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MEMORANDUM

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Date: **September 4, 2018**

Subject: **Ballot Initiative Proposing "Just Compensation" Amendment to Colorado Constitution**

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SUMMARY OF REQUEST

The National Association of Realtors® ("NAR"), on behalf of the Colorado Association of Realtors® (the "Association"), has requested review of Colorado Ballot Initiative #108 (the "Initiative"), which proposes to amend the Takings Clause of the Colorado Constitution to require that "just compensation" be paid when private property is "reduced in fair market value by government law or regulation." The Association is concerned about the impact the Initiative would have on local governments' use of economic development tools and the possibility that local governments would simply abandon certain regulations because of the anticipated fiscal impact of such a just compensation requirement on state and local governments. The Association has not taken an official position on the Initiative and has requested an analysis of the benefits and risks of the Initiative were it to be passed by the voters.

In reviewing this memorandum, please note that we are not Colorado attorneys, and that our analysis reflects our review of the issues discussed from the perspective of our general experience with land use planning, policies, and techniques, along with their implementing laws and regulations. We do not purport to offer a legal opinion or legal advice with respect to the interpretation and effect of Colorado law. To the extent that you or the Association requires a legal opinion or advice on this issue, you should consult with Colorado counsel.

EXECUTIVE SUMMARY

The **Background** section of this memorandum first describes the text of the Initiative and discusses the context in which it has been proposed. This section then briefly summarizes regulatory takings law under the United States Constitution and the Colorado Constitution. The Background section then summarizes statutory measures in Florida, Oregon, and Arizona that created a right to compensation for land use regulations that caused a loss of property value. The features and some of the impacts of these measures are discussed and summarized in a table attached to this memorandum as **Appendix A**. It then identifies some features of these measures that could be considered "best practices" for other states to emulate in adopting property rights compensation measures.

The **Analysis** section describes two major differences between the Initiative and the measures adopted in Florida, Oregon, and Arizona: (1) the Initiative is a constitutional amendment rather than a statutory provision; and (2) unlike the other states' measures, the Initiative is not limited to land use laws. The Analysis then discusses questions raised regarding how the Initiative would be implemented, given that the Initiative itself would only add six words to the Colorado Constitution. This section then discusses the potential "regulatory chill" that the Initiative would have on the enactment and enforcement of any law or regulation that could diminish the fair market value of property. It points out that due to the broad scope of the Initiative, this "regulatory chill" could have significant negative consequences on the health and safety of communities because many laws and regulations that provide important safeguards to the public arguably also can have a negative impact on property values. The Analysis next explains that the Initiative would not "clarify" existing takings law, but rather would constitute a fundamental shift in the purpose of takings law, which could undercut government's ability to function. The Analysis then suggests that the Initiative is likely to mostly benefit the special interests proposing it rather than the average person, as has been the case in other states. Lastly, the Analysis discusses the potential negative impacts to the real estate market and to development that may result if the government chooses to waive land use regulations instead of paying just compensation.

BACKGROUND

DESCRIPTION OF INITIATIVE AND CONTEXT FOR ITS PROPOSAL

The Initiative, titled "Just Compensation for Reduction in Fair Market Value by Government Law or Regulations," proposes to amend Section 15 of the Colorado Constitution as follows (additional language is shown in CAPITAL LETTERS):

> **Section 15. Taking property for public use—compensation, how ascertained**. Private property shall not be taken, of [sic] damaged, OR REDUCED IN FAIR MARKET VALUE BY GOVERNMENT LAW OR REGULATION for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and

> whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.[1]

The petition for inclusion on the November 2018 Colorado statewide ballot was submitted to the Colorado Secretary of State on August 3, 2018 with 209,000 signatures.[2] Provided that a sufficient number of the signatures are determined to be valid, the Initiative will appear on the November ballot.[3]

The Initiative was filed by the Colorado Farm Bureau, but reportedly is financially backed by several oil and gas companies.[4] It apparently was conceived in response to another ballot initiative, Initiative 97, which, if approved, would require that new oil and natural gas development, except on federal lands, be situated at least 2,500 feet from occupied structures or "vulnerable areas."[5] It would also permit local governments to establish greater setback requirements.[6] Current law requires a setback of 500 feet from occupied buildings and 1,000 feet for dense neighborhoods and highly sensitive populations.[7] Opponents of Initiative 97 claim that it would cause dramatic economic and job losses, not only directly to the oil and gas industry but, also indirectly to other industries (e.g., retail, health care, construction, food services, etc.), by eliminating between 62% and 80% of annual new oil and gas development in the state.[8]

The Colorado Farm Bureau claims that the Initiative is a "modest change to the [Colorado] Constitution [that] will better clarify current private property rights, improve government, and provide individual citizens with stronger protections."[9] Presumably, the oil and gas companies

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[1] 2017-2018 #108 – Final Draft, Colorado Secretary of State, *2018-2018 Initiative Filings, Agendas & Results*, available at https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html, last accessed August 23, 2018.

[2] Marianne Goodland, *Record 209,000 petition signatures turned in for Colorado Initiative 108*, Colorado Springs News (Aug. 4, 2018), available at https://gazette.com/news/record-petition-signatures-turned-in-for-colorado-initiative/article_ff33c006-9757-11e8-88a5-4bac6898883f.html, last accessed August 23, 2018.

[3] Colorado General Assembly, *How to File Initiatives*, available at https://leg.colorado.gov/content/how-file-initiatives, last accessed August 23, 2018.

[4] Suzie Brundage, *Opinion: Opposition Mountain to Initiative 108*, Pagosa Daily Post (Aug. 2, 2018), available at http://pagosadailypost.com/2018/08/02/opinion-opposition-mounting-to-initiative-108/, last accessed August 23, 2018.

[5] "Vulnerable Areas" is defined as "playgrounds, permanent sports fields, amphitheaters, public parks, public open space, public and community drinking water sources, irrigation canals, reservoirs, lakes, rivers, perennial or intermittent streams, and creeks, and any additional vulnerable areas designated by the state or a local government." 2018-2018 #97 Final Text, available from https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html, last accessed August 23, 2018.

[6] Colorado Legislative Council Staff, *Initial Fiscal Impact Statement, Initiative #97*, available at https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2017-2018/97FiscalImpact.pdf, last accessed August 23, 2018.

[7] *Id.*

[8] Chris Brown and Zhao Change, *Increasing the Oil and Gas Setback Requirements to 2,500-feet in Colorado: The Economic and Fiscal Impacts of 2018 Initiative 97* (July 2018), available at http://commonsensepolicyroundtable.org/wp-content/uploads/2018/07/CSPR_Initiative97Report072718.pdf, last accessed August 23, 2018.

[9] Shawn Martini, *Opinion: Coloradans can find common ground in defense of property rights*, www.coloradopolitics.com (June 8, 2018), available at https://coloradopolitics.com/coloradans-can-find-common-ground-in-defending-property-rights/, last accessed August 27, 2018.

that have provided financial backing would anticipate using the "modest change" to seek compensation for the lost fair market value of lands that could not be used to develop oil and gas wells if Initiative 97 passes.

REGULATORY TAKINGS LAW PRINCIPLES UNDER THE UNITED STATES CONSTITUTION

The Takings Clause of the Fifth Amendment to the U.S. Constitution protects private property from being taken for public use without just compensation.[10] In additional to takings that occur when the government exercises its eminent domain power to appropriate private property, the Takings Clause requires compensation when property is taken indirectly through burdensome regulation—known as an inverse condemnation or regulatory taking.[11] The U.S. Supreme Court has identified two clear situations in which it would hold that a regulatory taking has occurred: (1) when the regulation entails the permanent physical occupation of property, and (2) when the regulation deprives a landowner of all productive uses of the land.[12] These situations are referred to as *per se* regulatory takings.[13]

When a landowner cannot make a case for a *per se* regulatory taking, the landowner still may be able to obtain just compensation under the multi-factor balancing test first used in *Penn Central Transportation Company v. City of New York*.[14] Under the *Penn Central* test, the courts examine the economic impact of the regulation on the claimant, the character of the government regulation, and the extent of the interference with the claimant's investment backed expectations.[15] With regard to the first factor, the Supreme Court has held that a taking can occur even when the regulation does not cause a total deprivation of value and that the partial deprivation may be compensated.[16] However, as stated by the Colorado Supreme Court, "although the [U.S. Supreme Court] did not address what level of interference a government regulation must have caused to constitute a taking under a fact-specific inquiry, a mere decrease in property value is not enough…it is apparent that the level of interference must be very high."[17] The lost property value is also then weighed against the other two factors.

REGULATORY TAKINGS LAW PRINCIPLES UNDER THE COLORADO CONSTITUTION

The Takings Clause of the Colorado Constitution states: "Private property shall not be taken or damaged, for public or private use, without just compensation."[18] Except for the "or damaged" clause, Colorado courts have interpreted this section of the Colorado Constitution as being consistent with the Takings Clause of the U.S. Constitution,[19] which similarly states "nor shall

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[10] U.S. Const., amend. V.
[11] Brian W. Blaesser, *Discretionary Land Use Controls: Avoiding Invitations to Abuse Discretion*, §1:20 (Thomson-Reuters: 2017).
[12] *Id*. at §§ 1:26 – 1:28.
[13] *Id.*
[14] *Id.* at §§ 1:20 – 1:24.
[15] *Id.*
[16] *Id.* at 1:21 (*citing Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)).
[17] *Animas*, 38 P.3d at 65.
[18] Colo. Const. Art. II, § 15.
[19] *Animas Valley Sand and Gravel, Inc. v. Bd. of Cty. Com'rs*, 38 P.3d 59, 63 (Colo. 2001) (*citing Cent. Colo. Water Conservancy Dist. v. Simpson*, 877 P.2d 335 (Colo. 1994).

private property be taken for public use, without just compensation."[20] The courts have interpreted the "or damaged" clause of the Colorado Takings Clause as allowing landowners to recover for damage to land caused "by 'the making of … public improvements abutting their lands, but whose lands have not been physically taken by the government.'"[21] That is, the damage clause only applies when there is government action on an adjacent property that causes damage to the subject property. Colorado cases construing this clause have primarily dealt with compensation for a governmental obstruction of ingress and egress from a property onto a public way or significant changes to the use of a public street.[22] Therefore, other than for this type of "damage" claim, the U.S. Supreme Court regulatory takings cases apply to a claim for regulatory taking in Colorado.[23]

<u>Note</u>: This background summary is for informational purposes only, and is not intended as legal advice or a legal opinion as to the interpretation of Colorado law. We encourage the Association to consult with local counsel to the extent that it requires legal advice or a legal opinion as to any of the issues discussed in this memorandum.

OTHER STATES' LAWS REQUIRING JUST COMPENSATION FOR LAND USE REGULATIONS THAT DIMINISH PROPERTY VALUE

Several other states have proposed measures to address the perceived unfairness of takings laws that do not allow for compensation when a law or regulation has a negative impact on property value. In the mid-1990s the Bert J. Harris, Jr. Property Rights Protection Act was enacted in Florida, the Private Real Property Rights Preservation Act was enacted in Texas, and both Mississippi and Louisiana enacted measures to compensate agricultural and forest landowners for regulations that caused diminution in value.[24] In the mid-2000s, similar measures were proposed in Washington, Oregon, California, Idaho, Montana, Nevada, and Arizona, but only Measure 37 and Measure 49 in Oregon and Proposition 207 in Arizona were passed.[25] The Florida, Oregon, and Arizona measures and the experiences of each state in administering these measures are discussed below. A summary table, including a comparison to the features and anticipated impacts of the Initiative, is attached to this memorandum as **Appendix A**.

<u>Florida</u>: Bert J. Harris, Jr. Property Rights Protection Act

The Bert J. Harris, Jr. Property Rights Protection Act (the "Bert Harris Act"), enacted in 1995 and amended in 2011, created a judicially enforceable right to compensation for "inordinately

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[20] U.S. Const. amend. V.
[21] *Id.* (quoting *City of Northglenn v. Grynberg*, 846 P.2d 175, 179 (Colo. 1993)).
[22] *See City of Northglenn v. Grynberg*, 846 P.2d 175, 179 (Colo. 1993) and cases cited therein.
[23] *See Animas*, 38 p.3d at 64.
[24] John D. Echeverria and Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, at 22 and 38, Georgetown Environmental Law & Policy Institute, Georgetown University Law Center (2008), available from https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1000&context=gelpi_papers, last accessed August 24, 2018 (hereinafter "Echeverria"). The Texas, Louisiana, and Mississippi statutes have not been used as widely as that in Florida and now, Oregon and Arizona. *See id.*
[25] *Oregon Ballot Measures 37 (2004) and 49 (2007)*, Wikipedia, available at https://en.wikipedia.org/wiki/Oregon_Ballot_Measures_37_(2004)_and_49_(2007)#cite_ref-10, last accessed August 23, 2018.

burdensome" regulatory restrictions on the use of property. In order to protect the interests of private property owners against such "inordinate burdens," the Bert Harris Act enables landowners to file a claim "for relief, or payment of compensation," separate and distinct from the law of takings, when a new law, rule, regulation, or ordinance unfairly affects real property.[26] Section 70.001(2) of the Bert Harris Act states:

> When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section.[27]

The term "existing use" actually includes not only actual existing uses, but also any future use that is reasonably foreseeable, non-speculative, suitable for the property, compatible with adjacent land uses, and would have a fair market value higher than the then-current use of the property.[28] The term "inordinate burden" is defined as a government action that directly limits the use of property so that the owner is permanently prohibited from achieving its reasonable, investment-backed expectations for the proposed use or the allowed uses are unreasonable such that the owner bears a disproportional burden of the public good.[29]

In order to obtain compensation, a landowner must make a claim to the government, with an appraisal demonstrating the loss in fair market value and the government must respond with a settlement offer, which may take many forms, within 180 days. If the settlement would "contravene the application of a statute as it would otherwise apply," the Circuit Court must approve the settlement.[30] If no settlement can be reached, the government must issue a statement of what uses are permitted and if the owner is unsatisfied, the owner can seek compensation in Circuit Court.[31] Claims must be brought within 1 year of the regulation first being applied to the property.[32]

<u>Oregon</u>: Measure 37 and Measure 49

The Oregon Land Use system, which was developed in the early 1970s, is a top-down planning system that gives substantial power to the state to ensure that local land use policy advances state-level goals, including restricting a substantial portion of privately held land to farming and forestry use.[33] Measure 37 was a citizen-led initiative aimed at reducing the perceived overreach of that system by forcing local governments to curtail unnecessary and harmful regulations or compensate landowners whose land was devalued.[34] Measure 37, which was passed by Oregon voters in 2004, added a new statute which provided that:

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[26] Fla. Stat. § 70.001(1).
[27] Fla. Stat. § 70.001(2).
[28] Echeverria at 6-7.
[29] *Id.* at 7.
[30] *Id.* at 11 (quoting Fla. St. Ann. § 70.001(11)(d)).
[31] *Id.* at 12.
[32] Fla. Stat. § 70.001(11).
[33] Alex Potapov, *Making Regulatory Takings Reform Work: The Lessons of Oregon's Measure 37*, 39 ELR 10516, 10519 (2009).
[34] *Id.* at 10523.

> If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.[35]

Measure 37 required that the "just compensation" be "equal to the reduction in the fair market value of the affected property interest … as of the date the owner makes a written demand."[36] For then-existing land use regulations, the written demand had to be submitted within 2 years of the effective date of Measure 37. For future land use regulations, the written demand had to be submitted within 2 years of the enactment or within 2 years of the submission of a land use application in which the land use regulation was an approval criteria.[37] If the regulation was still applied to the property 180 days after the written demand, the property owner then had a cause of action for compensation, including reasonable attorney fees, expenses, and costs incurred in collecting the compensation.[38] In lieu of compensation, the local government could waive the provisions of the offending regulation.[39]

For the purposes of Measure 37, "land use regulation" was defined to include: statutes regulating the use of land or any interest in the land; administrative rules of the Land Conservation and Development Commission; local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances; metropolitan service district regional framework plans, functional plans, and planning goals and objectives; and statutes and administrative rules regulating farming and forestry. Measure 37 also exempted the following categories of land use regulations:

- those restricting activities recognized as *public nuisances* under common law;
- those restricting or prohibiting activities for the *protection of public health and safety* (e.g., fire and building codes, sanitation regulation, pollution control, and hazardous waste regulations);
- those regulations that are required in order to comply with *federal law*;
- those *restricting or prohibiting adult uses*; and
- all regulations *enacted prior to the owner's acquisition of the property*.[40]

Critics of Measure 37 point to several drafting and design errors in the measure that made implementation difficult. These include imprecise definitions, a lack of process for determining lost property value, and how the measure was to interact with nuisance law and federal law.[41]

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[35] Oregon DLCD, *Measure 37*, https://web.archive.org/web/20061018222951/http://www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Information_About_the_Election, last accessed August 23, 2018.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* (emphasis added).
[41] Potapov at 100534.

In 2007, the Oregon voters passed Measure 49, which was drafted by the Oregon legislature as a fix to Measure 37.[42] Measure 49 limited compensation claims to only residential development, eliminating claims for commercial and industrial uses.[43] It further limited those residential claims to a maximum of 10 dwellings for any given owner across all claims. Measure 49 also created a "fast track" approval process that limited relief to three dwelling units and a set of procedures for claiming more dwelling units, which requires a showing of actual lost value.[44]

For new claims, Measure 49 continued to allow claims for compensation for the effect of new land use regulations or wavier of those regulations, but limit the scope of regulations subject to the statute to: state statutes establishing a minimum lot/parcel size; state statutes that restrict the residential use of private property; provisions in comprehensive plans, zoning ordinances, and subdivision ordinances that restrict residential uses; certain statutes and rules that restrict forest and farming practices; statewide planning goals and administrative rules of the statewide Land Conservation and Development Commission; and provisions of the Metro government's function plan that restrict residential uses.[45]

One of the major criticisms of Measures 37 and 49 has been the ambiguities created by the statutory language. For example, under Measure 37 it was not clear whether waivers (made in lieu of compensation) were transferrable to future owners and there were no clear required procedures for municipalities to follow when processing a claim, leading to disparities among municipalities and to the potential for municipalities to discourage claims by making the process difficult and expensive.[46] The ambiguities in Measure 37 alone led to over 250 lawsuits.[47] Because few of these suits made it to the appellate level, little precedent was created to assist local governments in navigating its requirements.[48] While Measure 49 provided a tenable way forward for local governments, it created a new uncertainty regarding the rights possessed by owners who had been granted development approvals under Measure 37. Only those owners who had acquired a "common law vested right" in their Measure 37 waiver, were entitled to develop their property as permitted by the waiver. Under Oregon law, determining whether an owner has a vested right to a use is based on several factors and is determined on a case-by-case basis.[49]

<u>Arizona</u>: Private Property Rights Protection Act ("Proposition 207")

Proposition 207, entitled "The Private Property Rights Protection Act," was passed in 2006 and amended Title 12, Chapter 8 of the Arizona Revised Statutes by adding new Article 2.1. It was proposed during the wave of post-*Kelo* eminent domain reform, when many states restricted the definition of "public use" or "public purpose" for which private property could be taken by narrowly defining "blight" and restricting takings for economic development in cases where the

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[42] *Id.* at 10536.
[43] *Id.* at 10536-37.
[44] *Id.*
[45] Department of Land Conservation and Development, *Measure 49 Guide*, at 3, available at https://www.oregon.gov/LCD/MEASURE49/docs/general/m49_guide.pdf, last accessed August 23, 2018.
[46] Potapov at 10529-30/
[47] *Id.* at 10529.
[48] *Id.*
[49] *See Friends of Yamhill County v. Bd. of Comm'rs*, 264 P.3d 219 (Or. 2011).

property taken is transferred to a private entity.[50] Proposition 207 both narrowed the definition of a "public purpose" in the eminent domain context and created a new statutory right of just compensation to landowners whose property has lost fair market value due to land use regulations. The primary focus of the Proposition 207 campaign was eminent domain reform.[51] In fact, it appears that little emphasis was placed on the regulatory takings aspect of the proposal, with the proponents stating only that "courts had allowed the state and local governments to 'impose significant prohibitions and restrictions on private property' without compensation" and without providing any examples.[52]

With respect to regulatory takings, Proposition 207 amended Arizona law by permitting landowners to obtain "just compensation" if a "land use law," enacted after the owner acquired the property, reduced the property's "fair market value."[53] It states:

> If the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property the owner is entitled to just compensation from this state or the political subdivision of this state that enacted the land use law.[54]

A claim brought under Proposition 207 must be brought within three years of the effective date of the offending land use law, or the date when the existing rights to use, divide, sell or possess property are first diminished, whichever is later.[55] If the offending law still applies to the property 90 days after the date of the owner's written demand, the owner is entitled to compensation or a waiver of the requirement that caused the reduction in value.[56] Proposition 207, like Oregon's Measure 49, excludes certain land use laws from claims for compensation. Excluded land use laws are those that:

- limit use or division of land for the protection of public health and safety (e.g. fire and building, health and sanitation, transportation and traffic controls, solid or hazardous waste, and pollution control);
- prohibit uses or divisions that would be public nuisances under common law;
- are required by federal law;
- limit the use or division of property for the purposes of housing sex offenders, selling illegal drugs, liquor control, and adult uses;
- establish the location of utilities;
- do not directly regulate an owner's land; or
- were enacted before the date of Proposition 207.[57]

[50] *See generally* Looking Back Ten Years After *Kelo*, The Yale Law Journal, https://www.yalelawjournal.org/forum/looking-back-ten-years-after-kelo, last accessed August 23, 2018.
[51] Jeffrey Sparks, *Land Use Regulation in Arizona After the Private Property Rights Protection Act*, 51 Ariz. L. Rev. 211, 217 (2009).
[52] *Id.*
[53] Ariz. Rev. Stat. § 12-1134(A).
[54] *Id.*
[55] *Id.* at § 12-1134(G).
[56] *Id.*at § 12-1134(E).
[57] *Id.* at § 12-1134(B).

Arizona municipalities have attempted to avoid claims by seeking waivers from property owners, either in response to a landowner's application for a permit under a land use law, or proactively when considering a regulatory change.[58] Although such waiver requests technically are voluntary, requests made of an applicant seeking municipal approvals (e.g., use permits, land divisions, or development review) have been criticized as essentially being a pre-requisite to receiving approval.[59] Arizona municipalities and the state reportedly have experienced a "regulatory chill" because of their fear of being sued for compensation under Proposition 207.[60]

BEST PRACTICE PRINCIPLES FOR PRIVATE PROPERTY RIGHTS MEASURES

Regulatory takings case law, both from the U.S. Supreme Court and the Colorado Supreme Court, establishes a very high standard for a law or regulation that diminishes property values to be considered a taking requiring just compensation. The state of the law has created substantial leeway for regulations and laws to intrude upon private property rights without consequence. The private property rights measures enacted in Oregon, Arizona, and Florida have been the three most successful measures in constraining this perceived governmental overreach by requiring just compensation when a law or regulation diminishes property value (even if it does not reach the level of a constitutional taking) and requiring governments to consider whether the value of enacting or enforcing laws and regulations is worth the potential of having to pay compensation for lost property value. However, as described above and in **Appendix A**, these measures are not perfect. Nonetheless, they do provide the following examples of what might be considered best practice principles for adopting a private property rights compensation measure:

- ***The Measure is a Statute that Adds to Existing Regulatory Takings Law***

The Arizona, Oregon, and Florida measures are legislative enactments that create additional protections beyond constitutional regulatory takings requirements. Through the legislative process, a proposed measure can be crafted with input from all stakeholders, leading, ideally, to a measure that will have broad support. Also, as opposed to a constitutional amendment, legislation is more easily amended to respond to aspects of a measure that, in practice, are not deemed successful.

- ***The Scope of Laws or Governmental Actions Subject to the Compensation Requirement are Precisely Defined***

Although ranging in scope, the measures discussed above define what governmental actions would be compensable and include a list of the types of laws and regulations that are *not* compensable under the measure (which may still be compensable under constitutional regulatory takings law if the law or regulation "goes too far"). Defining the scope of laws and regulations that are subject to the measure provides certainty for both property owners and the government. By contrast, a broadly or vaguely stated scope of laws or regulations likely would increase the

[58] *Id.* at 10540; *see also* League of Arizona Cities and Towns, *Sample Proposition 207 Waiver Form and Claims Checklist*, available at https://www.azleague.org/DocumentCenter/Home/View/89, last accessed August 24, 2018.
[59] Sparks at 224-26.
[60] Potapov at 10540.

amount of litigation arising from a measure due to the need to determine whether a certain governmental law, regulation, or action is subject to the measure.

- ***The Measure Specifies What Property Rights are Compensable***

Each of the above measures limits compensation to impacts on *real property*. If a measure is intended to also provide compensation for damaging impacts to *personal property*, then it should make this clear. Such a measure should also specify what laws, regulations, or actions are subject to the compensation requirement and specify how damaging impacts to personal property will be quantified, as it should with impacts to real property.

- ***The Measure Specifies How Fair Market Value is Calculated***

While the term "fair market value" has a common meaning, when used as the basis for calculating the amount of compensation required under a private property rights measure, it must be specifically defined. Not only should the factors to be considered in determining property value be established, the measure should specify how the reduction in value is determined. For example, under Oregon's Measure 49, a claimant is required to demonstrate the market value of the property one year before and one year after the enactment or enforcement of the offending regulation in order to prove a reduction. The time period for measuring a reduction in property value should be defined and should attempt to isolate the effect of the law or regulation, disregarding other market factors that can impact fair market value.

- ***The Measure Creates an Administrative Process for Adjudicating Claims***

Lastly, a measure should create an administrative process for adjudicating claims so that those seeking compensation are not required to sue the government for every compensatory action. The administrative process will reduce costs for both claimants and the government by addressing compensable claims more efficiently.

ANALYSIS

Issue: The Initiative differs substantially from the Oregon, Arizona, and Florida examples in ways that may have unintended negative consequences.

The Initiative, although purportedly arising from similar concerns over intrusion on private property rights, is substantially different from the Oregon, Florida, and Arizona examples. These differences highlight the breadth of the Initiative and its potential to significantly limit governmental action.

- ***The Initiative Is a Constitutional Amendment***

The Initiative would amend the Takings Clause of the Colorado Constitution by simply inserting the words "or reduced in value by government law or regulation." In contrast, the Oregon, Florida and Arizona examples were statutory enactments. While the Oregon and Arizona

measures, like the Colorado Initiative, were proposed as ballot initiatives, there are substantial differences between a constitutional provision and a statute.

First, the constitution is more difficult to amend. An amendment to the Colorado Constitution must be voted for by two-thirds of all the members of each house of the General Assembly and approved by favorable vote of 55% of the voters.[61] In comparison, a legislative ballot initiative requires only a simple majority to be passed and can be later amended by the legislature.[62] Although proponents of the Initiative may find the fact that the legislature cannot amend the language attractive, the necessity of passing another constitutional amendment to make any changes would make it difficult to respond to any deficiencies or ambiguities created by the Initiative itself. As noted by one constitutional law professor: "Embedding policy in Colorado's constitution—from the Taxpayer's Bill of Rights to legalizing marijuana—has often created policy and management problems after the fact….There is a lot of stuff that is in our constitution that in a rational world would be in statute, which is easier to correct."[63]

The fact that the Initiative is constitutional amendment may also restrict how local governments can manage the implementation of laws and regulations that may cause a decrease in property value. In Arizona, many local governments have come to rely on waivers of Proposition 207 rights accompanying any request for land use approval. Although these waivers are "voluntary," there is an element of coercion involved in the granting of such waivers, particularly where the request is made after a development application has been filed (*see discussion above*).

Under the "unconstitutional conditions doctrine," such waivers would not be permissible under the Colorado Initiative because the rights that would be "waived" would be constitutional rights, rather than statutory rights under Arizona law. The unconstitutional conditions doctrine "holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."[64] Put simply, under this doctrine it is unconstitutional for the government to require a landowner to waive a constitutional right in order to obtain a governmental benefit. For example, a landowner who seeks a special permit for particular use cannot be required (or coerced) by a municipality to waive a constitutional right (e.g., the right to just compensation for laws or regulations that reduce fair market value of property) as a condition of granting the special permit.

- ***The Initiative Is Not Limited to Land Use Laws***

Both the Oregon and Arizona examples create a right to compensation only when a land use law causes a decrease in fair market value. As discussed above, the right to compensation is further limited by the exemption of specific types of laws and regulations. Florida's Bert Harris Act is specifically limited to regulations that "inordinately burden an existing use of real property."[65]

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[61] Colo. Const. Art. V, § 1(4)(b); Art. XIX, § 2(1)(b).
[62] Colo. Const. Art. V, § 1(4)(a).
[63] Mark Jaffe, *Colorado ballot initiative could blunt local land-use rules, officials warn*, The Gazette (Jul. 31, 2108), available at https://gazette.com/news/colorado-ballot-initiative-could-blunt-local-land-use-rules-officials/article_7a9b72e8-94f6-11e8-8092-770b9e3767e2.html, last accessed August 27, 2018.
[64] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989).
[65] Fla. Stat. § 70.001(2) (emphasis added).

By contrast, the Initiative would apply to all "government laws and regulations," without any exception for laws or regulations enacted for protection of public health and safety (i.e., building and fire codes, pollution control, hazardous wastes), laws prohibiting use of property for illegal purposes, or laws prohibiting activities considered to be a public nuisance. The seemingly unlimited scope of the Initiative is an extreme expansion of the Florida, Oregon, and Arizona examples. Moreover, the lack of exemptions for such laws and regulations suggests that the proponents of the Initiative did not take into account the fact that many laws and regulations create substantially more value to the public than burden to the individual, for which compensation is not necessarily appropriate. For example, the Colorado Initiative would appear to require compensation for the loss of property value caused by a law that prohibits nuisance activities. The U.S. Supreme Court has long held that the government does not take property "when it asserts its power to enjoin the nuisance-like activity."[66]

The Initiative also would ignore the "average reciprocity of advantage" concept that the U.S. Supreme Court has applied in evaluating zoning and other land use regulations. The Court said that, although zoning regulations can reduce property values, "the burden is shared evenly, and it is reasonable to conclude that on the whole the individual who is harmed by one aspect of zoning will be benefitted by another."[67] Further, takings law recognizes the government's "police powers" (i.e., the authority to regulate for the health, safety, and welfare of citizens) as being exempt from takings law, unless a law or regulation exercising the police power goes "too far" and rises to the level of a regulatory taking. The Initiative would essentially eliminate the police power "exception."

***Recommendation*:** In determining its position on the Initiative, the Association should take into account the substantial differences between the Initiative and other states' measures that would significantly expand the scope of compensation claims beyond that experienced in other states. Also, because the Initiative is a constitutional amendment rather than a statute, it may be more difficult to "fix" if necessary and would preclude the use of waivers as a tool for local governments to deal with potential compensation claims. The Association should recognize that the Initiative has none of the features of the other private property rights compensation measures that, as discussed in the Background section, could be considered "best practices."

Issue: The Initiative raises several questions as to how it would be implemented.

The Initiative adds only six words to the Colorado Constitution, but it creates many questions regarding how it would be implemented.

- ***Would it apply retroactively?***

There is nothing in the text of the Initiative indicating that it applies only to laws or regulations enacted or enforced *after* the date the Initiative becomes effective or is limited to laws or regulations enacted *after* an owner acquires the property. That is, it appears that a property owner could seek compensation for a decrease in fair market value that occurred before the owner

[66] William J. Rich, *The Nuisance Exception to the Takings* Clause, 1Modern Constitutional Law § 17:16 (3rd ed)(quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 (1987)).
[67] Brian W. Blaesser and Alan C. Weinstein, *Federal Land Use Law & Litigation* § 3:48 (2017 ed.)

acquired the property—a factor that should have already been factored into the purchase price—or for a law or regulation that has been in effect for a long time.

- ***What is Fair Market Value?***

The Initiative requires compensation for reduction in "fair market value" of the property. Although Colorado regulatory takings law similarly quantifies the diminution in value caused by a regulation in terms of "fair market value,"[68] the way such value is determined under the Initiative may not be the same. By definition, compensation claims under the Initiative will not be for a near total loss of value. In attempting to determine the amount of value lost and to isolate the impact of a particular regulation, guidance on the process for determining "fair market value" will be needed, but is absent from the Initiative. Critical questions arising from a claim for compensation that are left unanswered by the Initiative include, for example: How closely correlated will a decrease in fair market value have to be associated with the adoption or enforcement of a particular law or regulation? How will other market forces be accounted for? Will an owner only be compensated for an immediate decline in fair market value or could an owner wait to see if the decline will increase as other market factors change?

- ***Will compensation be available even if the law or regulation is not applied directly to a property?***

The Initiative appears to open the door for claims for loss of fair market value attributable to a law or regulation, even if the law or regulation does not directly apply to a particular property. If this is the case, claims may be possible on the basis that governmental laws or regulations do not go far enough to protect the value of private property. For example, if a new oil or gas well is developed based on currently required 500 foot setbacks (a requirement established by Colorado statute), could a neighboring residential owner claim diminution in fair market value because the state law does not go far enough to protect the residential property value (i.e., that if the state statute were stricter, the residential property value would not decrease)? Furthermore, if state or a local government responds to a claim by waiving the requirements of the particular law or regulation, could that governmental action give rise to a claim by an adjacent property owner who is no longer protected?

- ***Will land owners be required to seek administrative relief before making a claim for loss of fair market value?***

The property rights protection statutes adopted in Arizona, Florida, and Oregon include a basic timeline for when claims must be filed and how soon a lawsuit can be initiated if the government fails to respond to the claim. The Initiative does not include any procedures that a landowner must follow in order to make a claim. For example, there is nothing in the text of the Initiative that would prevent a landowner from making a claim even if the landowner has not pursued administrative relief from the law or regulation in question.

[68] *See Animas Valley Sand and Gravel, Inc. v. Bd. of Cty. Comm'ns of the Cty. Of La Plata*, 38 P.3d 59, 66 (Colo. 2001).

As the questions above demonstrate, and similar to the Florida, Oregon, and Arizona experiences, if passed the Initiative would create a substantial amount of uncertainty regarding how it is to be applied, what is compensable, and what laws or regulations would not be subject to compensation claims. This uncertainty will be costly due to the ensuing litigation that likely will be needed to answer these questions, the delay that some development may experience due to uncertainty, and the negative impacts that could result if the state or local governments choose not to enact or enforce public health, safety, and welfare regulations out of fear of being sued for compensation under the Initiative.

***Recommendation*:** The Association should consider the substantial uncertainty as to how the Initiative will be applied, and the confusion, unsettled expectations, and high potential for resulting litigation over these issues if the Initiative passes.

Issue: The Initiative may keep state and local governments from enforcing or adopting new regulations until there is some certainty as to how the proposed additional language is interpreted, which could jeopardize the health, safety, and welfare of the people of Colorado.

The Colorado Farm Bureau, the proponent of the Initiative, claims that "[t]he measure will improve government's accountability to citizens and make elected officials more responsive to voters. The negative impacts of government action will be harder to ignore, creating stronger protections for communities across the state."[69] However, it is likely the government will refrain from acting in any way that could create a claim in court for compensation under the Initiative until the uncertainties created by the Initiative are resolved, thus weakening protections for communities, not strengthening them.

Evidence from Oregon and Florida indicates that a "regulatory chill" resulted from these measures because local governments were hesitant to adopt planned-for measures and rolled back regulations when threatened with claims.[70] The executive director of the Colorado Municipal League has stated in response to the Initiative: "My advice to counties and municipalities if this passes, don't do anything – no zoning, no ordinances."[71] The potential cost of defending lawsuits or of paying out claims—which ultimately would be borne by resident taxpayers—may be anticipated to be too much for many local governments to absorb, raising the possibility that the government will follow the advice of the Colorado Municipal League and not enact *any* new regulations and refrain from enforcing existing laws.

Research on the impacts of the other states' property rights compensation measures found that the potential for compensation claims was a significant factor in not implementing planned regulatory changes. The level of "regulatory chill" in other states appears to have gone beyond the intended effect of the property rights protection statutes (i.e., to ensure that the government considers the

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[69] Colorado Farm Bureau, *Protecting Colorado's Property Rights*, available at https://www.coloradofarmbureau.com/protecting-property-rights-colorado/, last accessed August 24, 2018. This argument was also seen in Oregon in support of Measure 37. *See* Potapov at 10523.
[70] Echeverria at 17-18.
[71] Mark Jaffe, *Initiative 108 could blunt local land-use rules, officials war*, Colorado Politics (Aug. 1, 2018) , available at https://coloradopolitics.com/colorado-ballot-initiative-could-blunt-local-land-use-regulation/, last accessed August 24, 2018.

impacts that laws and regulations have on property value and, ideally, make fairer decisions) such that governments have refrained from regulation not because proposed legislation was considered unfair, but because of the unknown potential financial impacts.

Because the Initiative it not limited to land use laws, the potential negative impact to community health, safety, and welfare caused by government's decision not to enact or enforce laws and regulations that could diminish property values is greater. For example, the federal flood protection program requires certain minimum statewide design and construction requirements for buildings constructed in Special Flood Hazard Area before a state is permitted to take part in the National Flood Insurance Program. If Colorado ceases enforcing these standards because of potential compensation claims, all property owners in Colorado could potentially lose flood insurance protection. Another example would be sex offender registration requirements, which have been documented to reduce the value of properties near registered sex offenders.[72] The intent of these regulations is to provide notice to residents of potential dangers. Not enforcing such a requirement could jeopardize community safety.

Additionally, the experience of other states demonstrates that case law interpreting these measures has not always developed quickly. In Florida, there are very few reported cases under the Bert Harris Act, with most cases not receiving appellate review.[73] The same is true in Oregon.[74] Consequently, there is little, if any, binding precedent that local governments can rely on when evaluating the risks of adopting new legislation, meaning that the risk to local governments has not substantially decreased as the measures have been implemented and the "regulatory chill" continues.

Recommendation**:** The Association should consider the detrimental effects on health and safety regulations that could result from the "regulatory chill" that the Initiative could cause.

<u>Issue</u>: The Initiative would change the fundamental concept of what is a "taking," making it difficult for the government to govern.

The Colorado Farm Bureau states:

> The Colorado Constitution provides for compensation when government seizes private property. But courts have not applied the standard equally. This [Initiative] will clarify the intent of the Constitution and push judges to enforce these provisions equally.[75]

Contrary to this assertion, the Initiative does not clarify or refine the application of existing takings law. Instead, it changes the fundamental purpose of the just compensation requirement. As stated by the Colorado Supreme Court: "Takings jurisprudence balances the competing goals of compensating landowners on whom a significant burden of regulation falls and avoiding

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[72] *See* Suzanna Hartzell-Baird, *When Sex doesn't' Sell: Mitigating the Damaging Effect of Megan's Law on Property Values*, 35 Real Est. L. J. 353 (2006).
[73] Echeverria at 17.
[74] Potapov at 10529.
[75] Colorado Farm Bureau, *Protecting Colorado's Property Rights*, available at https://www.coloradofarmbureau.com/protecting-property-rights-colorado/, last accessed August 24, 2018.

prohibitory costs to needed government regulation."[76] The Takings Clause "assures that the government may not force 'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[77] Yet, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law."[78]

The Initiative reverses this long established principle of takings law by guarantying compensation for burdens that are borne widely and which are not necessarily significant. It would require government to pay for diminished property value caused by every change in the general law, rather than only those actions that single out one property owner for particularly burdensome treatment. This is a fundamental shift in the purpose of the just compensation requirement, not just a change to the level of interference that must be shown under the multi-factor *Penn Central* analysis. The result may be that the "[g]overnment hardly could go on" if it must dedicate resources to adjudicate and to compensate every action that causes some reduction in fair market value of property.

The Colorado Farm Bureau's stated intent, to expand the class of compensable governmental actions that diminish the value of private property beyond what is permissible as a constitutional regulatory taking, is reasonable. However, the method it has chosen to achieve this goal (i.e., the Initiative) upends rather than expands the regulatory takings concept.

Recommendation: The Association should understand that the just compensation requirement under the United States and Colorado constitutions is intended to compensate owners who have been singled out and are substantially burdened in a way that the public generally is not burdened. It is, by design, a high threshold and not intended to provide redress for every governmental action that affects property value. The Initiative seeks to fundamentally change this purpose and use the just compensation requirement in a way that could make it very difficult for the state and local governments to govern. The Association should consider the property rights measures enacted in other states as better examples of structuring a private property rights protection measure.

Note: Nothing in foregoing section is intended as legal advice or a legal opinion as to the interpretation of Colorado law. We encourage the Association to consult with local counsel to the extent that it requires legal advice or a legal opinion as to any of the issues discussed in this memorandum.

[76] *Animas*, 38 P.3d at 63.
[77] *Krupp v. Breckenridge Sanitation Dist.* 19 P. 3d 687, 695 (Colo. 2001)(quoting *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994)).
[78] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

Issue: The Colorado Farm Bureau claims that the Initiative protects everyone but research from other states indicates that similar measures primarily protect special interests.

The Colorado Farm Bureau states: "Our amendment is broad and encompasses the entire state. ALL Coloradans will enjoy improved protections from government action under the proposal."[79] While advancing protections for all property owners is a legitimate goal of any program designed to advance private property protections, the experience in other states suggests that special interests, not the majority of property owners, have benefitted the most from similar programs.[80] In Oregon, the largest number of claims (in terms of acreage and the amount of compensation sought) were filed by members of the timber industry, which financially backed the measure.[81] Most residential claims were not for small subdivisions to fund a retirement (as was the desire of Dorothy English, the public face of the Measure 37 campaign) but rather for large subdivisions (over 10 lots).[82] Similarly, in Florida, the financial backing of the Bert Harris Act was from large agricultural and timber lands owners and the largest beneficiaries have been large-scale developers.[83]

Recommendation: The Association should consider that the Initiative is likely to have a similar result in Colorado, providing the most benefit to the special interests backing it and not to the "average Coloradan."

Issue: Use of waivers to avoid payment of just compensation may undermine comprehensive planning and foster land use conflicts, which may negatively impact the real estate market.

Good land use planning can ensure that an appropriate mix of land uses will be accommodated in the community over time, that those uses relate to one another in a rational way, and that development opportunities and decisions are viewed over the longer term and take account of a wider community vision, rather than resting exclusively on the basis of profits for the individual owner. Where development occurs at the behest of a particular economic actor under minimal governmental oversight and regulation, and is focused only on achieving the highest short-term return, the result will not necessarily be uses that will relate well to their neighbors, or development that is conducive to efficient and cost-effective public infrastructure investments for the community as a whole.

Assuming that Colorado and its local governments would act similarly to local governments in Oregon and Florida by waiving the application or enforcement of laws and regulations that cause a reduction in fair market value rather than pay out claims, the Initiative will undermine planning efforts by permitting uses and/or development designs that are inconsistent with a publicly supported comprehensive plan and land use regulations and may be incompatible with the surrounding land uses. This result may not only undermine comprehensive planning efforts, but

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[79] Colorado Farm Bureau, *Protecting Colorado's Property Rights*, available at https://www.coloradofarmbureau.com/protecting-property-rights-colorado/, last accessed August 24, 2018 (emphasis in original).
[80] Echeverria at 49.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 50.

it may also negatively affect the values of abutting properties. Evidence from Oregon and Florida suggests that waivers have resulted in permitting incompatible uses that reduce the fair market values of neighboring properties and frustrate local planning efforts.[84]

Additionally, waivers may deter new development in an area by adding unpredictability to the real estate market. A developer is unlikely to build an expensive residential development if it is possible that his immediate neighbor could obtain a waiver to operate a commercial or industrial use, which would have a negative impact on the value of homes in the development. Similarly, a prospective home buyer may be less likely to purchase a home in an area where his new neighbor could potentially obtain a waiver that would allow him to develop his property right up to their shared property line. The uncertainty that could be created by the widespread use of waivers will destroy the value that planning, land use, and other regulations create for real property and may lead to delay of development that would occur if the protection offered by laws and regulations were guaranteed.

***Recommendation*:** The Association's position on this issue will depend on the extent to which it supports the belief that an individual has a right to use his or her property without interference from the government regardless of the potential permanent costs to existing and potential neighboring property owners. If the Association favors that position, then it can voice support for this aspect of the Initiative. If the Association favors that position with limitations, it could suggest that the Initiative needs to be reconsidered to limit the circumstances under which a landowner could receive a waiver from laws and regulations.

GENERAL CONCLUSION AND RECOMMENDATION

The examples of property rights legislation in Florida, Oregon, and Arizona described above were borne of genuine frustration from property owners subjected to substantial land use regulatory restrictions on their property. These statutory examples addressed the need to provide a basis for relief where restrictive regulations can be demonstrated to diminish property value but are not so onerous as to constitute a taking of property under the federal or state constitutions. Properly structured along the lines of the best practice principles outlined above, a Colorado property rights measure could potentially provide Colorado property owners with a meaningful method for seeking relief from highly restrictive land use regulations. However, by virtue of the simplistic formulation of Colorado Ballot Initiative #108, there is no reason to expect that the Initiative, if implemented, would reflect these basic best practice principles. Rather, it is more likely that the Initiative would result in the unintended consequences outline in this memorandum. In light of this circumstance, the Association should consider articulating its support for properly structured property rights legislation, while opposing the Initiative for the reasons discussed above.

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[84] *See* Echeverria at 50-51.

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APPENDIX A

COMPARISON OF OTHER STATES' PROPERTY RIGHTS MEASURES WITH THE INITIATIVE

JURISDICTION	**Arizona (Ariz. Rev. Stat. § 12-1134)**	**Florida (Fla. Stat. § 70.001)**	**Oregon (Measure 49)**	**Colorado**
KEY COMPONENTS OF PROPERTY RIGHTS MEASURES				
Type of Law	Statutory	Statutory	Statutory	Constitutional Amendment
Type of Action Subject to Compensation	Enactment or applicability of "any *land use law*" that reduces "*existing rights to use, divide, sell or possess* private *real property*."	Governmental entity "specific action" that "inordinately burdens" "an *existing use* of *real property* or a vested right to a specific use of real property."	Enactment of a "*land use regulation*" that restricts "the *residential use* of private *real property* or a farming or forest practice" that reduces "the fair market value of the property."	"Private property" that is "reduced in fair market value by government law or regulation."
Exclusions for certain types of regulations?	Yes	Yes	Yes	No
Retroactive?	No	No	No (but Measure 37 was)	Unclear
Limitation on ability to make claim?	Yes, claim must be brought within 3 years.	Yes, claims must be brought within 1 year after the law or regulation is first applied.	Yes, Measure 49 claims must be filed within 5 years of the enactment of the regulation.	No
PROPERTY RIGHTS MEASURES' IMPACTS				
Extent of Litigation	There are 12 Notes of Decision in Westlaw interpreting this statute.	There are 65 Notes of Decision interpreting the Bert Harris Act	416 lawsuits filed under Measure 37, dropped to 80 under Measure 49	The Colorado Initiative is broader and does not define any terms or process to be followed. Therefore, it can reasonably be expected that there will be a significant amount of litigation to define terms and process.

PROPERTY RIGHTS MEASURES' IMPACTS (cont.)				
Compensation Paid	There have been a few awards made under the Arizona Act.	As of 2008, there had been approximately 202 claims filed with state, regional, and local governments. There has been significantly more claims since but accurate numbers are difficult to find. The City of Anna Maria, appears to have had over 100 claims in 2016 and 2017 alone.	Total claims under Measures 37 and 49 totaled $17 billion. It appears that most claims were for property acquired before the statewide land use goals became effective, suggesting that future claims will be substantially fewer.	It is difficult to predict whether claims made pursuant to the Initiative will be pursued, whether or not they will be successful, or whether the government will seek to waiver regulation rather than pay claims. The experience in other states suggests that the government will seek to avoid paying compensation, whether that is by refraining from enacting new laws or regulations, waiving enforcement of existing laws, challenging claim in court, or some other method.
Regulation Not Enforced	In Arizona, state and local government have relied primarily on waivers of Proposition 207 rights from applicants and affected neighbors. There has also been a substantial amount non-enforcement of regulations.	There has been a substantial amount of regulatory non-enforcement caused by the Bert Harris Act, that has been widely reported in the news.	Measure 49 primarily permitted additional residential development. A total of 8,681 new "home sites" were authorized ("home sites" include new dwellings and parcels and legalization of existing dwellings and parcels).	As noted above, it appears likely that governments will avoid paying claims, due to fiscal constraints. Unless governments are successful in defending claims, the experience of other states suggests that there will be significant exemptions from laws and regulations granted to claimants.

REALTOR® ASSOCIATION TRACKING FORM
PART II

****To be completed by REALTOR® Association and sent to NAR within ten (10) business days of receipt of final response****

ASSOCIATION: ______________________________

CORRESPONDENCE:

Date of Receipt of Final Response from Robinson & Cole: ______________________________

__ Verbal
__ Written

FEEDBACK:

What action did you take subsequent to receiving this information (i.e., How did you use the information)?

____

____

What, if any, legislative/regulatory activity has occurred as a result?

____

____

Are you satisfied with the service you have received?

Verbal communication (e.g., timely, constructive):

____

____

Written analysis:

Length	Depth	Format
__ about right	__ about right	__ very helpful
__ too short	__ not enough detail	__ somewhat helpful
__ too long	__ too detailed	__ could use improvement

Do you have any suggestions for improving NAR's Land Use Initiative program?

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