



# A Way to Render Measure 7 Irrelevant

By John Charles

In November 2000, Oregon voters passed Measure 7 to require state and local governments to compensate landowners for property devalued by law or regulation. Since then, supporters and opponents have sought to determine what it really means—and how it should best be applied, if at all. The Oregon Legislature will be addressing the measure's implementation in the 2001 session.

However, lawmakers should not focus solely on compensation. The real problem is deeper: Oregon's heavy

reliance on zoning to regulate land use. Without such zoning, the "takings" and compensation concerns that spawned Measure 7 would not have arisen. So the real question is, are there ways less intrusive than zoning to protect land and the interests of its owners? If so, the compensation issue could be rendered irrelevant. Let's examine the facts.

## Farm and Forest

Oregon's land use program withholds more than 90 percent of the state's private, rural land from urban development. The reason: to "protect" farms and forests, as required by the enabling statute. Following is a breakdown of the assumptions and facts on this issue.

**Assumption:** Farming and forestry are economically significant.  
**Fact:** According to the 1999 Statistical Abstract of the United States, farming, forestry and fishing comprised only 2.9 percent of Oregon's 1996 Gross State Product. As other (especially high-tech) industries grow, this percentage will decline.

**Assumption:** To ensure adequate food, farmlands must be preserved.

**Fact:** Since the 1920s, farmers have produced more and more food on less and less land. The result: not shortages, but surpluses. These drive down farmers' prices and profits. In Oregon last year, net farm income fell 35 percent to \$323 million—the lowest since 1983.

**Assumption:** Government can identify the lands most appropriate for food and lumber production—regardless of market factors or landowner preferences.

**Fact:** Government decision-makers cannot accurately and intelligently allocate land uses over a long period of time. Why? The economy is dynamic—and zoning is static. In our digital world, the easy transferability of knowledge, labor, and capital render land use mandates outdated as soon as they are adopted. Worse, such mandates create new problems, unforeseen at the time of policy adoption.

Examples: "urban growth boundaries" and housing affordability.



### Urban Growth Cartels

Oregon's land use law mandated that each city draw an urban growth boundary. Inside the boundary, land could be developed; outside, it was to be protected. Advocates claimed boundaries would protect "livability." But as consultants to the

Portland-area's metro-regional government predicted several years ago, this has actually caused "reduced average lot sizes, a greater proportion of households in multifamily housing, decreased percentage of households owning their own homes, increased percentage of household income spent on housing, and increased number of housing units that will require subsidy."

The boundaries also transfer wealth from rural to urban landowners. How? When demand for buildable land exceeds supply, intra-boundary land values skyrocket while those outside stagnate. In the Portland area, the differential exceeds \$100,000 an acre. Result: a government-protected cartel of urban property owners.

### Replace Mandated Zoning With Strong Property Rights And Market Incentives

Government zoning doesn't work and should be abolished. In its stead, other methods could protect land, its owners, and its neighbors. Flexible zoning targets the effects of a specific site's use—rather than mandating, as with government zoning, a rigid use for that site. Flexible zoning is based on three principles:

- (1) The private market, not government, determines the best use of a site;
- (2) No use is automatically denied a site; and
- (3) With proper design and buffering, any use of a site can be made compatible with neighboring land.

Under flexible zoning, municipalities impose "performance standards" on properties

that govern noise, pollution discharge, odors, and traffic. To win approval of a proposed use, a property owner simply demonstrates that he can meet those standards.

This is not just a theoretical concept. It has been used in such diverse communities as Fort Collins, CO; Duxbury, MA; and Jacksonville, OR. The city of Portland adopted performance zoning in order to de-regulate the construction of accessory dwelling units (ADU), or "mother-in-law" apartments. The city was required to abolish prohibitions against ADUs by Metro's 2040 plan, in order to encourage in-fill and redevelopment of urban centers. However, the trade-off is that ADUs pose some risk to existing neighborhoods because of potential conflicts over parking, traffic, and property setbacks. Portland chose to regulate these problems through performance standards. Thus, all Portland homeowners now have the right to create ADUs, as long as they meet the standards. This approach to land use regulation would work for virtually any aspect of development where there are concerns about potential negative spillovers.

### Strict Enforcement of Nuisance Law and Deed Restrictions

The only justification to regulate land use is to ensure one property owner's activities do not infringe another's. Oregon defines such infringement as a "nuisance": "an offensive, annoying, unpleasant, or obnoxious thing or practice, a cause or source of annoyance, especially a continuing or repeated invasion or disturbance of another's rights." Only if a property mani-



feats such nuisance should its neighbors—or government—have grounds to challenge its use.

Governments should stop “planning” and simply enforce nuisance law. Then, property owners could do more with their land, and everyone else would be freer of nuisance-causing activities. Many private homeowner associations impose stricter land use controls via deed than municipal governments do via prescriptive zoning. More, they give a prospective landowner a choice: if he agrees with the controls, he can purchase a property and assume its deed; if not, he can decline it and seek property elsewhere.

Absent government control, private homeowner associations arise naturally. Proof: five of the ten largest associations are in Houston—the one major city without a centralized zoning code. This doesn’t mean Houston has “no zoning”: it has some of the strictest. This calls for zoning by private deed restriction—not government mandate.

Deed restrictions, which originated in this country more than 150 years ago, have emerged as the regulatory tool of choice for most developers, as demonstrated by the rapid increase in the number of homeowner associations. Between 1962 and 1998, the number of associations rose from 500 to 204,882. This trend makes most local zoning ordinances redundant. A tighter link between the risks and rewards of land development would assure government could not “free-ride” on landowners—and vice versa.

Every land use decision incurs an “opportunity cost”—the cost of one course taken vis-a-vis the potential gain of another forgone. Example:

a landowner spends \$50,000 to establish a tree farm. Is the farm’s cost, then, \$50,000? No: it’s the lost opportunity to build a factory on that land, or to put the \$50,000 into the stock market—and to have reaped the greater profit those investments may have brought.

Without a crystal ball, one cannot determine the cost of every opportunity. But when a property owner must bear the risk of a land use decision, he is likely to act prudently. The problem: under Oregon’s land use system, there is a yawning disconnect between those who incur the risks and those who reap the rewards.

Government regulators impose their land use “vision” via zoning restrictions, reap the political power therefrom—yet, in doing so, bear virtually no risk. Instead, landowners bear the risk—and often are forced by the rigid zoning to employ their land uneconomically.

But the opposite pertains as well: landowners enjoy government-built and serviced infrastructure (e.g., roads, schools, sewers, libraries) at no risk and a low price. This may encourage them to develop their land dysfunctionally, so densely as to congest traffic, or so sparsely as to inhibit transit.

In an open market, private entrepreneurs have shown they can provide virtually any good or service. If government withdraws from the infrastructure, business and property owners must purchase such services on their own; a market to provide them will emerge. This will re-establish the risk-reward connection, encourage logical and economical land use, and benefit the entire community.

## Conclusion

Planning advocates have little faith in market knowledge. They believe that only comprehensive planning and zoning can allocate land uses properly. But the facts prove otherwise. There are viable alternatives to government zoning—and the legislature should consider them in this session. If we abandon centralized, command-and-control planning and adopt decentralized, market-based decision-making, Measure 7 won’t matter. There will be no more regulatory takings, and no more need for compensation.



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