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Members of the House Committee on
Transportation and Economic Development
of the Oregon State Legislature

Re: Remarks In Opposition to HB 4031 By the Oregon Outdoor Advertising Association

Dear Members:

In my capacity as counsel to the Oregon Outdoor Advertising Association ("OOAA") I have been asked to comment on HB 4031 that would require sign owners, after expiration of their leases, to "sell" any sign that is non-conforming to the property owner at some arbitrarily established value. This is similar to legislation that was proposed during the 2011 session; that bill, amendment 13 to HB 639, was defeated but it has been reintroduced in the present legislative session.[1]

The concerns by the OOAA for HB 4031 are as follows:

1. It would be unconstitutional as violating the Fifth Amendment of the US Constitution and Article 1 §18 of the Oregon Constitution (the "takings" clauses.)

   - These constitutional provisions permit the taking of private property by government only for a *public* use: the proposed legislation mandates a taking even though no public use is involved.[2]

[1] OOAA estimates that HB 4031 would affect approximately 738 of the currently existing 1300 signs owned by the membership of the OOAA; this estimate is based of the number of signs that are non-conforming due to later changes to local zoning regulations. The current version of the bill suggests that signs would also be considered non-conforming due to changes in the Uniform Building Code; if that is the case, virtually every sign that has been constructed would be non-conforming. Therefore, passage of this bill would affect a very significant number of signs in Oregon.

[2] Proponents of the bill argue that there is no taking because there is no "investment backed expectation" in the sign structure to the sign owner after the expiration of the lease. On the contrary, both the property owner and the sign owner has determined that there is value in the sign or the parties would not be engaging in this dispute.

- Because this legislation mandates the taking of private property without just compensation, sign owners forced to "sell" their property could sue the State of Oregon for just compensation. The State would also be required to pay the sign owner's attorney fees under ORS 20.085 which gives property owners whose property is taken not only the right to sue the government for just compensation but also to recover their fees. This proposal hence exposes the State of Oregon to significant liability.

2. HB 4031 would violate Oregon's Ballot Measure 39 (ORS 35.018), the Anti-*Kelo* measure passed by the Oregon voters in 2006.

In June 2005, the United States Supreme Court issued a decision in *Kelo v. City of New London*, holding that the US Constitution did not prevent the City of New London from condemning Mrs. Kelo's home and transferring that home to a developer for a proposed new private development. There was a significant backlash to the decision and over 43 states have now passed laws restricting state and local governments from using the condemnation power to take private property from one citizen to give to another. Oregon's response, known as Ballot Measure 39, prohibits the taking of property by the government if it intends to transfer it to a private property owner. It passed by 67.1% of the voters.

Voters who passed Measure 39 demonstrated that they did not think it was fair to allow the government to force the transfer of property from one private property owner to another. This proposed legislation on signs does exactly that.

3. The bill is contrary to public policy because it would extend the number of signs beyond the cap mandated by the Oregon Motorist Information Act or alternatively, result in hundreds of unpermitted signs throughout the state of Oregon.

The Oregon legislature previously passed the Oregon Motorist Information Act ("OMIA") to regulate signs along state routes. ORS Chapter 377. The purpose of the OMIA was to reduce visual blight and distraction caused by signs and to control and reduce the number of these signs. ORS 377.705. Adoption and appropriate enforcement of the OMIA by exercising "effective control" is a prerequisite for ODOT to receive funds from the federal government for highway related purposes. To exercise "effective control" the OMIA has adopted a "cap" on signs, which allows some ability to relocate signs in certain circumstances.

The proposed legislation does not even meet the standards established by the Oregon courts requiring the payment of just compensation as established by *fair market value*, which is a standard dramatically different from "replacement value."

Based upon a review of the bill and comments made when the bill was introduced on January 18, 2012, there is some dispute as to whether the bill would require the issuance of new sign permits over and above the cap already mandated by the OMIA.

Our reading of the bill suggests that the number of permits which ODOT would be required to issue would be expanded based upon the proposed addition of Section 4 of ORS 377.723(2)(b). This provision allows ODOT to issue a permit to an existing sign if the sign, when constructed, complied with applicable ordinances, but is now non-conforming.[3] At the hearing on January 18, 2012, however, the proponents testified that a relocation credit would need to be provided before a permit would be issued. Obviously, this issue needs to be clarified.

Either way however, the proposed legislation does not constitute good public policy nor would it be lawful:

If the intent of the drafters is that both the property owner and the sign owner are entitled to a permit (or a credit) this would extend the number of signs beyond the cap and would not be considered "effective control". If the intent of the drafters is that these existing signs no longer will have state permits because the relocation credit has been assigned to the sign owner, this bill will result in hundreds of additional unpermitted signs. Sadly, there are a number of rogue sign operators which continue to maintain unpermitted signs in the state. After ODOT's recent effort at managing and removing signs constructed before the recent OMIA amendments were passed, ODOT would not likely meet the prospect of hundreds of new unpermitted signs with much enthusiasm.

4. The bill would give rise to claims against the State of Oregon for causes of action including intentional interference with contractual relations and intentional interference with prospective economic advantage.

In order to establish a claim for intentional interference with contractual relations, a claimant must show that (1) a defendant caused a third person to breach a contract with claimant, (2) the interference resulted from wrongful conduct beyond the interference itself, and (3) that he or she also did so for an improper purpose. *Top Serv. Body Shop Inc. v. Allstate Ins. Co.*, 283 Or App 201, 582 P2d 1365 (1978).

The bill shows that the drafters are aware of the existing contracts that sign owners have with landowners and the bill would severely impact those rights. HB 4031 states that "the owner of an outdoor advertising sign may not remove the sign from the sign site if ... the landowner provides the sign owner with the written notice of landowner's intent to purchase the sign..." That authorizes landowners to breach

[3] Currently, the OMIA requires ODOT to issue a relocation credit upon the owner's request if the sign is *removed*, the lease is lost, and the sign and permit conform to the requirements in the OMIA. The bill would require ODOT to issue a relocation credit if the sign is *sold*, the lease is lost, and the sign and permit are conforming to the OMIA (ORS 377.700-840).

existing contracts with sign owners that contemplate the signs would remain the property of the tenant. This gives rise to a claim that HB 4031 has intentionally interfered with these parties' contractual relationships.

Similarly, the legislation will also give rise to a claim for intentional interference with prospective economic advantage. The sign owners would be prohibited prospectively from entering into contracts to retain the ownership of their signs and negotiate extensions or options for those signs. That prospective interference is in conflict with the long standing course of conduct of sign owners to enter leases to erect signs and retain ownership of those signs.

Therefore, the proposed legislation creates serious liability on the part of the State of Oregon.

5. The bill violates the Contracts Clause of the Federal and Oregon Constitutions.

The Contracts Clause was established to protect an individual's ability to enter into a contract with another party without government interference.

Oregon law provides that a Contracts Clause violation exists if a law is passed that substantially impairs a contractual promise without a significant legitimate public purpose.

Oregon State Police Officers Association et.al v. State of Oregon, 323 Or 356, 364 (1996).

In the present situation there is a contractual relationship by virtue of a lease between the property owner and the sign owner, which would be impaired by the proposed legislation. Typically leases between property owners and sign owners allow the sign owner to take down the sign. This critical contractual promise is being impaired by the mandate that the sign can be purchased by the property owner at an artificially low value. There is no significant legitimate public purpose in modifying this purely private transaction. The only alleged public purpose supporting the proposed legislation would be to protect the landowner's use of their property. This reason is insufficient given the fact that the landowner's contracted their rights away in an arms length transaction.

In the 2011 legislature, Governor Kitzhaber vetoed HB 2211 which prohibited floral order facilitators from receiving or charging consideration for individual orders and limited the price that a floral order facilitator could receive for consideration. Governor Kitzhaber vetoed that bill because it violated the Contracts Clause of the Oregon and United States Constitutions. HB 4031 on signs is similar and is objectionable for the same reasons.

6. HB 4031 unfairly exposes current sign owners to potential liability for later use of the signs after the forced "sale" of the sign to the landowner.

Currently, present sign owners have the obligation to maintain and repair their signs and they do so. If this bill were to pass, these sign owners would no longer have the ability to maintain the signs, yet they would likely still be in the line of fire if the signs caused damage after the "sale" to the new landowner. Does the State of Oregon intend to indemnify private sign owners for such a circumstance?

7. The bill would interfere with local governments' rights to manage non-conforming structures based on local law and regulations.

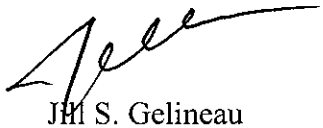
The Doctrine of Home Rule (defined generally as "local or regional self-determination") enables local governments to take action regarding their local affairs without first obtaining authorization from the State Legislature to do so. This proposal interferes with a local government's ability to manage what traditionally has been a local land use planning function: that is, how local governments regulate non-conforming uses.

In conclusion, the OOAA believes that such proposed legislation would neither be lawful nor good policy.

Please let me know if you have any further questions.

Very truly yours,

SCHWABE, WILLIAMSON & WYATT, P.C.



Jill S. Gelineau

JG:lrb