht (Apr. 28, 2002), *supra* note 65.

would not pluck a starfish, attractive and flourishing in its tide pool habitat, and carry it home to have it become a dead, stinking nuisance the next day to be dumped out.⁹⁹

3. Planning's unused conservation tools, and the myth that growth is always good.

Fundamental assumptions sometimes go unstated in planning because they are politically volatile, resulting in essential information being suppressed, ignored or uncollected. One of the most potent of these misconceptions is that growth is always beneficial to a local (or county or state) economy. In fact, development is often significantly more expensive for communities than no development and the preservation of open landforms. In many cases, development can act as a drain on local economies rather than as a boost due to the costs of providing requisite infrastructure (e.g., streets, sewers, police and fire services, schools, etc.). This can be more expensive (even without consideration of externalities discussed below) than purchasing undeveloped land – or at least the development rights – for conservation purposes. Eben Fodor, an Oregonian, economist and planner who has long worked on land use planning issues in the state, notes that “[the] public costs [of providing infrastructure] are usually distributed across the entire population of a community through property taxes or general obligation bonds, whereas the benefit of these investments often accrue primarily to the new development.”¹⁰⁰

Acquisition for conservation, often a far surer way to conserve than through regulation, and, as stated, often less expensive than growth, can occur in a number of ways. Open-space bonds and real estate transfer taxes (a small percentage of which are assessed on property sales and specifically allocated to conservation) are one way to provide revenue for purchase of land or development rights. These tools are unfortunately often overlooked. “Although all coastal states own coastal properties, only three use state ownership and land management as the primary tool for resource protection.”¹⁰¹ Similarly, Mr. Benner concludes that:

99. *Id.*

100. Eben Fodor, *The Real Cost of Growth in Oregon*, 18 POPULATION AND ENV'T 373, 374 (1997). “Our society’s depletion of natural capital in the form of nonrenewable resources will undoubtedly have an impact on future generations. Irreversible contamination of, or damage to, the environment has similar future costs.” *Id.* at 378. Global warming immediately comes to mind. For a more extensive and updated version of this work, see EBEN FODOR, ENERGY & ENVIRONMENTAL PLANNING ASSOCIATION, *THE COST OF GROWTH IN OREGON: 1998 REPORT* (1998).

101. Tina Bernd-Cohen & Melissa Gordon, *State Coastal Program Effectiveness in*

[a]cquisition provides not only a safety valve but also a creative mechanism for those unique circumstances for which landscape management cannot provide. Lodged in the hands of a 'conservancy' – an entity designed to buy and sell interests in land – the ability to acquire an interest in property, such as a scenic easement, can save a landscape from discordant development.¹⁰²

There will be a loss of some ad valorem real estate tax income, but savings more than offsets this effect because, as proponents are fond of pointing out, "deer and seagulls don't require schools, policemen, traffic lights, or a waste treatment facility."¹⁰³

There are also additional costs of development that, though they might be quantifiable in economic terms, are most often incurred as externalities. Mr. Fodor writes that "[t]he physical changes resulting from urban expansion are permanent. We make irreversible commitments of resources – land, energy and water. We create social and environmental impacts on the existing community. And we incur economic costs, many of which are not paid by the new development itself."¹⁰⁴ Loss of habitat, decreasing wildlife populations and pollution are all external costs of development. If Oregon's coastal communities are to alter their apparent current trend toward sprawl, they must create mechanisms for planning and permitting processes that ensure that these costs are included in the costs of development.

Unfortunately, in the United States, governments are often structured to encourage growth in ways that actually facilitate sprawl. Looking through an Oregon lens, Mr. Fodor notes that:

[i]t is reasonable to say that virtually every community in the United States subsidizes growth, most to a great extent. In some cases, there may be benefits to the community associated with this growth. However, the public costs should be compared with the public benefits to determine whether continued subsidization is in the public interest.¹⁰⁵

Fiscal and human resources that are used to subsidize growth cannot be used for programs that restore urban vitality, enrich community culture, and

Protecting Natural Beaches, Dunes, Bluffs, and Rocky Shores, 27 COASTALMGMT. 187, 212 (1999).

102. Benner, *Growth and the Northwest Landscape*, *supra* note 19, at 15.

103. Telephone interview with Weber (May 24, 2004), *supra* note 67.

104. Fodor, *The Real Cost of Growth in Oregon*, 18 POPULATION AND ENV'T at 374.

105. *Id.* at 387.

protect open spaces, habitat and wildlife, in short to bolster all aspects of what makes a place livable.

Oregon has a process under its constitution that allows the people to pass legislation directly through an initiative placed on the ballot.¹⁰⁶ In 1998, this resulted in the passage of Ballot Measure 66, which amended the state constitution to require that certain funds from a state-run lottery be used to purchase land for preservation.¹⁰⁷ While this is a valid source for accomplishing what is referred to above, the state, unfortunately, appears neither to be spending the money in a timely fashion nor acquiring appropriate property.¹⁰⁸

*E. Democracy, Personal Values and the Land:
The Uncertain Significance of Recent Changes.*

Perhaps the most often voiced "greatest failure" of Oregon's land use program has been that it has failed to ensure democracy in planning. 1000 Friends gives the state a "D" grade for its efforts.¹⁰⁹ "For three-fourths of the cities and counties in the state, Goal 1 has become a hollow shell. Its requirements are not being followed. Its objectives are not being met."¹¹⁰ Citizen Involvement, Statewide Planning Goal 1, was well utilized in the initial years of the development process for growth management goals and comprehensive plans, but by the early 1980s, after all the plans were in place, citizen participation sharply declined. This drop has been the result of a combination of factors, including local governments that felt that once the plan was adopted, the need to involve citizens was no longer necessary, and citizens who figured that the heavy lifting was done and became apathetic about the process of permitting, plan amendment and periodic review. Furthermore, since those early, heady days after SB 100 was passed, more than a million new citizens have come to live in Oregon, citizens who had no direct involvement in setting up the land use programs in their communities.¹¹¹

106. OR. CONST. art. IV, § 1(2) (2003).

107. Oregon Ballot Measure 66, Voters' Pamphlet for Nov. 3, 1998 Election; OR. CONST. art. XV, § 4(10) (2003).

108. Telephone interview by Eugene C. Bricklemyer, Jr., with Chris Beck, Oregon State Representative (May 3, 2002).

109. 1000 Friends of Oregon, *Citizen Involvement*, LANDMARK, Feb. 1997, at 24 [hereinafter *Citizen Involvement*].

110. *Id.* at 23. The results of a 1996 DLCD survey generally support 1000 Friends' findings that some mechanisms necessary to assure citizen involvement were either moribund or had never been established at all. *Id.*

111. *Id.* at 22.

While issues involving the siting of prisons and landfills have briefly galvanized people on a local level, interest immediately waned again once those decisions were made.¹¹² There have also been a series of administrative amendments concerning how the public process works, from changes in notification rules to increased fees for requested hearings, and there has been legislative action to streamline the development procedures.¹¹³ According to 1000 Friends and the DLCDC's own research, "many local governments [now] make only token efforts to involve citizens in the crucial, periodic review of plans."¹¹⁴

Most parties tend to agree that for far too long there have been no sustained or successful citizen participation programs, and that for two decades, nothing has managed to bring citizens back into the critical, ongoing planning process.¹¹⁵ Observers note that local governments, when challenged about not meeting their citizen involvement goal, often will say that their planning commission is their citizen involvement committee. Yet, it is the city councils that appoint their planning commissioners, and a common complaint is that the councils do not often seek, at least on the coast, to have a diverse representation of opinions. Rather, some would say that the city councils stack their commissions with those who would support the position that "all development is good development."¹¹⁶

Now, although rural communities are still often anti-planning, the experience of rampant growth has recently provoked what some observers believe are dramatic shifts in attitude. While still at the DLCDC, Richard Benner wrote that "[v]oters . . . across the state are enacting by local initiative city charter provisions that require a vote on every annexation, in order, supporters say, to gain control they feel they have lost over the local planning process. A recent 'no growth' conference in Portland attracted a standing-room-only audience over six-hundred strong."¹¹⁷ Growth management non-governmental organizations (NGOs) like 1000 Friends and its network of affiliates and cooperating organizations from local land trusts to planning groups are gaining in members and credibility. These include Citizens for Orderly Development, Friends of Bend, Friends of Eugene and the Hood River Valley Residents Committee. New organizations are forming in support of halting growth altogether. For instance,

112. Telephone interview with Recht (Apr. 28, 2002), *supra* note 65.

113. *Id.*

114. *Citizen Involvement*, *supra* note 109, at 24.

115. *Id.* at 22.

116. Telephone interview by Eugene C. Brickleyer, Jr., with Fran Recht, Director, Oregon Shores Conservation Coalition (Oct. 13, 2003) [hereinafter Telephone interview with Recht (Oct. 13, 2003)].

117. Benner, *Growth and the Northwest Landscape*, *supra* note 19, at 16.

Alternatives to Growth Oregon (AGO) was founded in 1998 to address the root causes of both environmental degradation and social injustice, which include increasing population and consumption. AGO is leading a statewide effort to build sustainable communities that recognize limits to growth. AGO's position is that the intensity of citizen concern indicates that the state has reached the point that a failure to curb inappropriate growth may jeopardize Oregon's land use planning program and the economic future of the state.¹¹⁸

A positive change in environmental awareness may also be evident in the results of a local household opinion poll conducted in 1998 in rural coastal Tillamook County. The poll was a part of the Strategic Visioning Project conducted by the nonprofit Tillamook County Futures Council established by the Board of County Commissioners.¹¹⁹ Mailings were sent to over four-thousand residents, onethousand of which responded. The survey of random households asked residents to rank a set of policy priorities in order of importance. The initiative "To sustain the most important qualities of Tillamook County we must protect the natural features of the area" ranked second.¹²⁰ "The abundance of wildlife in the County is important to conserve" ranked fourth, and "To improve fish habitat and water quality we must preserve riparian areas along our streams and estuaries" ranked seventh. Overall, fifteen of the top thirty priorities were related directly to environmental preservation, environmental quality or land use planning.¹²¹ The results appeared to indicate a social climate willing to create and implement policies for conservation and sustainability.

And yet, as Bob Bailey points out, democracy is "messy:"

This is the same county that in 2000 failed to re-elect two county commissioners who were attempting to develop county policies

118. Alternatives to Growth Oregon, available at <http://www.agoregon.org/page.asp?navid=39> (last visited Feb. 5, 2004).

119. Tillamook County Futures Council, available at <http://tcf.tillamook.k12.or.us/> (last visited Apr. 25, 2004).

120. Tillamook County Futures Council, *The Big Book: Strategic Vision for Tillamook County*, available at http://tcf.tillamook.k12.or.us/newbook/new_Chapter6.htm (last visited Apr. 25, 2004). "The Big Book" documents the creation of the Strategic Vision for Tillamook County, a process begun in 1998, and has developed into a series of benchmarks that look into the county's future in 2020. "The Big Book" describes how the twenty-thousand residents and property owners in the rural coastal area of Tillamook County were invited to participate in a series of public processes designed to identify ways to preserve and protect existing highly-valued features and to improve conditions for the future. The work was funded by the state Economic Development Department and facilitated by the University of Oregon's Community Planning Workshop.

121. *Id.* Even the top-ranking concern, "We must assure that our sewage treatment plants are adequate," has its environmental implications. *Id.*

and programs to carry out many of those values, and instead elected two commissioners with a different set of priorities and values as regards land use planning and environmental protection. This survey does not indicate a failure of citizen involvement in the coastal zone [but when viewed with the election results] it shows a disconnect between the values expressed and a willingness to vote that way at election time. That is citizen involvement at its most basic.¹²²

Allison Asbjornsen, an OSCC board member and Tillamook County resident, does not disagree about the disconnect, but argues that this is not the complete story. According to Ms. Asbjornsen, there was a very strong, virulent campaign leading up to the election, complete with newspaper ads of guns pointed at the reader emphasizing the certainty of regulatory gridlock, financial ruin, etc. A major focus of the campaign was related to a proposed countywide riparian ordinance, a voluntary program to deal with water-quality-limited streams. Not only were farmers around Tillamook concerned, but the Oregon Farm Bureau and the Oregon Cattlemen's Association were afraid that the standards would become statewide expectations for riparian setback. Ms. Asbjornsen concludes that, if one asks residents what they are concerned about today, the overwhelming response is the desire for clean air and clean water. But exactly how that affects actions is up for grabs, as there currently is a battle brewing over a proposal to build a golf course on part of a 240-acre parcel immediately adjacent to Sand Lake Estuary. This land has wetlands and estuarine components and, according to some, is one of the last places that should be developed in this manner.¹²³

Despite these concerns, Bob Bailey does not believe that there is a failure in the state's framework. While he agrees that citizen participation could be more robust and that land use decisions could be more reflective of local sentiment, he also believes that DLCD, OCMP and local governments are doing everything possible to get the public involved. Mr. Bailey argues that the Tillamook experience shows that one cannot judge what is going on just by what people say.¹²⁴ To cure some of the public participation problem (real or perceived), at least in instances of DLCD and LCDC rulemaking, goal amendments and certain policy efforts, the DLCD has

122. E-mail from Bailey (Dec. 27, 2001), *supra* note 68.

123. Telephone interview by Eugene C. Brickleyer, Jr., with Allison Asbjornsen, board member, Ocean Shores Conservation Council, and resident, Tillamook County (Jan. 9, 2004) [hereinafter Telephone interview with Asbjornsen (Jan. 9, 2004)].

124. E-mail from Bailey (Dec. 27, 2001), *supra* note 68.

proposed that the LCDC adopt and implement Citizen Involvement Guidelines for Policy Development.¹²⁵

One final interesting statewide survey is carried out annually by the Oregon League of Conservation Voters Education Fund. Its purpose is to keep public officials apprised of voter sentiment on highly visible issues. The results identify topics in order of importance to voters, and while generally following a pattern repeated over the past several years, environmental concerns are further down in this year's list. Beginning with the most important, the issues were as follows: gas prices; economy and jobs; health care; education; the state's budget deficit; Medicare and Social Security; taxes; private property rights; environment in general; clear air and water; energy issues; terrorism and security; and sprawl and overdevelopment. Of those surveyed, eighty percent rejected the myth that a clean environment and a strong economy are in conflict. Also, by a two-to-one margin, those surveyed responded that protecting Oregon's coastal bluffs and bays from sprawling development was extremely important or very important.¹²⁶

What exactly is going on in Oregon when it comes to the vision of Governor McCall is further muddied by several recent property rights initiatives placed on the ballot by the voters. The first was rejected by a majority of Oregon voters four years ago.¹²⁷ Measure 7 contained the most restrictive language on the subject of government "takings" in the United States. Had it gone into effect, Measure 7 would have changed the Oregon constitution to require payment to a property owner for almost any action a government conceivably could take that limited the use of private land.¹²⁸ Within weeks of the vote, two separate lawsuits had been filed, and a

125. Oregon Department of Land Conservation and Development, *Citizen Involvement Guidelines For Policy Development*, available at <http://egov.oregon.gov/LCD/docs/publications/citinvguidepoldev.pdf> (last visited Nov. 6, 2004). "The purpose of these guidelines is to provide and promote clear procedures for public involvement in the development of Commission policy on land use." *Id.* The guidelines are an update of earlier public involvement documents adopted by the LCDC. *Id.*

126. Oregon League of Conservation Voters Education Fund, *Results of OLCV Education Fund 2004 Telephone Poll*, available at <http://www.olcveducationfund.org> (last visited Jan. 10, 2005). The statewide telephone survey gathered opinions from 600 registered voters plus interviews with 200 voters living in zip codes located along the Oregon coast. *Id.* It was held from May 26–28 and on June 22, 2004. *Id.*

127. Oregon Ballot Measure 7, Voters' Pamphlet, for Nov. 7, 2000 Election. See also OR. CONST. art. 1, § 18 at Historical Note (2003).

128. *Id.* Measure 7's proposed amendment of the Oregon Constitution would have replaced language that currently requires just compensation to be paid a property owner if government action deprives the property owner of *all* economically viable use of his or her land with language requiring payment for *any* reduction in the beneficial use of a property owner's land. OR. CONST. art. 1, § 18.

Marion County trial court enjoined the Secretary of State from canvassing to determine if the measure had passed. By January 2001, a motion for summary judgment for the plaintiffs in the consolidated cases had been granted.¹²⁹ In February 2001, Measure 7 was held to be in violation of the “separate vote” requirement of the Oregon constitution.¹³⁰ On appeal, the Oregon Supreme Court agreed with the trial court. In an *en banc* decision issued on October 4, 2002, the court held that Measure 7 was not adopted in compliance with the requirements of the Oregon constitution and that it was void in its entirety.¹³¹

While the initiative ultimately failed, a question remains: What does such a measure say about the values of the Oregonians who voted in favor of it? Does it mean that the grand idea of the common good, to which individual private profit is made subservient, the idea that propelled the passage of SB 100, is dead?

Fran Recht argues that people are generally not well informed with respect to politics and, therefore, conservative candidates do not come across as radical. While often appearing moderate during the election, the policies implemented by the candidates after the election turn out to be otherwise.¹³² Or, as Allison Asbjornsen points out, at least in cases like that of Tillamook County, voters are frightened or maybe misled.¹³³ Ms. Recht likewise concludes that “candidates say they are for the environment; the public believes they are and votes for them. But once elected, it turns out that they really are not pro-environment at all, and, in fact, they are often radically hostile to its protection.”¹³⁴

“Maybe,” according to Ms. Recht, “that explains Measure 7 as well. But more likely, the reasons are more difficult to divine.”¹³⁵ These reasons revolve around concepts of the “public interest” in the coast and coastal protection. Taking care of the natural environment that we all share and enjoy is a broad general interest proposition; in reality, people often just do not see these resources as being specifically threatened, or, as is often

129. *League of Oregon Cities v. Oregon*, 56 P.3d 892, 896–97 (Or. 2002).

130. *See id.* The unreported lower court cases, *McCall v. Kitzhaber* and *League of Oregon Cities v. Oregon*, were consolidated. The lower court held that Measure 7 violated the Oregon Constitution’s mandate that “when two or more amendments shall be submitted . . . to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately.” OR. CONST. art. XVII, sec. 1.

131. *League of Or. Cities*, 56 P.3d at 911.

132. Telephone interview with Recht (Oct. 13, 2003), *supra* note 116.

133. Telephone interview with Asbjornsen (Jan. 9, 2004), *supra* note 123.

134. Telephone interview with Recht (Apr. 28, 2002), *supra* note 65; e-mail from Fran Recht, Conservation Director, Oregon Shores Conservation Coalition, to Eugene C. Bricklemeyer, Jr. (Oct. 14, 2003) (on file with Eugene C. Bricklemeyer, jr.).

135. Telephone interview with Recht (Oct. 13, 2003), *supra* note 116.

found, many people think that they are already protected and/or are being taken care of by the government (DLCD and OCMP) or others (conservation groups such as 1000 Friends). But on the other side of the equation, there is the "private interest" and its kin, "self interest." These interests are both specific and potentially directly threatened by rules that protect the natural environment. Finally, it is entirely possible that a majority of Oregonians support the protection of the environment and the ascendancy of the common good; but not enough of them are sufficiently motivated to act on this and vote.¹³⁶

This citizen apathy occurs for all the obvious reasons, and perhaps, in this case as well, because the visions usually associated with the coast are often beautiful, idyllic ones like the one in this article. Such visuals could reinforce an insufficient sense of urgency and peril. Nevertheless, some, including Ms. Recht, believe that a sufficient number of Oregonians are becoming alarmed at the true implications of a Measure 7-type initiative (especially as to the issue of where the money would have come from to pay for all of the takings) and predict that if such a measure is introduced in the future, Oregonians will vote "no."¹³⁷

While those that believe Oregonians will never again pass a Measure 7-type initiative have not been proven totally wrong, the combination of apathy and self interest mentioned above resulted in a son-of-Measure 7-type initiative being overwhelmingly passed in the November 2004 election. Measure 37, less draconian than Measure 7, is a statutory scheme instead of a constitutional scheme. It requires that "governments must pay owners or forgo enforcement when certain land use restrictions reduce property value."¹³⁸

Exactly what this means for protective land use regulations depends on how actively citizens use the new law, in other words how many applications there are for cash or waivers. According to Shirley Kalkhoven, chair of the Tillamook County Futures Council, while several hundred claims

136. *Id.*

137. *Id.*

138. The Oregon Voters Guide for Nov. 2, 2004 General Election, *Measure 37*, available at <http://www.sos.state.or.us/elections/nov22004/guide/cover.html> (last visited Jan. 14, 2005). Administrative rules have been promulgated by the Oregon Department of Administrative Services, Risk Management Division, and are available at <http://www.oregon.gov/DAS/Risk/docs/m37Rule.pdf> (last visited Jan. 14, 2005). Also, the DLCDC has established a Web site on Measure 37. See Oregon Department of Land Conservation and Development, *Measure 37 Information*, available at <http://egov.oregon.gov/LCD/measure37.shtml> (last visited Jan. 15, 2005). Election results for Oregon are posted by the Oregon Secretary of State. See Oregon Secretary of State, *General Election November 2, 2004*, available at <http://www.sos.state.or.us/elections/nov22004/nov22004/g04abstract.html> (last visited Mar. 20, 2005).

have been registered statewide, for now no lawsuits have been filed, either by those opposed to Measure 37 or those who seek to nullify limitations on their property rights. The Oregon legislature is back in session, and it could weigh in and amend the measure; but because the measure was passed by an almost two-to-one margin (only in one county did a majority of voters cast “no” votes), Ms. Kalkhoven recommends that observers simply “stay tuned.”¹³⁹

During a round table discussion of the authors of this series, the topic of property rights and ownership was addressed. Here, another perspective, a third way to look at rights to land and stewardship, was introduced by the Mexican authors. Beyond the concepts of public ownership/public interest and the diametrically opposed private ownership/self-interest is a category called “community ownership” and its intimately linked component “community interest.” Community ownership is not a novel approach in Mexico, as property was and often still is owned by the *ejido*, or community. Before such land can be altered or sold, a community consensus must be reached. Community ownership takes the public interest concept and brings it down to a local level where threats can be seen as real, direct, specific and quantifiable. At the same time, community ownership keeps land use issues one level above an individual’s personal self-interest. Is it possible to introduce this concept into the mechanisms employed for coastal protection in the United States? It seems that today, a significant portion of American society is becoming more interested in what makes a “viable community” and then either creating one or seeking out one in which to live. Thus, this idea of the community preserving its environment seems a natural fit.

139. Telephone interview by Eugene C. Bricklemeyer, Jr., with Shirley Kalkhoven, Chair, Tillamook County Futures Council (Dec. 31, 2004). 1000 Friends of Oregon also has a Web site devoted to the issue. See 1000 Friends of Oregon, *Why We Are Opposed to Waivers of Zoning Protections & No Public Process*, available at <http://www.friends.org/issues/m37.html> (last visited Jan. 20, 2005). According to 1000 Friends:

We believe Oregon voters approved Measure 37 with the understanding that they were voting for greater fairness in Oregon’s land use system. However, we believe Measure 37 also includes several provisions that are inherently unfair and toxic to the democratic process.

Measure 37 is an unfunded mandate with one clear objective: to rollback Oregon’s land use protections. The measure makes the false promise of payments to property owners, but local and state governments simply do not have the money for such payments. It is inherently unfair to authorize government to issue waivers arbitrarily for select property owners. In the absence of adequate funding, the effect of Measure 37 is to force government to issue such waivers.

With respect to land use controls, it is not possible to predict what the future holds for the Oregon coast. It is, however, clear that the debate to derive the proper vision for livability and sustainability on the Oregon coast will be both a continuing and lively one. The confluence of issues is clear. Oregon is faced with continuing population growth coupled with the results of questionable local planning, zoning and development practices. There is the incredible escalation in the price of land on the coast and a wave of affluent people reaching retirement age who appreciate what the coast can offer. How the Oregon coast will look in five, ten or twenty years depends on the legacy past visionaries have instilled in local environmental activists, statewide conservation organizations, workers in the resource extractive and construction trades, property rights proponents, politicians, Oregon residents and visitors.

III. EVALUATION OF THE OREGON EXPERIENCE

What is the actual state of the Oregon coast from an on-the-ground perspective? How well have the management programs worked? While the answers to these questions may be elusive, there is no shortage of opinions on the subject, and often diametrically opposed ones.

As director of the DLCD in 1998, Richard Benner wrote that UGBs had contained urban growth, though he impliedly conceded that sprawl was sometimes occurring inside UGBs due to a lack of proper development densities. During his tenure, he found that expansions of UGBs had been minimal, and he concluded that Oregon was the closest thing America had to a "deliberate" place. However, he also stressed that Oregon's sacred locales were still at risk of being lost.¹⁴⁰

On the other hand, Robert Liberty and 1000 Friends see sprawl, a lack of protection of coastal, natural and scenic resources, and a decline in public participation in the growth planning process as problematic in Oregon. On these subjects, they give the state a "D" grade.¹⁴¹ Similarly,

140. Benner, *Growth and the Northwest Landscape*, *supra* note 19, at 12-13, 16. The average density of new developments in Bend, Oregon, was two units per acre. *Id.* at 6. As an example of the fast and threatening development on the coast, Mr. Benner points to condominium developments on dunes of questionable stability in Netarts, the proliferation of trophy homes at Chapman Point at Cannon Beach and golf course developments in Bandon. *Id.* at 18-19.

141. *Protecting Oregon's Coast*, *supra* note 53, at 7-10. The coastal UGBs, like the Brookings area and Tillamook County, had a high percentage of growth outside their boundaries. A single 3,500 acre UGB expansion was approved for Brookings, larger than all the expansions approved for Portland during the last fifteen years. Five coastal counties approved an inordinate share of all dwellings allowed in forest zones, especially in Coos and Lincoln counties, and from 1982-1992, Oregon lost 4,000 acres of wetlands and deep-water

Fran Recht sees inappropriate development, the failure of cities and counties to meet the requirements of SB 100 and an increasing sense of loss of wild places on the land's edge as proof of the state's shortfalls in coastal conservation. To her, these problems are most clearly exemplified by the two-thirds decline in Western Snowy Plover nesting sites and the concomitant plummeting population of nesting birds.¹⁴²

Bob Bailey of the DLCDC Coastal Program feels that the comprehensive plans have been useful, that public participation has worked and that, while some growth has occurred, it is mostly where it was intended to be. "If there is one thing I am struck by while I travel the coast, it is how much it is today as it was in the mid-1970s or before."¹⁴³

What we found most striking was that no one can trumpet a definitive assessment on the environmental status of the Oregon coast. We could not locate a document complete with maps and aerial photos of areas with UGBs and special natural and historic resources that analyzed how the land looked before and, after three decades of protection strategies, how the land looks today. Everyone agrees that there has been some growth, yet the authors of this paper could not find a single critical, analytical, and quantitative evaluation about the current state of Oregon's coast.¹⁴⁴

habitat to development. *Id.* at 8–10.

142. Telephone interview with Recht (Apr. 28, 2002), *supra* note 65. Plovers are easily bothered, and their nests, placed directly on the sand above the high tide mark, are easily disturbed. The birds were listed in the Endangered Species Act of 1993. A recently completed draft of a U.S. Fish and Wildlife Service recovery plan discloses that from a historic high of twenty-nine Plover nesting sites, there are now only nine, and no greater than one-hundred birds make use of them. These declines are attributable to a number of factors, including the spread of invasive species of grasses, but undeniably high on the list are human disturbances and disturbances associated with wild and domesticated animals (including residents' and visitors' dogs). *Id.*

143. E-mail from Bailey (Dec. 27, 2001), *supra* note 68. With respect to development pressure, Mr. Bailey agrees that there is some in certain areas like Newport, but little to none in other like Coos County. According to Mr. Bailey:

I can think of no coastal county where there has been major (or even minor) change in the basic land use pattern after 1997 that has led to "significant loss of habitat and open space." True, some areas have urbanized a bit (around Astoria, Newport, Florence, Brookings . . . and within Lincoln City) within the Urban Growth Boundary, but that is where development is supposed to go. \

Id.

144. The "Portland Oregonian" published a two-part series reporting on the growth in Oregon's coastal cities from 1990–1996. The results were as follows: Warrenton grew 56% to 3,600; Brookings grew 49% to 5,400; Manzanita grew 48% to 755; Florence grew 29% to 6,400; Gold Beach grew 37% to 2,115; Depot Bay grew 25% to 1,045; and Bandon grew 24%, adding over 500 residents. Peter L. Sleeth & Foster Church, *Oregon's Crowded Coast*, THE OREGONIAN, July 6, 1997, at A1 and July 7, 1997, at A1. The series, subtitled

Such a study could surely be done. It would involve going back to the period right after the end of World War II – say 1950 – and charting the changes on the coast until SB 100 was passed and the related land use plans were implemented. One would then follow changes to the present. Did the changes occur as planned or as advisable? Aerial photos have been taken for fifty years by a combination of state and federal resource agencies. Building permits could be digitally separated on the basis of whether the site was on the coast or near a significant natural area. With the aid of hindsight, was development in Oregon planned as it should have been? Since SB 100, has Oregon's growth been consistent with the vision of its drafters or to that first shaped when Governor Oswald West declared the beach a state highway in 1913?

IV. BROADER LESSONS FROM OREGON

The Oregon experience would seem to indicate that, in order to have a successful coastal conservation regime at the state level, at least the following elements must be included (with the first three occurring almost simultaneously):

1. *Leader(s) and a vision.* Here, the plan for the conservation and sustainable development of the coastal zone (CSDCZ plan) should be put forward.
2. *A compilation of facts.* Such facts should create an initial natural and cultural resource inventory, assess growth pressures and preliminarily determines the significant natural features that could be lost if no action is taken.
3. *An education program.* From the outset, an informed, supportive and involved electorate must help to fully form the vision, lobby it into reality and ultimately comply with it in practice.
4. *A roadmap law.* This process involves the passage of a state CSDCZ law requiring locally developed and implemented

"Sanctuary Under Siege," noted that actual growth outstrips the population data because many houses being built serve as second homes for part-time residents. For example, Seaside had a nine percent growth in population, adding 501 people, yet issued 1,013 residential and commercial building permits during the same period. *Id.* Likewise, Florence added 1,229 to its population at the same time it issued 2,061 building permits. *Id.* For more recent population growth data in these regions, see generally, 1000 Friends of Oregon, available at <http://www.friends.org/> (last visited Sept. 21, 2004) and Alternatives to Growth Oregon, available at <http://www.agoregon.org/> (last visited Sept. 21, 2004).

- comprehensive growth management plans guided by qualitative and quantitative standards. Again, public participation is critical.
5. *State management agency.* The roadmap CSDCZ law should create a strong, dedicated and adequately funded state agency and place it clearly in charge of coastal conservation and sustainable development. The agency should use its legislated power and powers of persuasion to see that the law is enforced and the vision manifested.
 6. *Local CSDCZ plans.* Such plans are where “the rubber meets the road.” They establish the specifics of how the vision and the state law are actually applied to land use regulation. The process must include mechanisms (*e.g.*, hearings) to encourage full community involvement in plan development.
 7. *State agency approval.* The state management agency must approve initial local CSDCZ plans and any subsequent local amendments. It must also conduct periodic reviews to ensure compliance.
 8. *State coastal commission.* Also created by the CSDCZ law, a strong state coastal commission must be available to adjudicate disputes between the state management agency and local governments over local plans or their implementation.
 9. *A property acquisition program.* A vigorous state and local government program for the acquisition of land for conservation is necessary. Such a program should provide a range of mechanisms for guaranteeing that funding will be both sufficient and consistent while also establishing clear criteria for how funds are to be used.
 10. *A healthy non-governmental organization community.* The participation of sophisticated and active conservation and environmental groups to scrutinize government decisions is integral, as are private land trusts to supplement state and local public land acquisition programs.
 11. *Continuous public participation.* An ongoing, innovative effort led by local and state CSDCZ plan management authorities must keep citizens interested and involved in the constant bureaucratic processes necessary for successful coastal conservation and sustainable development.

Despite challenges and shortcomings, comprehensive land use planning programs have proven effective in Oregon and throughout the world. The United States Coastal Zone Management Effectiveness Study found that

“[r]egulatory controls appear to be the most significant tools employed nationwide to protect shoreline resources.”¹⁴⁵ Planning programs only regulate planning, however, and therefore are fundamentally limited in their conservation and preservation potential. Planning programs work especially well when combined with other tools for conservation and resource management. When evaluating what has been effective in Oregon and nationwide, it becomes clear that some practical and creative approaches can be combined with planning programs to achieve real and meaningful management for sustainability in coastal zones. If Oregon and others can incorporate as many tools as possible into their management plans, they will undoubtedly find greater success. A critical part of this mix must include education.

As Robert Liberty states, “[h]owever frugal we may be in our private habits, as an urban nation, we are wastrels.”¹⁴⁶ According to Mr. Liberty, in the United States “[t]he first step is to publicly admit . . . that boundless sprawl is not the American dream and that our pattern of growth is unworthy of a great nation”¹⁴⁷ We must change our concepts and our paradigms about growth and development patterns before we can begin to create effective solutions that balance the development, conservation and preservation needs in our coastal zones.

In this regard, it is hard to argue with the proposition that, in order to be effective, planning must begin with a baseline data set. Inventories of physical and biological resources are desirable, but aerial photographs can provide a minimum record from which to measure changes and evaluate planning and management efficacy. In the United States, cities, counties, states and federal agencies are not regularly collecting information that can be used to measure on-the-ground results of planning and management programs. A program of nationally compatible data, collected at regular intervals and stored at a national resource center, would help coordinate coastal management at all levels.¹⁴⁸

Management programs must be well funded at both the state and federal levels. According to Mr. Liberty:

145. Tina Bernd-Cohen & Melissa Gordon, *State Coastal Program Effectiveness in Protecting Natural Beaches, Dunes, Bluffs, and Rocky Shores*, 27 COASTAL MGMT. 187, 212 (1999).

146. Robert Liberty, Address at the Growing Smart in Minnesota Conference (June 11, 1999), available at http://www.friends.org/resources/sp_rllinmn.html (last visited Sept. 21, 2004).

147. *Id.*

148. Pamela Pogue & Virginia Lee, *Providing Public Access to the Shore: The Role of Coast Zone Management Programs*, 27 COASTAL MGMT. 219, 236 (1999).

We are not spending enough money on land use planning at the state or local level Local planning staffs have a hard time keeping up with the responsibility of reviewing permits and cannot do the research, analysis, and updating of land use plans and regulations that changing circumstances require. And when it comes to making decisions on applications for permits, it is a common phenomenon for local staff and officials to defer [to] the self-interested findings of the geologists, biologists, and engineers hired by applicants because local government cannot afford their own experts.¹⁴⁹

Land use planning codes must have some power, they must be enforceable and they must be enforced. Local control can be a powerful tool for effective conservation and management, but planners must be well-educated and informed, and policy must be set to minimize ambiguity and decrease the opportunity for laws to be used in ways that do not uphold their spirit. In other words, goals and requirements must be clear, and interpretations must be consistent.

Planners must focus on increasing livability in urban centers as an antidote to sprawl.¹⁵⁰ Providing parks and green spaces in our communities creates a vibrant urban atmosphere while decreasing the discomforts and relieving some of the pressures associated with dense population. Survey after survey seems to indicate that a large portion of the people in Oregon, when given the choice, would choose to live in a well-planned urban environment within walking distance of schools and amenities rather than destroy treasured farmlands, coastlines and open space. As Mr. Benner points out, in order “[t]o be affordable, a community must give its green infrastructure as much attention as its sewers, water service, and storm drains and make parks and open space accessible to its residents.”¹⁵¹

On the other hand, Fran Recht points out the flaw with this idealistic view:

Few people on the coast would see this description applying to their small coastal towns. They don't consider their towns to be urban centers at all. They consider Portland, and Salem, and Eugene to have urban centers. Small communities on the coast have already sprawled up and down Highway 101, so figuring out

149. Liberty, *The Future of the Oregon Coast*, *supra* note 67.

150. An interesting recent article touts the environmental friendliness of dense cities, making a case for New York City as the greenest community in the United States. See David Owen, *Green Manhattan*, THE NEW YORKER, Oct. 18, 2004, at 111–23.

151. Benner, *Growth and the Northwest Landscape*, *supra* note 19, at 18.

how to create walkable downtowns in a portion of these coastal communities to revive them and to contain and reverse some of this sprawl along Highway 101 – or at least not let it expand farther and improve its aesthetics – would be a good aim.¹⁵²

Eben Fodor takes us back to the beginning: “Restoring local democracy is essential to controlling local growth and development.”¹⁵³ To be sure, citizens must have a meaningful way to participate in decision-making in their communities, and governments must find new ways to provide opportunities for informed public participation. Mr. Liberty puts a time line on it: “At least once every decade, every citizen should have a chance to know where current development trends are taking her community and an opportunity to decide whether they [sic] want to continue in that direction or to set a new course.”¹⁵⁴

In our view, achievement of such goals will require clear and accessible information combined with a program for public education and outreach in every community. Problems with planning will persist until active and consistent citizen participation is assured. The LCDC and the DLCD do recognize this, as does Bob Bailey. Oregon is currently approving new procedures to increase public input in the decision-making process.¹⁵⁵

Ultimately, acquisition for conservation provides the only permanent protection for land from development pressures. Available state funds should be used, and used appropriately, based on a well-thought-out, long-term conservation strategy. There are also a number of conservancies, both on the coast and elsewhere in the state, that currently work on the issue of land acquisition. Such conservancies need to be strengthened and duplicated, and the public’s focus on acquisition heightened. This must be done not only on the basis of biology and habitat, but also in an effort to retain open space and scenic landscapes. The Oregon Shores Conservation Coalition, for instance, has begun to explore and map the status of scenic coastal areas that were identified in the 1970s in a state-funded study. The

152. Telephone interview with Recht (Oct. 13, 2003), *supra* note 116.

153. Eben Fodor, *Taking Charge of Growth: An Action Plan for Oregon Communities*, available at <http://www.agoregon.org/page39.htm> (last visited Nov. 6, 2004). This is a universal challenge. An award-winning video, funded by the Ford Foundation and the Program For Appropriate Technology in Health (PATH), describes how wise leaders in coastal Kenyan communities a world away are seeking solutions to similar problems. Digital Video Disk: Haba Na Haba (Little by Little) – Stories of Culture, Health and Community (Tom Furtwangler, Cascade Health Communication Group, University of Washington 2003) (on file with Eugene C. Brickley, Jr.).

154. Liberty, *The Future of the Oregon Coast*, *supra* note 67.

155. Oregon Department of Land Conservation and Development, available at <http://www.lcd.state.or.us> (last visited Apr. 20, 2004).

Coalition's policy is to focus attention and public support on saving what viewpoints have not yet been lost. It is also advocating, within the context of a master planning process that the State Parks and Recreation Department is currently undertaking, for the Department to identify and manage certain beach areas for their natural features alone. Furthermore, the 1000 Friends of Oregon's Coastal Futures Project is choosing two communities in which to conduct a future visioning process that contemplates outcomes that may include the identification of priority areas for open space protection through land acquisition.¹⁵⁶

This work must be combined with a vigorous network of land banks, land trusts and conservancies funded publicly and privately at the national, state and local levels. The trusts and conservancies should focus specifically and proactively on acquisition and stewardship of open spaces and treasured landscapes. Operating hand-in-hand with strong laws and active regulation, such efforts are critical to the protection and preservation of the biological, historical and cultural importance of Oregon's coastal areas.

V. CONCLUSION

Nationwide, our coasts are arenas of intense interaction among biological, economic, cultural and aesthetic factors – complex interface zones of the most dynamic type. They also offer desirable places for humans to reside, but they have long provided home and habitat for the wild, which we lose at our peril. Thus, state and local coastal program management officials are called upon to make difficult decisions, to protect public health, safety, and the environment on one hand, while meeting the demands for economic growth, jobs, recreation, tourist development, and private property rights on the other.

To this day, Oregon's coast is one of the most dramatic and undeveloped in the lower forty-eight states. But if there is to be protection of Oregon's great landscapes through a statewide planning program, Oregonians must take responsibility for its development and implementation.¹⁵⁷ Optimally, the lessons learned and shortcomings observed in the decades since the passage of SB 100 could be used to fine-tune the state's land use planning process and make it better. Ideally, Oregonians would adapt their growth management programs to include new tools based on lessons learned from past experience and new ideas from fresh leadership. They would design and implement a well supported system of acquiring land for posterity. They would designate the coast as a "critical area of

156. Telephone interview with Recht (Oct. 13, 2003), *supra* note 116.

157. Benner, *Growth and the Northwest Landscape*, *supra* note 19, at 19.

statewide concern.” And they would accompany all of this with a conservation plan, conceived at a level of acuity and foresight akin to that which Governor McCall brought to the entire issue of growth management over thirty years ago.

According to one longtime observer, “Those necessary actions, a lot of hard work and good luck may be just enough to allow us to keep wild places of staggering beauty on the Oregon coast.”¹⁵⁸ Oregon could again become “an inspiration” for land use planning.

An inspiration. Governor McCall used just those two words to begin his opening address to the same state legislature that ultimately passed SB 100 in 1973. In Governor McCall’s words, “Oregon is an inspiration. Whether you come to it or are born to it, you become entranced by our State’s beauty, the opportunities she affords, and the independent spirit of her citizens.”¹⁵⁹ The Governor concluded his address by stating, “For us to tarnish the lustre of a fame so splendid would be shameful; not to diminish it would be a very great thing, but to augment it would be indeed glory.”¹⁶⁰

For Oregon in 2005, the jury is still out.

158. Telephone interview by Eugene C. Brickleyer, Jr., with Maggie Smith, environmentalist and humanitarian (Sept. 1, 2001).

159. McCall Message, *supra* note 27.

160. *Id.* Tom McCall’s grandfather was Samuel McCall, three-time governor of Massachusetts. Tom McCall spoke of his grandfather’s second inaugural address in the final pages of his 1973 opening address to the Oregon legislature, and concluded as follows:

Fifty-six years ago Governor Samuel McCall spoke of a state rich in accomplishment. He spoke of an intelligent and prosperous people, in a state towering in history and scenic beauty. His idealism of 1917 is equally at home today in Oregon – a State renowned in the world and precious to us all.

In his charge to the Legislative Assembly, Governor Samuel McCall expressed his love for Massachusetts. His words serve well as an expression to you of my love for Oregon: “For us to tarnish the luster of a fame so splendid would be shameful; not to diminish it would be a very great thing, but to augment it would be indeed glory.”

Id.