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PROVIDING FOR OPEN SPACE CORRIDORS: TWO EXAMPLES

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This paper examines the efforts of two jurisdictions to respond to public demands that land be set aside for active or passive recreational use. The response to those demands reflects the different social, political and economic circumstances of those jurisdictions in allocating public and private lands for these uses. This paper will set out those circumstances and describe the approaches used.

I. The Settings – The projects considered here are the efforts by the Republic of Singapore to convert disused railway track areas to a pedestrian and bicycle corridor and those of the State of Oregon to manage public and private lands along a 200-mile stretch of the Willamette River to enhance views in rural areas and provide public access in urban areas.

While the projects were similar in their successful outcomes, they had to overcome somewhat different challenges. Among other things, the jurisdictions varied in their attitudes toward property in general and public open space use and management in particular, the use of public regulation and acquisition of land, allocation of public funds for open space, and the role of the public in planning and plan implementation in realizing public open space and other goals along a corridor.

Before moving to the details of the two projects, it is important to understand the circumstances of the two jurisdictions. The Republic of Singapore originally achieved its independence as part of the Federation of Malaysia in 1963, but separated from the Federation and became an independent state in 1965.¹ Its property law is derived from British law, but with significant constitutional and statutory modifications,² discussed below. The Republic is wholly urban and has almost 5.8 million people within 270 square miles, a

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¹ *Singapore: A History*, in The Commonwealth at <http://thecommonwealth.org/our-member-countries/singapore/history>.

² Singapore Academy of Law, *SingaporeLaw.sg* at <http://www.singaporelaw.sg/sglaw/laws-of-singapore/commercial-law/chapter-29>.

population density of 21,430 and an average age of 40.5.³ The country is a parliamentary democracy with a president as formal head of state, but with power residing in the prime minister and cabinet, with the same party retaining power since independence.⁴ Finally, the Republic has found a need for aggressive land acquisition to meet the needs of an expanding population on limited land,⁵ so the power of public agencies has been expanded, at times to the detriment of the legal and economic interests of private landowners.⁶

Oregon is an American state, which for our purposes has similar powers of land acquisition and regulation as Singapore, subject to federal and state constitutional and statutory law.⁷ However, the state differs from most American jurisdictions in adopting a detailed planning regime. In 1973, the Oregon Legislature enacted SB 100, the state's enabling legislation to provide for a

³ Worldometers: Population at <http://www.worldometers.info/world-population/singapore-population/>.

⁴ Freedom House, *Freedom in the World 2018*, at <https://freedomhouse.org/report/freedom-world/2018/singapore>. While formal democracy exists in the Republic, in practice the People's Action Party "constrains the growth of credible opposition parties and limits freedoms of expression, assembly, and association" by various means. Its political dominance allows the ruling party to achieve its policies more efficiently.

⁵ SingaporeSG, *Land Acquisition Act is Enforced: 17th Jun 1967* at <http://eresources.nlb.gov.sg/history/events/1f669eff-bc82-49d1-a27c-2624e4cab8c6>. By 1985, the government owned 76.2% of the land and noted:

The compulsory acquisition of land by the government was effective in keeping the costs of building houses and industrial premises affordable. Cheaper and more effective land acquisition also resulted in better urban planning that facilitated the urban renewal efforts carried out by the Urban Redevelopment Authority and its predecessor the Urban Renewal Department in the central area, which led to the growth of the commercial and business district in downtown Singapore.

In addition, the Republic has an aggressive land reclamation program by which it has added a quarter of its current territory. Subramanian, *How Singapore Is Creating More Land for Itself*, *New York Times Magazine* (April 20, 2017) at <https://www.nytimes.com/2017/04/20/magazine/how-singapore-is-creating-more-land-for-itself.html>.

⁶ This debate is reflected in a scholarly article tracing the history of compulsory acquisition in Singapore, Chew et al., *Compulsory Acquisition of Land in Singapore: A Fair Regime?*, 22 *Sing. Acad. of L. J.* 166 (2010) at <http://journalsonline.academyPublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/371/Citation/JournalsOnlinePDF>.

⁷ The Oregon Encyclopedia, *Land Use Planning* at https://oregonencyclopedia.org/articles/land_use_planning/#.W1y-kC2ZO8U.

comprehensive land use planning and regulatory system. That legislation provided for a state role in comprehensive planning and required that local government (at that time cities and counties, the only general purpose local government entities) adopt binding comprehensive plans and land use regulations to meet standards (“goals”) adopted by the newly-created state agency, the Land Conservation and Development Commission (LCDC).⁸ As a result, the state can more easily direct land use policy on nonfederal lands within the state. Combined with the power of eminent domain (compulsory acquisition) of private lands with compensation, the public has significant tools to realize public policy goals.⁹

II. The Singapore Rail Corridor -- In 2011, a railroad line that had connected Singapore with the Malaysian Peninsula for almost 100 years ceased operations and a 24km right-of-way running along a north-south axis of the island, reverted to the Singapore government, and discussions over converting it to a green space for recreation and non-vehicular commuting began.¹⁰ The Urban Redevelopment Authority, which had spearheaded most development in the Republic over the half-century, ultimately would be tasked with the disposition of the land. In addition, the Land Transport Authority was tasked with pedestrian and cycling uses in the corridor and the National Parks Board tasked with its recreational aspects. The position of the corridor in this urban area offered many opportunities, as noted when the Republic acquired the corridor:

⁸ The new legislation was enacted by 1973 Or. Laws Ch. 80. For a fuller description of the Oregon land use system, *see generally* Edward Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961-2011*, 45 John Marshall L. Rev. 357 (2012) [hereinafter *Quiet Revolution*]. It is important to note that LCDC merely regulates land use. Any land acquisition must be undertaken by another public agency in the name of the State or a local government.

⁹ While the State Parks and Recreation Department (OPRD) has express statutory authority for the “exercise of eminent domain” under OR. REV. STAT. § 390.121(1), that authority is further restricted with regard to acquiring of a scenic easement through eminent domain for the greenway under OR. REV. STAT. § 390.332(4).

¹⁰ City Form Lab, *50 Ways to the Singapore Rail Corridor*, at <http://cityform.mit.edu/projects/50>. The Republic entered into the Points of Agreement (1990) with Malaysia to trade some land in the Singapore port area in return for the Malaysian-owned corridor. *From The Straits Times Archives: Malayan Railway land in Singapore* (October 31, 2014) at <https://www.straitstimes.com/singapore/transport/from-the-straits-times-archives-malayan-railway-land-in-singapore>. *See also* the news story by the same name in Zaccheus, *The Straits Times*, September 13, 2014 at <http://www.asiaone.com/singapore/50-ways-rail-corridor> and a discussion of the potential of the corridor in Richards, *Singapore's Rail Corridor: The Secrets of Singapore's Ghost railway Line* (June 30, 2016) at <http://www.traveller.com.au/singapores-ghost-railway-an-oasis-of-calm-gmdv48#ixzz5Mac60pp9>

Regardless of what the future holds for the corridor, one can hardly overstate the importance of the site for enhancing liveability in Singapore. The sites passed by the corridor contain numerous housing estates, businesses, MRT [Mass Rapid Transit] and bus stops and important cultural institutions in close distance. A great number of residents and employees could potentially benefit from the corridor being developed into a long and seamless park. Enhancing accessibility to the corridor from the surrounding areas will play a crucial role in developing the site. A better-accessed and less restricted corridor would lead to a better integration with the surrounding built environment, maximizing opportunities for people to go to work by bicycle, on foot or even run.¹¹

Following a design competition, a Concept Master Plan¹² was approved by the Urban Redevelopment Authority to give direction to future uses and improvements in the corridor.¹³ Most of the planned corridor uses will largely be

¹¹ City Form Lab, note 10, *supra*. On October 21, 2010, before the right-of-way became available, the Nature Society of Singapore proposed that the area be used for open space. Nature Society of Singapore, *The Green Corridor: A Proposal to Keep the Railway Lands as a Continuous Green Corridor* at <https://nss.org.sg/documents/TheGreenCorridor101103.pdf>. Given subsequent activity, this proposal resonated well with the authorities. It also had vigorous public support. Communication with Dr. Kevin Tan, Director, Equilibrium Consulting and Adjunct Faculty, National University of Singapore (on file with author).

¹² Two types of planning are at issue in dealing with the corridor. According to the Urban Redevelopment Authority, the purpose of the Concept Master Plan, which is reviewed every 10 years, is to

“* * * guide Singapore’s development over the next half a century, the Concept Plan is used to map out our long-term plans for strategic land use and transportation. Its main aim is to ensure there is sufficient land to meet our long-term needs, while ensuring the people continue to enjoy a quality living environment.”

Singapore Urban Redevelopment Authority, *Concept Plan* at <https://www.ura.gov.sg/Corporate/Planning/Concept-Plan>. On the other hand, the Authority defines a Master Plan as:

* * * the statutory land use plan which guides Singapore’s development in the medium term over the next 10 to 15 years.

It is reviewed every five years and translates the broad long-term strategies of the Concept Plan into detailed plans to guide the development of land and property. The Master Plan shows the permissible land use and density for developments in Singapore.

Both are binding, but it appears by denoting the Rail Corridor Plan as a Concept Master Plan, the Redevelopment Authority has recognized the development as consistent with medium and long-term development goals.

completed by 2021, with individual segments completed during this period to implement the Concept Master Plan.¹⁴

As of mid-2018, the conversion of the rail corridor to public uses appears to be going along well towards Singapore's reinvention of itself from a "Garden in a City" to a "City in a Garden."¹⁵ The Rail Corridor Plan has multiple objectives:

- Enhancing Areas for Park and Nature
- Increasing Urban Open Spaces
- Connecting People and Improving Transportation Alternatives
- Connecting Singaporeans with their History

¹³ Heng, *Winning Concept Master Plan Chosen for Rail Corridor*, Straits Times, November 9, 2015. The article discusses proposals for various portions of the corridor contains an illustrative map and notes that the winning proposal includes plans for 122 access points into the Rail Corridor and 21 "platforms" that will house amenities such as toilets and rest areas along the 24km stretch. See also Singapore Urban Redevelopment Authority, *Rail Corridor: Singapore's Green Artery* at <https://www.ura.gov.sg/Corporate/Get-Involved/Shape-A-Distinctive-City/Explore-Our-City/Rail-Corridor> and Singapore Ministry of National Development, *Rail Corridor* (2018) at <https://www.mnd.gov.sg/our-work/engaging-our-communities/rail-corridor>. The various public agencies of the Republic are coordinated through a ministerial process.

¹⁴ For example, the Ministry of National Development proposes to develop the Rail Corridor (Central) area for the following uses:

- Heritage and Culture: Sensitive enhancements to railway heritage structures and improved public access to these sites.
- Biodiversity and Greenery: Distinctive landscape experiences for visitors, and strengthened ecological connection between green spaces.
- Recreation: An inclusive hub with open spaces that cater to a range of recreational activities and needs of different users.

Republic of Singapore Ministry of National Development, *Rail Corridor (Central)* at <https://www.mnd.gov.sg/our-work/engaging-our-communities/rail-corridor>.

¹⁵ Long-time Prime Minister Lee Kwan Yew framed this objective in 1963.

The ambitious idea was 'to transform Singapore into a city with abundant lush greenery and a clean environment in order to make life more pleasant for the people' as well as suggesting that litter-free streets pinpoints Singapore out as a well-organised city that would draw increased numbers of tourists and foreign investment.

First Stop Singapore, *From a Garden in a City to a City in a Garden* (January 22, 2016) at <https://www.firststopsingapore.com/us/from-a-garden-in-a-city-to-a-city-in-a-garden/#oXmuUjQUPr8QzHzi.97>.

Unlike the case with land reclamation, there appears to be general consensus that the corridor should not be converted into housing or other urban development, for which there has been intense competition.¹⁶ Indeed, support has been shown by a “campaign website” apparently supported by the government¹⁷ and an extensive outreach program is in place.¹⁸ With no land acquisition difficulties to speak of following the agreement reached with the Malaysian government to extinguish that country’s interests in the corridor, a strong central government that is willing to make decisions, and a supportive population, the rail corridor project is likely to be completed as planned.

III. Oregon’s Willamette River Greenway -- The Willamette River Greenway is a corridor that extends for approximately 200 miles through rural and urban areas of the most populated portions of the state, i.e. from Eugene to Portland.¹⁹ In 1967, before any Greenway system was established, the state legislature declared a policy to protect and preserve the natural scenic and recreational value of the corridor by establishing a Willamette River Park System.²⁰ Even though

¹⁶ In contrast, the National Environment Agency has announced the exhumation of 45,500 graves in a cemetery to make the land available for other uses. National Environment Agency, *After Death: Choa Chu Kang Cemetery Exhumation Programme* at <https://www.nea.gov.sg/our-services/after-death/choa-chu-kang-exhumation-programme>. See also *Land-Starved Singapore Exhumes Its Cemeteries to Build Roads and Malls* (Guardian, August 7, 2015) at <https://www.theguardian.com/cities/2015/aug/07/land-starved-singapore-exhumes-its-cemeteries-to-build-roads-and-malls>.

¹⁷ Singapore Ministry of National Development, *Engaging Our Communities, Rail Corridor* at <https://www.mnd.gov.sg/our-work/engaging-our-communities/rail-corridor> announced on February 28, 2018:

In Oct 2017, NParks announced the formation of a Friends of Rail Corridor community as part of the Friends of the Park scheme. More details of the community structure will be shared when plans are firmed up.

“NParks” refers to the Ministry of National Parks. It may appear odd to Americans that a public agency has formed and may support a project support group. See also *work of a different support group*, The Green Corridor at <http://www.thegreencorridor.org/about/>.

¹⁸ Ministry of National Development, *Engaging Our Communities*, note 17, *supra*.

¹⁹ OR. REV. STAT. § 390.310(3).

²⁰ § 1, ch. 551, Or. Laws 1967. These early state efforts were largely for the use of public funds to acquire public parks and open space. McLennan, *Public Patrimony: An Appraisal of Legislation and Common Law Protecting Recreational Values in Oregon’s State Owned Lands and Waters*, 4. Env. L. 317, 372-373 (1974). The original plan for public control of the corridor was proposed by then-State Treasurer Bob Straub (112 Congressional Record 127 (Sen. Neuberger’s remarks, August 4, 1966)), but endorsed by his political opponent and eventual Governor, Tom McCall. Straub then succeeded McCall as Governor and continued this successful

the relevant state agency, then the Oregon Highway Commission which directed the Oregon Department of Transportation (ODOT), was prohibited from acquiring property by eminent domain (compulsory purchase), the concerns of riparian owners over conversion of riverfront property to public lands led the legislature in 1973 to limit acquisition efforts and require the Oregon Department of Transportation (ODOT) to set a greenway boundary and devise a plan for the corridor to be known as the Willamette River Greenway.²¹

As noted, Oregon provides for a state role in comprehensive planning, requiring that state agencies and local governments meet statewide goal standards in formulating and administering their programs.²² LCDC-adopted goals, were similar to state agency rules in that they were enforceable means to carry out certain state policies, such as resource lands preservation and affordable housing.

LCDC not only approved the Greenway Plan,²³ but also adopted a separate Willamette River Greenway Goal,²⁴ which set out detailed land use standards with an overall statement:

To protect, conserve, enhance and maintain the natural, scenic, historical, agricultural, economic and recreational qualities of lands along the Willamette River as the Willamette River Greenway.²⁵

With the LCDC adoption of the Greenway Goal and approval of the Greenway plan, the stage was now set for the Greenway program in which cities and

program. Netboy, *Willamette River Greenway*, Oregon History Project at <https://oregonhistoryproject.org/articles/historical-records/article-willamette-greenway-act/#.W2Dgti2ZO8U> and Schell, *The Willamette Greenway and How It Came to Be*, Oregon Live, April 29, 2017 at https://www.oregonlive.com/opinion/index.ssf/2017/04/the_willamette_greenway_and_ho.html.

²¹ Ch. 558, Or. Laws 1973. *See also* McLennan, note 20, *supra*. The new law defined the Greenway to include at least those lands within 150 feet from the ordinary low water line on each side of each river channel, revised the policy statements to allow for continuation of existing uses, establishing the compatibility of farm use with the Greenway, required local governments to submit plans for Greenway areas within their boundaries to deal with management, lands to be acquired and subsurface mineral rights. The Plan was to be submitted to, and approved by, the State Land Conservation and Development Commission, which deals with state land use matters. OR. REV. STAT. § 390.322. Cities are exempt from the limitations on use of eminent domain in the Greenway.

²² *See* note 8 and accompanying text.

²³ This action was undertaken by an interim order referenced in Goal 15, Part H and codified at OR. ADM. R. § 660-020-0060.

²⁴ OR. ADM. R. § 660-015-0015, hereinafter referred to as “Greenway Goal.”

²⁵ *Ibid.*

counties, which had land use jurisdiction over the river and its adjacent corridor would adopt plans and land use ordinances to regulate these areas. As with the Singapore corridor program, space does not allow for discussion of all of the details and mechanics of the Greenway program. A copy of the Goal is found in the Appendix and summarized section-by-section below:

- A. General Provisions – Lawful uses as of December 6, 1975 may continue; however, new development or change or intensification of existing uses must meet local criteria adopted to implement Goal 15 under the Greenway Compatibility Standards under Part F, below.²⁶
- B. Inventories and Data – Certain existing uses and land capabilities must be inventoried, including agricultural, timber, recreational, and historic sites, as well as lands to be acquired for public use.²⁷
- C. Considerations – Relevant statutes, goals and plans must be applied, boundaries set, agriculture, recreational use, fish and wildlife habitat uses must be addressed, as well as setbacks from the river and land to be acquired.²⁸

²⁶ Greenway Goal, note 24, *supra*. Part A. The idea was to allow lawful nonconforming uses to continue, but generally to prohibit new uses or “intensifications” of existing uses that would be inconsistent with the Greenway Plan following its adoption.

²⁷ Greenway Goal, note 24, *supra*. Part B. Reliance on science, in the form of inventories and data, is a characteristic of the Oregon system and is featured in Goals 1 (citizen involvement), 2 (land use planning), 3-5 (agricultural and forest lands and natural resources), 7 (natural hazards and disasters), 8 (recreational uses), 9 (economy of the state), 10 (housing), 11 (public facilities and services), 12 (transportation), 14 (urbanization), and 16-19 (the coastal goals). However, in the case of the Greenway, aside from initial funding to adopt the Willamette River Greenway Plan approved by LCDC in 1978, there has been no further state funding for these efforts. Communication from Amanda Punton, Planning Services Division, Oregon Department of Land Conservation and Development, August 10, 2018 (on file with author).

²⁸ Greenway Goal, note 24, *supra*. Part C. Local governments may establish a more extensive greenway corridor or extend the area for compatibility considerations. In general, for rural areas, the preservation of lands for natural resource uses consistent with Goal 3-5 is a consistent refrain of Oregon land use policy. See *e.g.*, *Reeves v. Yamhill County*, 888 P2d 79, 81-82 (1989) and *J. R. Golf Services, Inc. v. Linn County*, 661 P2d 91 (Or. App., 1983). For urban areas, transportation, recreation and public access are similar principles. A frequent issue in urban areas will be requirements to dedicate land for public access or trails and possible conflicts under the Fifth Amendment and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *West Linn Corporate Park, L.L.C. v. City of West Linn*, 240 P3d 29 (Or., 2010); *Kingsley v. City of Portland*, 55 Or. LUBA 255 (2007). Of course, such arguments may also be made in a rural lands context as well. See *Larson v. Multnomah County*, 25 Or. LUBA 18 (1993) and *Nelson v. Benton County*, 23 Or. LUBA 392 (1992).

- D. Plan Maintenance – The State maintains the plan showing Greenway Boundaries, acquisition areas and public access to the river.²⁹
- E. Cities and Counties – These entities must incorporate the Greenway Plan into their own plans, zoning maps and regulations and other implementation measures, including listing uses allowed and areas to be acquired.³⁰
- F. Implementation Measures – Greenway Plan consistency is required and includes mapping amendments to existing Greenway boundaries, use of exclusive farm use zoning for agricultural lands, and treatment of open spaces and flood plains, as well as requiring Greenway Compatibility Review for changes or intensification of uses (discussed below).³¹

²⁹ Greenway Goal, note 24, *supra*. Part D. Before 1980, ODOT, acting through its Parks and Recreation Division administered the State’s parks and recreation programs; however Ballot Measure 1 limited the principal source of ODOT revenues, the gasoline tax, to transportation facilities. Ballotpedia, *Oregon Limitations on Uses of Gasoline and Highway User Taxes, Measure 1 (May 1980)* at

[https://ballotpedia.org/Oregon Limitations on Uses of Gasoline and Highway User Taxes, Measure 1 \(May 1980\)](https://ballotpedia.org/Oregon_Limitations_on_Uses_of_Gasoline_and_Highway_User_Taxes,_Measure_1_(May_1980)). In 1989, the legislature created the Oregon Parks and Recreation Department and transferred ODOT’s functions of that nature to that department. *See* Ch. 904, Or. Laws 1989, §§ 18-21 and OR. REV. STAT. § 390.111.

³⁰ Greenway Goal, note 24, *supra*. Part E. All current local Greenway plans are “acknowledged” as consistent with the statewide planning goals. However, under Section G of the Goal, notice of plan amendments or changes or intensification of uses must be given to the State Parks and Recreation Department as the statutory successor to ODOT. Even within cities, where a broader range of uses may be allowed under the Goal, new regulations and rezonings must meet the requirements of the Goal. *See Woodard v. City of Cottage Grove*, 57 Or. LUBA 152, 175-80 (2008) and *Okroy v. City of Cottage Grove*, 47 Or. LUBA 297 (2004). A fair number of cases stand or fall on the adequacy of the findings made locally, rather than on the correctness of policy choices. *See Reinert v. Clackamas County*, 57 Or. LUBA 690 (2008); *Cox v. Polk County*, 49 Or. LUBA 78 (2005); *McNern v. City of Corvallis*, 39 Or. LUBA 591 (2001); *Richards-Kreitzberg v. Marion County*, 32 Or. LUBA 76 (1996); *Boldt v. Clackamas County*, 21 Or. LUBA 40 (1991); *O’Brian v. City of West Linn*, 18 Or. LUBA 665 (1990). At present, there are no funds allocated for acquisition of lands within the Greenway. Communication from Amanda Punton, Planning Services Division, Oregon Department of Land Conservation and Development, August 10, 2018 (on file with author).

³¹ Greenway Goal, note 24, *supra*. Part F. Effectively, new goal, administrative rule or statutory requirements are imposed on local governments regardless of whether they are contained in local plans and regulations. OR. REV. STAT. § 197.646(3). However, acknowledged plans implement the Goal and their interpretations control. *See, e.g., Kellogg Lake Friends v. Clackamas County*,

- G. Notice to State Regarding Plan Amendments or Changes or Intensifications of Uses– If a local government or state agency considers a change or intensification of use, it must give notice to the State so that the State may participate in (and possibly appeal from) that decision.³²
- H. State Agency Decision-making – State agencies continue their respective roles; however, they must also deal with issues in the Greenway in accordance with Greenway statutes, goals and plans.³³
- I. Scenic Easements – Existing law to expand or contract state authority to acquire scenic easements in the Greenway is unchanged.³⁴

773 P2d 23, 24 (Or. App., 1989) (local ordinance that calculated setback from Willamette River, rather than from more proximate lake, upheld.)

³² Greenway Goal, note 24, *supra*. Part G. This process is detailed in OR. ADM. R. § 660-020-0065. In *Allen v. City of Portland*, 742 P2d 701 (Or. App., 1987), a local determination that an exception to Goal 15 was not required to allow a non-recreational use in a city was upheld by the Oregon Court of Appeals. The City allowed a fill (which was permitted by the Goal and its implementing ordinances), but used that fill to provide additional land to meet setback requirements for a highway ramp. Because the fill was allowed and would obviate the need for an exception for the setback, the local decision was affirmed. However in *Oregon Department of Parks and Recreation v. City of Portland*, 772 P2d 435, 436-37 (Or. App., 1989), the Court of Appeals explained that, in a review as to whether there was substantial evidence in the whole record to support a fact, the City did not bear the burden of demonstrating the evidence it relied upon was “substantial;” the reviewing tribunal must make that determination without placing the burden on the parties defending the decision.

The process of amending the greenway boundary is exemplified in a proposal by the City of Portland to do so in 2010 and the careful response of LCDC and its staff to honor both the original greenway boundary and the amendment process. See Memorandum to LCDC by Land Conservation and Development Department Director Richard Whitman dated August 10, 2010 re: City of Portland Request to Amend Willamette River Greenway Boundary at https://www.oregon.gov/LCD/docs/rulemaking/090110/item8_prop_amend_willamette_river_greenway_plan_boundary.pdf.

As a practical matter, the LCDC staff assigned to monitor Greenway activity reports states that the Oregon Department of Parks and Recreation (OPRD), which succeeded to ODOT usually does nothing with the notices unless a local government proposes to amend the Greenway boundary, in which case it attempts to discourage that proposal. More importantly, OPRD may request, but is not entitled to receive Greenway Compatibility notices from local governments.

³³ Greenway Goal, note 24, *supra*. Part H. Oregon requires subordination of state agency plans and activities to acknowledged local plans in OR. REV. STAT. § 197.180.

³⁴ Greenway Goal, note 24, *supra*. Part I. However, it is important to reiterate the role of the local comprehensive plan and, in the context of this article, the plan’s Greenway Element, which

- J. Trespass – Similarly, the Goal does not authorize trespass onto private lands without easements or other arrangements.³⁵
- K. Definitions – Issues important for implementation of the Goal are set out, including “committed lands” (usually resource lands lawfully and physically committed to non-resource use, such as rural subdivisions on farm or forest lands), change of use and intensification of use.³⁶

IV. Comparison of the Models – Despite their somewhat similar origins in common law property law, the two examples considered here differ in their approaches to a common end of providing for open space preservation and use:

1. The physical setting and nature of the activity– Singapore is a first-world urban area, which has incidental open space. However, the projected population growth of the Republic puts open space at a premium that must be planned for in order for those areas to be preserved and used. The Willamette Valley in Oregon is much larger and has vastly smaller urban lands, both now and in the immediate future, so that an urban-rural division (with regard to land uses and conflicts with open space) will continue to be an issue. Similarly, public perceptions of open space needs will also differ, due especially to the premium of available land in Singapore and the fact that a public agency owned the land and undertook a project to develop the same. For the most part, the Oregon activity was in the form of regulating private lands.
2. The spaces preserved – The existence of a publicly owned linear corridor (and the historical presence of railroad tracks) in Singapore provides a ready-made object for public use.³⁷ While

controls not only local land use regulations, but also local government actions. *Willamette Oaks, L.L.C. v. City of Eugene*, 46 Or. LUBA 813 (2004) (failure to list subject property on list of properties to be acquired may be fatal to eminent domain action).

³⁵ Greenway Goal, note 24, *supra*. Part J. Rural landowner concerns over trespass has been a significant factor in Greenway policy in Oregon. McLennan, note 20, *supra*. at 372-73.

³⁶ Greenway Goal, note 24, *supra*. Part K. In *Gunderson, LLC v. City of Portland*, 290 P3d 803 811 (Or., 2012), the Oregon Supreme Court resolved the statutory construction issue of whether there was a negative inference that may be drawn from state and local authority to regulate changes or intensifications of uses to conclude that uses lawfully existing in 1976 were exempt from further regulation, rejecting that argument.

³⁷ In the United States, there is a body of case law arising from the conversion of land awarded to railroads for extending service to the American West from railroad to non-railroad use, as the railroad was operated by government agencies. Depending on many factors including the terms of the award, these lands may revert to the federal government, to the states or to adjacent property

areas may be added or taken away from the original corridor, there remains a specific area for planning and utilization. Initially, the Willamette River Greenway was legislatively delineated, and with some exceptions, included lands within 150 feet of the ordinary low water line of the river, but has been revised slightly under subsequent state agency and local actions.

The changing function of the Oregon Greenway focuses on new treatment of certain areas. While resource protections provided by Goals 3 (agricultural lands) and 4 (forest lands) would likely prevent most non-resource related development in rural areas in any event, lands adjacent to rivers may also be desirable for pedestrian or bicycle paths or for park acquisitions. Those urban lands may be developed for private use, but frequently there are open space design and public path issues under Greenway Goal implementation measures that arise in a development approval context.³⁸

3. Perceptions of Open Space – Because open space competes with other potential uses in Singapore, public agencies and citizens focus directly and immediately on its planning and preservation. While Oregon has more area, the demand for a state role in the Willamette River Greenway arises largely from the more populated areas of the state and initially resulted in less consensus over the state role in planning, land acquisition, and public access. As discussed below, a wholly different view of property rights is also a significant factor.
4. The Role of Citizen Involvement – While Singapore is a parliamentary democracy the leadership in the Republic tends to be decisive in advancing government programs. In the case of the rail corridor, the government acquired the land and agreed with a public consensus that the land should generally be used for open space. However, it was the government that delegated to the

owners or may be retained by the railroads. If there is a claim that these lands are private and a public agency seeks to use those lands for public purposes (such as pedestrian or bicycle paths), there may be trespass, quiet title or takings litigation over the same. *See, e.g., Preseault v. United States*, 100 F.3d 1525 (1996); Ferster, *Rails-to-Trails Conversions: A Legal Review*, 58 Planning and Environmental Law, No. 9, p. 3 (September, 2006).

³⁸ Communication from Amanda Punton, Planning Services Division, Oregon Department of Land Conservation and Development, August 10, 2018 (on file with author).

various ministries the several components of the planned corridor uses and supported the formation of public advisory committees for the ultimate plans and uses. In contrast, Oregon has moved in fits and starts on the state role in the Greenway, beginning with providing a vehicle for public funding, to supporting, then limiting, public acquisition efforts, and then supporting a combination of limited public acquisition and land use regulations that differed in their impacts, depending on the urban or rural nature of the specific area.³⁹ And while citizen involvement is a stated desideratum in the Oregon planning program, the longstanding acceptance of the Greenway infrequently generates controversy.

5. Attitudes towards property and regulation -- As noted above, the dearth of available space caused Singapore to appraise real property to be acquired by the public at fairly low values. Combined with the relative ease of acquisition (and in this case, the corridor did not have significant land costs, other than those negotiated with the Malaysian government) and the fact that the corridor was already publicly owned when planning for ultimate uses began, the focus in Singapore was on planning and plan implementation. Given its structure and politics, it is much easier for the government to “get things done” in Singapore, whereas public consensus is more difficult to achieve in Oregon and regulation is more restrained by political and constitutional considerations.

Indeed, Oregon’s situation was much more complex. For one thing, there is a strongly held view of the importance of private property rights. And while the public owned park properties and had a limited number of view and other easements over the approximate 200-mile corridor; most of the lands were and are in private ownership and much of those were in rural areas, where landowners had deep suspicions as to the nature of regulations to be encountered and whether those regulations were a prelude to the public tramping across their lands they maintain. To a large extent, the existence of the Greenway Plan at the state and local

³⁹ Actual land acquisition has not been funded by the state, so that program generates little controversy. Communication from Amanda Punton, Planning Services Division, Oregon Department of Land Conservation and Development, August 10, 2018 (on file with author).

levels and a legislative policy limiting acquisition, disfavoring trespass, and providing an even-handed approach to public and private uses in the Greenway have alleviated those concerns. Legal conflicts are more likely to occur as urban entities attempt to acquire easements for public corridors.

6. Funding – Singapore appears to be committed to completion of the rail corridor project and ongoing maintenance of those improvements. Oregon sets budget priorities every two years, so that supporting state regulatory and planning support for the Greenway is always an issue and may be reduced if circumstances require.⁴⁰ Similarly, acquisition of land or interests in land by the public may be reduced or temporarily eliminated more easily.

V. Conclusion – Singapore and Oregon represent different approaches to public planning, acquisition and maintenance of open space. Some of this is happenstance and circumstantial, such as the public or private or the urban or rural natures of the lands at issue. Some of it can be traced to the very different views of private property from an economic, social and political perspective. Each system is politically efficient and “works” in the medium of the felt social needs of its respective circumstances. But both models provide alternatives that are valuable to other jurisdictions facing open space needs.

APPENDIX A

GOAL 15: WILLAMETTE RIVER GREENWAY (OAR § 660-015-0005)

To protect, conserve, enhance and maintain the natural, scenic, historical, agricultural, economic and recreational qualities of lands along the Willamette River as the Willamette River Greenway.

⁴⁰ In fact, state funding for land acquisition in the Greenway has not been proposed for many years, nor is there much public support for these efforts. What appears effective is a combination of resource lands regulation in rural areas that has the incidental effect of enhancing visual experiences from the river and urban transportation plans that provide a basis for exacting pedestrian and bicycle paths when new development occurs in riparian areas. Communication from Amanda Puntton, Planning Services Division, Oregon Department of Land Conservation and Development, August 10, 2018 (on file with author).

A. GENERAL

1. The qualities of the Willamette River Greenway shall be protected, conserved, enhanced and maintained consistent with the lawful uses present on December 6, 1975. Intensification of uses, changes in use or developments may be permitted after this date only when they are consistent with the Willamette Greenway Statute, this goal, the interim goals in ORS 215.515(1) and the statewide planning goals, as the case may be, and when such changes have been approved as provided in the Preliminary Greenway Plan or similar provisions in the completed plan as appropriate.

2. The Willamette Greenway Program shall be composed of cooperative local and state government plans for the protection, conservation, enhancement and maintenance of the Greenway, and of implementation measures including management through ordinances, rules, regulations, permits, grants as well as acquisition and development of property, etc. It shall also become a part of all other local and state plans and programs within and near the Greenway.

3. The Greenway Program shall include:

a. Boundaries within which special Greenway considerations shall be taken into account;

b. Management of uses on lands within and near the Greenway to maintain the qualities of the Greenway;

c. Acquisition of lands or interests in lands from a donor or willing seller or as otherwise provided by law in areas where the public's need can be met by public ownership.

B. INVENTORIES AND DATA

Information and data shall be collected to determine the nature and extent of the resources, uses and rights associated directly with the Willamette River Greenway. These inventories are for the purpose of determining which lands are suitable or necessary for inclusion within the Willamette River Greenway Boundaries and to develop the plans and management and acquisition programs.

Each of the following items shall be inventoried¹ as it relates to the Greenway objectives:

1. All agricultural lands as provided in Goal 3. This includes all land currently in farm use as defined in ORS Chapter 215.203(2);

2. All current aggregate excavation and processing sites, and all known extractable aggregate sources;

When information on such items is not available through previous studies, information will be maintained by the agencies for those portions of the plan for which they are responsible. This requirement shall not limit units of government from collecting information on other items.

3. All current public recreation sites, including public access points to the river and hunting and fishing areas;
4. Historical and archaeological sites;
5. Timber resources;
6. Significant natural and scenic areas, and vegetative cover;
7. Fish and wildlife habitats;
8. Areas of annual flooding and flood plains;
9. Land currently committed to industrial, commercial and residential uses;
10. The ownership of property, including riparian rights;
11. Hydrological conditions;
12. Ecologically fragile areas;
13. Recreational needs as set forth in Goal 8;
14. Other uses of land and water in or near the Greenway;
15. Acquisition areas which include the identification of areas suitable for protection or preservation through public acquisition of lands or an interest in land. Such acquisition areas shall include the following:
 - a. Areas which may suitably be protected by scenic easements;
 - b. Scenic and recreational land for exclusive use of the public;
 - c. Sites for the preservation and restoration of historic places;
 - d. Public access corridor;
 - e. Public parks;
 - f. Ecologically fragile areas; and
 - g. Other areas which are desirable for public acquisition may also be identified if the reasons for public acquisition for the Greenway are also identified.

C. CONSIDERATIONS AND REQUIREMENTS

The Oregon Department of Transportation (DOT) Greenway Plan, the portions of each city and county comprehensive plan within the Greenway, and the portions

of plans and programs and implementation measures of all special districts, state and federal agencies within the Greenway shall be based on the following factors:

1. General Considerations and Requirements

a. Statutory requirements in ORS Chapter 390.010 to 390.220 and in ORS Chapter 390.310 to 390.368;

b. City, county and regional comprehensive plans adopted pursuant to ORS Chapter 197 for jurisdictions along the river;

c. Statewide planning goals and guidelines adopted pursuant to ORS Chapter 197 by LCDC;

d. Interim goals set forth in ORS Chapter 215.515(1).

2. Boundary Considerations and Requirements.²

The temporary and preliminary Greenway boundaries shall be reviewed as to their appropriateness and refined as needed based on the information contained in the inventories. The refined boundaries shall include such lands along the Willamette River as are necessary to carry out the purpose and intent of the Willamette River Greenway through a coordinated management and acquisition program.

² See ORS Chapter 390.318(1) for specific statutory language. “There shall be included within the boundaries of the Willamette River Greenway all lands situated within 150 feet from the ordinary low water line on each side of each channel of the Willamette River and such other lands along the Willamette River as the development of such Greenway; however, the total area included within the boundaries of such Greenway shall not exceed, on the average, 320 acres per river mile along the Willamette River, however, for the purpose of computing the maximum acreage of lands within such Greenway, the acreage of lands situated on such islands and within state parks and recreation areas shall be excluded.”

Within farm areas, consideration shall be given to the ability of agricultural land adjacent to the Willamette River Greenway to enhance and protect the Greenway.

3. Use Management Considerations and Requirements. Plans and implementation measures shall provide for the following:

a. Agricultural lands -- The agricultural lands identified in the inventory shall be preserved and maintained as provided in Goal 3 as an effective means to carry out the purposes of the Greenway including those agricultural lands near the Greenway. Lands devoted to farm use which are not located in an exclusive farm use zone shall be allowed to continue in such farm use without restriction as provided in ORS 390.314(2)(c), ORS 390.332(4) and ORS 390.334(2);

b. Recreation –

- (1) Local, regional and state recreational needs shall be provided for consistent with the carrying capacity of the land;
 - (2) Zoning provisions shall allow recreational uses on lands to the extent that such use would not substantially interfere with the long-term capacity of the land for farm use as defined in ORS 215.203;
 - (3) The possibility that public recreation use might disturb adjacent property shall be considered and minimized to the greatest extent practicable;
 - (4) The public parks established by section 8a of Chapter 558, 1973 Oregon Laws, shall be set forth in Oregon Laws, shall be set forth on the appropriate comprehensive plans and zoning established which will permit their development, use and maintenance;
- c. Access -- Adequate public access to the river shall be provided for, with emphasis on urban and urbanizable areas;
 - d. Fish and wildlife habitat -- Significant fish and wildlife habitats shall be protected;
 - e. Scenic qualities and views -- identified scenic qualities and viewpoints shall be preserved;
 - f. Protection and safety -- The Willamette River Greenway Program shall provide for the maintenance of public safety and protection of public and private property, especially from vandalism and trespass in both rural and urban areas to the maximum extent practicable;
 - g. Vegetative fringe -- The natural vegetative fringe along the River shall be enhanced and protected to the maximum extent practicable;
 - h. Timber resource -- The partial harvest of timber shall be permitted beyond the vegetative fringes in areas not covered by a scenic easement when the harvest is consistent with an approved plan under the Forest Practices Act, or, if not covered by the Forest Practices Act, then with an approved plan under the Greenway compatibility review provisions. Such plan shall insure that the natural scenic qualities of the Greenway will be maintained to the greatest extent practicable or restored within a brief period of time;
 - i. Aggregate extraction -- Extraction of known aggregate deposits may be permitted when compatible with the purposes of the Willamette River Greenway and when economically feasible, subject to compliance with ORS 541.605 to 541.695; ORS 517.750 to 517.900 and subject to compliance with local regulations designed to minimize adverse effects on water quality, fish and wildlife, vegetation, bank stabilization, streamflow, visual quality, noise, safety and to guarantee necessary reclamation;

j. Development away from river -- Developments shall be directed away from the river to the greatest possible degree; provided, however, lands committed to urban uses within the Greenway shall be permitted to continue as urban uses, including port, industrial, commercial and residential uses, uses pertaining to navigational requirements, water and land access needs and related facilities;

k. Greenway setback -- A setback line will be established to keep structures separated from the river in order to protect, maintain preserve and enhance the natural, scenic, historic and recreational qualities of the Willamette River Greenway, as identified in the Greenway Inventories. The setback line shall not apply to water-related or water-dependent uses.

4. Areas to be Acquired -- Considerations and Requirements

Areas to be acquired must:

- a. Have potential to serve the purposes of the Greenway;
- b. To the maximum extent practicable, be consistent with non-interference or non-interruption of farm uses as defined in ORS Chapter 215.203(2);
- c. Be suitable for permitting the enforcement of existing statutes relating to trespass and vandalism along the Greenway, and be suitable for allowing maintenance of the lands or interests acquired.

D. DOT GREENWAY PLAN

The DOT will prepare and keep current, through appropriate revisions, a Greenway Plan setting forth the state interests in the Greenway. The plan will show:

1. The boundaries of the Willamette River Greenway;
2. The boundaries of the areas in which interests in property may be acquired. These shall be depicted clearly on maps or photographs together with the nature of the acquisition such as fee title or scenic easement; the general public purposes of each such area, and the conditions under which such acquisition may occur.
3. Use Intensity Classifications for the areas acquired by the State for Greenway purposes; and
4. The locations of public access, either already existing or to be acquired.

The DOT plan or revision thereto will be reviewed by the Land Conservation and Development Commission (LCDC) as provided in ORS 390.322. When the Commission has determined that the revision is consistent with the statutes and this goal it shall approve the plan for recording.

E. COMPREHENSIVE PLANS OF CITIES AND COUNTIES

Each city and county in which the Willamette River Greenway is located, shall incorporate the portions of the approved DOT Greenway Plan in its comprehensive plan and implementing ordinances and other implementation measures.

1. Boundaries: Boundaries of the approved Willamette River Greenway shall be shown on every comprehensive plan.
2. Uses: Each comprehensive plan shall designate the uses to be permitted for the rural and urban areas of each jurisdiction, which uses shall be consistent with the approved DOT Greenway Plan, the Greenway Statutes and this Goal.
3. Acquisition Areas: Each comprehensive plan shall designate areas identified for possible public acquisition and the conditions under which such acquisition may occur as set forth in the approved DOT Willamette Greenway Plan and any other area which the city or county intends to acquire.

F. IMPLEMENTATION MEASURES

Implementation of the Greenway Program shall occur through the cooperative efforts of state and local units of government and shall be consistent with the approved DOT Greenway Plan and the city and county comprehensive plans, the goals and appropriate statutes.

1. Boundaries: Willamette River Greenway boundaries shall be shown on city and county zoning maps and referred to in the zoning ordinance and the subdivision ordinance.
2. Uses: Measures for managing uses within the Greenway shall include at least:
 - a. Exclusive farm use zoning of all agricultural land within and adjacent to the Greenway;
 - b. Flood plain zoning of all areas subject to flooding;
 - c. Open space zoning (see ORS Chapter 308.740) of all open space areas; and
 - d. Provisions for the use management considerations and requirements set forth in C3 of this Goal.
3. Greenway Compatibility Review: Cities and counties shall establish provisions by ordinance for the review of intensifications, changes of use or developments to insure their compatibility with the Willamette River Greenway. Such ordinances shall include the matters in a through e below:
 - a. The establishment of Greenway compatibility review boundaries adjacent to the river within which review of developments shall take place. Such boundaries in urban areas shall be not less than 150 feet from the ordinary low water line of the

Willamette River; in rural areas such boundaries shall include all lands within the boundaries of the Willamette River Greenway;

b. The review of intensification, changes of use and developments as authorized by the Comprehensive Plan and zoning ordinance to insure their compatibility with the Greenway statutes and to insure that the best possible appearance, landscaping and public access are provided. Such review shall include the following findings, that to the greatest possible degree:

(1) The intensification, change of use or development will provide the maximum possible landscaped area, open space or vegetation between the activity and the river;

(2) Necessary public access will be provided to and along the river by appropriate legal means;

c. Provision is made for at least one public hearing on each application to allow any interested person an opportunity to speak;

d. Provision is made for giving notice of such hearing at least to owners of record of contiguous property and to any individual or groups requesting notice; and

e. Provision is made to allow the imposing of conditions on the permit to carry out the purpose and intent of the Willamette River Greenway Statutes.

f. As an alternative to the review procedures in subparagraphs 3(a) to 3(e), a city or county governing body may prepare and adopt, after public hearing and notice thereof to DOT, a design plan and administrative review procedure for a portion of the Greenway. Such design plan must provide for findings equivalent to those required in subparagraphs 3(b)(1) and (2) of paragraph F so as to insure compatibility with the Greenway of proposed intensification, changes of use or developments. If this alternative procedure is adopted and approved by DOT and LCDC, a hearing will not be required on each individual application.

G. NOTICE OF PROPOSED INTENSIFICATION, CHANGE OF USE OR DEVELOPMENT

Government agencies, including cities, counties, state agencies, federal agencies, special districts, etc., shall not authorize or allow intensification, change of use or development on lands within the boundaries of the Willamette River Greenway compatibility review area established by cities and counties as required by paragraph F 3.a. without first giving written notice to the DOT by immediately forwarding a copy of any application by certified mail--return receipt requested. Notice of the action taken by federal, state, city, county, and special districts on an application shall be furnished to DOT.

H. AGENCY JURISDICTION

Nothing in this order is intended to interfere with the duties, powers and responsibilities vested by statute in agencies to control or regulate activities on lands or waters within the boundaries of the Greenway so long as the exercise of the authority is consistent with the legislative policy set forth in ORS 390.310 to 390.368 and the applicable statewide planning goal for the Willamette River Greenway, as the case may be. An agency receiving an application for a permit to conduct an activity on lands or waters within the Greenway shall immediately forward a copy of such request to the Department of Transportation.

I. DOT SCENIC EASEMENTS

Nothing in this Goal is intended to alter the authority of DOT to acquire property or a scenic easement therein as set forth in ORS 390.310 to 390.368.

J. TRESPASS BY PUBLIC

Nothing in this Goal is intended to authorize public use of private property. Public use of private property is a trespass unless appropriate easements and access have been acquired in allowance with law to authorize such use.

K. DEFINITIONS FOR WILLAMETTE RIVER GREENWAY GOAL

1. Change of Use means making a different use of the land or water than that which existed on December 6, 1975. It includes a change which requires construction, alterations of the land, water or other areas outside of existing buildings or structures and which substantially alters or affects the land or water. It does not include a change of use of a building or other structure which does not substantially alter or affect the land or water upon which it is situated. Change of use shall not include the completion of a structure for which a valid permit had been issued as of December 6, 1975 and under which permit substantial construction has been undertaken by July 1, 1976. The sale of property is not in itself considered to be a change of use. An existing open storage area shall be considered to be the same as a building.

Landscaping, construction of driveways, modifications of existing structures, or the construction or placement of such subsidiary structures or facilities as are usual and necessary to the use and enjoyment of existing improvements shall not be considered a change of use for the purposes of this Goal.

2. Lands Committed to Urban Use means those lands upon which the economic, developmental and locational factors have, when considered together, made the use of the property for other than urban purposes inappropriate. Economic, developmental and locational factors include such matters as ports, industrial, commercial, residential or recreational uses of property; the effect these existing uses have on properties in their vicinity, previous public decisions regarding the land in question, as contained in ordinances and such plans as the Lower

Willamette River Management Plan, the city or county comprehensive plans and similar public actions.

3. Intensification means any additions which increase or expand the area or amount of an existing use, or the level of activity. Remodeling of the exterior of a structure not excluded below is an intensification when it will substantially alter the appearance of the structure. Intensification shall not include the completion of a structure for which a valid permit was issued as of December 6, 1975 and under which permit substantial construction has been undertaken by July 1, 1976. Maintenance and repair usual and necessary for the continuance of an existing use is not an intensification of use. Reasonable emergency procedures necessary for the safety or the protection of property are not an intensification of use. Residential use of lands within the Greenway includes the practices and activities customarily related to the use and enjoyment of one's home. Landscaping, construction of driveways, modification of existing structures or construction or placement of such subsidiary structures or facilities adjacent to the residence as are usual and necessary to such use and enjoyment shall not be considered an intensification for the purposes of this Goal. Seasonal increases in gravel operations shall not be considered an intensification of use.