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Windfalls, wipeouts and Measure 7

Solving the regulatory
takings problem

by **John A. Charles**

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About the Author

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The Oregon Better Government Competition

This report is a product of Cascade Policy Institute’s Oregon *Better Government Competition*, which highlights citizen ideas to improve public services, reduce the costs of state and local government, and enhance Oregon’s quality of life. Two previous *Competition* winners have sought to address the ill effects of state land use laws on Oregon individuals and businesses. Former Jacksonville organic farmer Ann Brentmar’s proposal, *Preserve farmland through prosperity: Reform Oregon’s land use laws*, aided the passage of Senate Bill 588, which allowed Oregon farmers more flexibility to process crops on their land. In light of continued problems associated with Oregon’s land use system, this report on Measure 7 is presented with the goal of improving the quality of life for all Oregonians through comprehensive land use reform.

About Cascade Policy Institute

Founded in 1991, Cascade Policy Institute is Oregon’s premier policy research center. Cascade’s mission is to explore and promote public policy alternatives that foster individual liberty, personal responsibility and economic opportunity.

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I. Introduction

Since 1973, Oregon has administered a statewide land use regulation system. The principal goal of this policy has been to limit development on rural lands. The primary method for implementing the program has been to restrict the supply of land for urban development through exclusionary zoning, urban growth boundaries (UGBs), and property tax exemptions.

Unfortunately, these policies create disparate impacts on various classes of people.¹ For some property owners, government policies such as upzoning—authorizing higher densities—can create extraordinary opportunities for profit. This is sometimes referred to as the “windfall” effect of government regulation.

Downzoning creates the opposite effect. When governments engage in downzoning, they restrict or prohibit any kind of development. Since this usually reduces the value of the land, it is known as the “wipeout” effect.

Thousands of Oregonians have been adversely affected by the total or near-total loss of property value created by downzoning. Though bills have been introduced to address this problem over the past 20 years, the legislature has never done anything to provide relief for those landowners bearing the greatest burden from zoning.

For this and other reasons, Measure 7 was placed on the ballot last year, and passed in the November, 2000 general election. Measure 7 requires the government to compensate landowners when a government action results in a loss of property value. There are four exceptions. No compensation is required if: (1) the restrictive government action was “*adopted, first enforced or applied*” prior to the current owner of the property becoming the owner; (2) the regulation implements a federal law “*to the minimum extent required;*” (3) the regulation “*is a historically and commonly recognized*” nuisance law; or (4) the regulation prohibits the use of a property in the purpose of selling pornography, performing nude dancing, selling alcohol or other controlled substances, or operating a gaming parlor.

Critics argue that the measure is poorly drafted, leaving numerous possible interpretations. Moreover, they argue that even if agreement can be reached on what Measure 7 means, the government can’t afford to implement it because it would be too costly.

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On December 6, 2000, judge Paul Lipscomb of the Marion County Circuit Court issued a preliminary injunction that has since prevented Measure 7 from being implemented. The judge indicated that the measure might eventually be ruled unconstitutional for violating the “separate vote” test of the Oregon Constitution. Plaintiffs allege that the measure violated the requirement because it contained two or more changes in the constitution and that each of those changes should be presented to voters separately.

Regardless of how the courts ultimately rule, it is widely expected that lawmakers will address some of the issues surrounding Measure 7 during the 2001 session of the state legislature. This paper argues that the public discussion should not focus exclusively on the meaning of specific words in Measure 7, because the problem of “regulatory takings” is merely the symptom of a much deeper problem: the use of zoning. Policy makers should *repeal municipal zoning entirely* and enact alternative policies for shaping land use patterns. If this strategy is adopted, there will be few if any takings, thereby making compensation policies unnecessary.

II. Background on zoning

Perhaps the earliest zoning ordinance enacted in the country was adopted in 1916 in New York City. Regulations were adopted to resolve a land use dispute between different classes of merchants. One group felt that their “territory” was being invaded by a less-desirable group of merchants, and zoning was used to segregate uses. By delineating the specific areas where certain types of commercial activity could take place, the New York ordinance used the police powers of the state to redistribute wealth among the landowners affected by the ordinance. Some people benefited, and others did not.

This is the basic nature of zoning. Though usually described as a tool for promoting the “public interest,” in fact zoning has always been used to promote the interests of one or several political groups over the interests of others. As legal scholar Charles Reich has put it, “*zoning is a process by which some are punished and others rewarded for reasons which have no relation to objective merits but have relation only to government policy.*”²

Property owners are theoretically protected from unreasonable losses through the 5th Amendment to the U.S. Constitution, but landowners have rarely been compensated for so-called “regulatory takings”—those cases where property is not physically taken

by government but its use is severely restricted through regulation. Supreme Court decisions have created a threshold so high that unless someone loses virtually all economic uses of their land, they will have little success seeking compensation.

III. Measure 7 and solutions

Measure 7 was promoted as a means of solving the regulatory takings problem, but that goal will be frustrated by several flaws within the law. For one thing, key words in Measure 7 are open to multiple interpretations. Thus, it is likely that the measure will be litigated for years.

Second, even if it is implemented, the process of determining how much damage has been caused by regulation, and to whom, will be long and arduous. This process will be made even more difficult by hostile local governments that have already begun enacting costly filing procedures for those wishing to initiate claims.

Perhaps most importantly, the scope of Measure 7 is too limited. In a misguided effort to appease the pro-regulatory advocates, Measure 7 proponents drafted the measure to apply only to regulations enacted after property owners take possession of their property. But there are thousands of landowners in Oregon who bought or inherited property after zoning ordinances were adopted. In some cases they may have once agreed that the ordinances made sense, but now want to change uses because market realities have changed. These people are trapped in a land use time warp in which they cannot make economic use of their land, but they will not qualify for compensation under Measure 7.

This is not the way to solve the problems caused by zoning. Instead of arguing about how to implement Measure 7, policy makers should correct the root problem by prohibiting the use of exclusionary zoning and other government regulations that simply transfer wealth from one class of property owners to another.

There are four principle policies that should be enacted to carry out this strategy:

- 1) Abolish municipal zoning and replace it with privatized zoning (deed restrictions and homeowner associations);
- 2) Adopt the use of performance-based zoning to protect existing neighborhoods from potential negative spillovers caused

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One of the oldest and most popular neighborhoods in Portland—Ladd's Addition—was built between 1890 and 1910, and was regulated entirely through deed restrictions. The neighborhood has a variety of housing types, common open spaces, public flower gardens, and a mixture of densities.

by new developments;

- 3) Re-institute the use of common law nuisance and trespass principles to minimize incompatible land uses; and
- 4) Privatize as much of the infrastructure as possible (e.g., roads, sewers and water) so that any effects on property values will not be compensable under Measure 7 (since the measure only applies to government actions).

IV. Discussion

Privatized zoning: Deed restrictions and homeowner associations

Privatized zoning has a history that pre-dates municipal zoning. Deed restrictions and the use of homeowner associations to enforce those restrictions came into use in this country as early as 1831; municipal zoning did not arise until the early 1900's. Deed restrictions were used primarily to ensure that designated open spaces were protected, by assessing monthly or annual fees on certain property owners and then using the proceeds for maintenance of the open space. Gramercy Park in New York (1831) and Louisburg Square in Boston (1844) are two early examples of this technique (see Appendix II for a more detailed history).

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Privatized zoning was largely supplanted by municipal zoning in the mid-20th century, but in the last 40 years, deed restrictions have been revived as the preferred planning technique by developers, especially in California, Texas and Florida. This is reflected in the number of Community Associations; in 1962, there were only 500 private community associations in the United States; by 1998 there were at least 204,882.

Private community associations are the natural response to the absence of government control. This is demonstrated by the fact that five of the ten largest private homeowner associations in America are found in Houston—the one major city in the U.S. that does not have a centralized municipal zoning code. This rebuts the common assertion that Houston has "no zoning." Actually, it has

some of the strictest zoning found anywhere in the country; it just happens to be administered through private homeowner associations enforcing deed restrictions.

Virtually all of the contemporary “New Urbanist” communities in the country, such as Kentlands in Maryland and Celebration in Florida, rely on privatized zoning to ensure that the master plan is enforced. In both of those cases, not only was municipal zoning redundant, it was actually a barrier to progressive planning. Municipal codes frequently prohibit accessory dwelling units (so-called mother-in-law apartments, which are popular methods of adding affordable housing), require excessively wide streets, and impose minimum lot sizes that spread out development. Many consumers prefer to have smaller lots and narrower streets, and these preferences can best be accommodated by allowing the market to work—as it has with Kentlands and Celebration.

Ironically, two of the most disputed parcels of undeveloped land in Oregon—the St. Mary’s property in Hillsboro and the North Stafford basin near West Linn—involve large landowners who would like to develop their properties into New Urbanist communities of mixed use, pedestrian-oriented villages, but are prohibited from doing so because of downzoning.

Performance-based zoning

Relying on privatized zoning does not mean that the public sector would necessarily vacate the field. It simply means that local governments would cease imposing long-range “visions” on private landowners, and remove inflexible zoning ordinances that have little to do with market factors. However, it is expected that municipal governments would still look to protect the interests of the broader community by regulating nuisances. One way to do this is through performance-based zoning. This technique, also known as flexible zoning, is an approach to land control that focuses on the *effects* of land uses, rather than *categories* of use. The model for performance zoning was first developed by Lane Kendig in 1973 when he was Director of Community Planning for Bucks County, Pennsylvania. Since then, performance zoning has been reviewed extensively in the planning literature, and implemented on a limited scale in various parts of the country.

The guiding principles of performance zoning are as follows:

- *No land use is automatically excluded from a specific site.* Rather, criteria are established which ensure that each land use will be

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compatible with adjacent land uses. Of course, the word “compatible” is open to interpretation. As used here, it means that one land use will not adversely affect others — based on long-established principles of trespass and nuisance (described below). Criteria are established relating to such issues as traffic congestion, water runoff, noise, and building height, and a site plan is required to evaluate the applicant’s success or failure to address these criteria.

- *Any land use can be made compatible with any neighboring land use through buffering, design and the use of appropriate incentives.* This assumption dramatically changes the role of government officials in development. It moves them out of the business of planning the economy, and into the more appropriate role of enforcing property rights when those rights are threatened by negative spillovers.
- *The private market is in a better position to determine the appropriate location of types of land uses than government officials.* Every parcel of land has many potential uses. The attempt to lock certain uses into place on a zoning map is a futile and costly undertaking. Government officials should be concerned only with the performance of particular uses, not their location on a zoning map.

Performance zoning offers several critical advantages over traditional exclusionary zoning. First, it does not require planners and city officials to guess what the future could/should look like. It simply establishes measurable performance standards that protect property rights, then requires all new development to meet the standards.

Second, measurable performance standards provide a more legally supportable basis for zoning requirements, as they demonstrate a direct link between the public purpose of the provisions and the requirements. This is exactly what the Supreme Court has begun to require from local governments in recent land use decisions. Indeed, as several experts have written:

What better way to show this link than by the use of performance standards? In a flexible zoning system, the nexus or essential link between the mitigating measure and the development impact must be established when the performance standards are initially designed and enacted, and therefore it is virtually woven into the very fabric of the performance

criteria themselves.³

Third, performance zoning does not require local officials to pick winners and losers in the economy. By authorizing any use on any property, performance zoning allows property owners to focus their energies (and financial resources) on creating quality developments, rather than lobbying governments and filing legal appeals.

Where has performance zoning been used?

Various communities in the United States have *abolished* traditional zoning codes and enacted performance zoning standards as a wholesale replacement. Performance zoning has been used successfully in such diverse places as Bath Charter Township, Michigan; Buckingham Township, Pennsylvania; Duxbury, Massachusetts; Fort Collins, Colorado; and Largo, Florida.

Implementing performance zoning in Oregon

Performance zoning is already being used in some Oregon communities as adjunct strategies to traditional prescriptive zoning.⁴ That use should be accelerated by the state legislature. The only way to ensure this is to prevent state agencies from requiring, and local governments from utilizing, exclusionary zoning or zoning standards not clearly related to the control of negative spillovers. That means that the legislature should prohibit *at least* the following:

- **Lot size regulations.** As a general matter, there is no way that local planning boards can prospectively adopt lot size regulations and link those rules to a public purpose. All such decisions should be made in the context of specific land use proposals, and regulations imposed *only* when necessary to control potential negative spillovers (i.e., nuisances).
- **Density regulations.** As with lot size, it is impossible for regulators to know, in the abstract, what the “correct” density should be. Furthermore, it is extremely difficult—if not impossible—to actually implement density controls.⁵ Therefore, density should be negotiated directly with developers in the context of specific plans, and regulated only for the purpose of controlling negative spillovers.
- **Income tests related to building permits.** It is none of the government’s business how much money farmers or any other class of people make, at least for purposes of issuing building

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If neighborhood associations or entire jurisdictions believe that community values can be better protected through a self-designed system of land use regulation, there is no compelling reason that government officials should deny them the opportunity.

permits. Income bears no relation to the question of externalities; therefore it should not be a matter of land use regulation.

- **Regulations that prohibit or require certain uses.** The market is far better at determining the appropriate uses for individual parcels of land. Under performance zoning principles, all uses are allowable, regulated only for the control of externalities.

If individual developers want to restrict the uses of properties that they sell within their own development, they are free to impose deed restrictions.

Backup policy option: The local opt out

If policymakers are unwilling to embrace either privatized zoning or performance zoning, an alternative approach would be to allow communities to opt out of the existing statewide land use program and chart their own course. If neighborhood associations or entire jurisdictions believe that community values can be better protected through a self-designed system of land use regulation, there is no compelling reason that government officials should deny them the opportunity.

In concept, this “waiver” approach is similar to 1995 legislation that authorized local school districts to establish “alternative schools.” This legislation recognized that “*one-size-fits-all school policy is detrimental to the goal of educating students,*” and that local districts should have the authority to experiment with different approaches, so long as charter schools are held accountable for their performance. The same approach could be applied to land use regulations as well.

Regulating existing land uses: Common law approaches to controlling negative spillovers

While performance zoning and privatized zoning both have many desirable attributes, one drawback (common to all zoning systems) is that they only affect new construction or remodeling of existing structures. There are many causes of negative spillovers that are linked to *existing* land uses, such as backyard burning or industrial pollution. These problems require solutions that go well beyond zoning.

One such policy is the vigorous enforcement of property rights through common law doctrines of trespass and nuisance. Com-

mon law can be traced back many centuries, to the English unwritten or customary law that from medieval times has governed the rights and responsibilities of property owners. English settlers brought the common law to what is now the United States and Canada, and it still applies except where it has been overridden by statutes.

Rather than being written in statutes, common law property rights have evolved in the courts through the ages. Many provisions of the common law function as environmental protection laws.⁶ Three are discussed below.

Trespass

Under the common law, if a harmful substance is allowed, intentionally or carelessly, to invade the property of another, there may be a trespass. This may occur by land, air or water. If the trespass occurs, the defendant is held responsible for damages.

Throughout North America, people have used the trespass doctrine as a pollution control strategy. In a turn-of-the-century case, a New York court issued an injunction against a town's sewage disposal practices. In emptying sewers into a creek that flowed through a farmer's land, causing filth to accumulate on the creek's bed and along its banks, the town had trespassed against the farmer. This violation of the farmer's property rights could not be permitted, regardless of the public necessity of the sewage works or the great inconvenience that could result from shutting them down.⁷

Oregon courts have consistently found polluters liable for pollution migrating onto the property of others. In 1963, Harvey Aluminum Co., the largest employer in The Dalles (550 employees), was sued by several orchard owners who claimed that their crops had been damaged by fluoride emissions.⁸ The court found the pollution to be both a trespass and a nuisance, and awarded the orchard owners approximately \$10,000 each in damages for the crop losses and ordered the plant managers to install emission-control equipment, at a cost to the owners of more than \$2 million. The company was given one year to install the equipment.

The parties ended up in court again several years later over a dispute about a settlement they had agreed to after the previous case. The court enforced the agreement, and required the company to compensate the orchard owners more than \$940,000.⁹

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The advantage of the nuisance doctrine over contemporary land use and environmental laws is that nuisance standards are flexible; the standards are very strict where there is clear harm to others, and lax where there are no victims.

In 1992, smoke and its lingering odor on a landowner's premises, which resulted from a neighbor's field burning of grass stubble, was held to be a trespass.¹⁰ This case had a powerful effect on the grass seed industry. With the prospect of similar lawsuits ahead, the industry made intense efforts to find substitute practices; as a result, open field burning dropped from 159,137 acres in 1990 to 56,878 in 1997.¹¹

Nuisance

A second critical element of common law is the doctrine of nuisance. Under nuisance law, each landowner must strike a balance between the use of his own land, and the effects of that use on surrounding properties. One cannot use property in a way that restricts the rights of neighbors to use their property.

In Oregon, courts have defined nuisance to be "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 right."¹²

Nuisance law, unlike trespass, requires proof of harm. Nonetheless it can be a useful tool for halting a wide array of environmental hazards. People have used it to protect themselves from pesticide sprays, smoke, soot, dust, fumes and other air pollutants. Odors, noise and vibrations from industrial activities have also been held to be nuisances.

The advantage of the nuisance doctrine over contemporary land use and environmental laws is that nuisance standards are flexible; the standards are very strict where there is clear harm to others, and lax where there are no victims. This allows societal resources to be focused so as to accomplish the most pollution reduction at the lowest cost.

For instance, Oregon courts have consistently ruled that such businesses as meat processing plants, funerals, and commercial stables are not necessarily nuisances *per se*—but they may become nuisances when operated in a manner where others are harmed, or when located in neighborhoods that are fundamentally incompatible with that use. Externalities such as noise pollution can be ruled nuisances if the noise-generating activities occur during hours usually devoted to sleep, even though that might not be so at other times.¹³

In contrast, zoning and environmental licensing laws tend to be

one-size-fits-all in nature, which results in the over-regulation of some activities and the under-regulation of others. For example, many (perhaps most) zoning ordinances exclude certain land uses, no matter how benign those uses may be. This is increasingly becoming a problem for people who want to telecommute, operate a small business from their home, or start a small farm. For these people, zoning laws represent a solution in search of a problem.

Unfortunately, the pollution-reducing potential of the nuisance doctrine has been sharply constrained by Oregon's Right-to-Farm land use law. This statute prohibits most nuisance lawsuits against commercial farming operations. Although this is perceived as a farmer-friendly law, it is so sweeping in scope that it harms property owners of all backgrounds—including, on occasion, farmers themselves.

For example, one of the most highly publicized land use conflicts in the entire west in recent years involved the farm waste practices of the Circle Four Farms, the nation's largest hog farming operation. Located near Milford, Utah, the Circle Four generates tens of millions of gallons of hog waste each day. In 1997 the stench of this waste forced some farm neighbors out of their houses, and generated a political controversy that has torn the town apart. As one neighbor put it, "Look, we're farmers. We can put up with animal odors. We can't put up with a sewer in our homes."¹⁴

Application of the nuisance doctrine would clearly place responsibility on the managers of the Circle Four Farms to clean up their act, but Right-to-Farm laws in Utah prevent local farmers from using this remedy.

Common law and the "compensation" issue

A return to common law principles would end the compensation debate and instantly *sweep away virtually all takings claims*, for two reasons.

First, most such claims involve zoning ordinances that prohibit landowners from developing their property as they wish. This would rarely occur with performance zoning, and never with privatized zoning. Second, Measure 7 exempts regulations enacted to limit nuisances. Performance standards are designed primarily for this purpose.

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Thus, a strict property rights approach to land use policy would greatly reduce the amount of legislative and legal confrontations, shifting resources towards other more socially useful activities.

Questions of compensation would still arise under this approach, but they would rightfully involve transfer payments from those causing nuisances to those harmed by them. Nuisance law would:

...force the offending landowner to internalize his externalities, by making internal changes in his method of operation which remove the offending activity or change its character so that it is no longer damaging to his neighbor. To the extent that these changes require capital outlays from the offending landowner they represent a kind of compensation to the injured landowners, because they remove the source of the complaint. By the same token, the offending landowner who is farsighted enough to buffer his activities to reduce or eliminate the annoyance to his neighbors has by his foresight perhaps forestalled litigation against him.¹⁵

Implementing a common law approach to controlling spillovers

One problem with the common law approach is that most people do not have the time, inclination or resources to initiate common law cases against their neighbors. In economics jargon, the “transaction costs” are too high. In fact, this is the very reason why so many planning professionals advocate zoning in lieu of prosecuting individual nuisance or trespass claims.

However, this problem can be overcome by creating a mechanism for government to prosecute property rights infractions. Just as homeowners do not have to pay the local police agency or district attorney’s office when they prosecute an armed robbery on behalf of the homeowner, citizens should be able to use the enforcement capability of government to settle a property rights dispute arising from a spillover. Local governments (perhaps each county) should create an Office of Property Rights Enforcement. These offices would be analogous to local law enforcement agencies, in the sense that the services would be free to those seeking redress from a property rights violation.

This need not be a costly burden to local governments. If zoning is simplified (or abolished) in the ways suggested by this paper, significant savings will likely accrue to local governments due to the elimination of costly long range planning exercises. These funds

could be shifted out of planning and into property rights enforcement.

Do government infrastructure investments fall within the scope of Measure 7?

Measure 7 defines “regulation” as any “law, rule, ordinance, resolution, goal, or other enforceable enactment of government.” It’s unclear whether traditional government-provided infrastructure facilities such as roads, sewers or drinking water systems will be deemed “enactments of government” under Measure 7. If so, landowners who perceive themselves to be adversely affected by the construction of these facilities—such as a landowner whose property is poorly positioned at a freeway interchange relative to other property owners—may well seek compensation.

If this happens, local governments will find it extremely difficult to build any new facilities. The simplest solution is to have most infrastructure services built and operated by private parties. Measure 7 only requires compensation for regulations adopted by units of government. If the government withdraws from the infrastructure business, the problem will never arise.

Such a policy will also have the benefit of ensuring that new development pays for itself. The alleged failure of growth to adequately pay for infrastructure is a common argument on behalf of land use regulation. But such subsidies are simply the result of public policies in which tax revenues are used to benefit one group at the expense of others.

Privatizing services will solve that problem. Private companies do not have the power of taxation; therefore user fees will have to cover the full cost of service.

IV. Policy recommendations

- (1) Oregon land use law should be modified to parallel the common law doctrines of trespass and nuisance. Local governments should specifically be prohibited from imposing regulations governing lot size, density, income, or use, unless such regulations are demonstrably linked to the control of spillover effects. Replacing traditional zoning with performance zoning or privatized zoning are two options for accomplishing this.

In the alternative, if the legislature is unwilling to enact such sweeping measures, communities should be *allowed* to opt

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Local governments should consider establishing an Office of Property Rights Enforcement, in order to better prevent negative spillovers from land uses.

out of Oregon's existing land use system in order to develop their own local mechanisms.

- (2) State and local laws that protect landowners from common law nuisance or trespass lawsuits should be repealed, in order to encourage responsible land use by owners.
- (3) Local governments should consider establishing an Office of Property Rights Enforcement, in order to better prevent negative spillovers from land uses. These offices should bring legal actions against landowners who export pollution or any other type of nuisance effect from their own property to the property of others.
- (4) The construction and operation of infrastructure services should be financed through market-based pricing mechanisms to ensure that individuals bear the costs of their own behavior. These services should be provided, wherever possible, by non-government institutions, to ensure that any effects on nearby landowners fall outside the scope of Measure 7.

Notes

1. For a discussion of problems associated with Oregon's current land use policies, see this author's *Beyond Zoning: Land Use Controls in the Digital Economy*. Cascade Policy Institute, June 1998. http://www.cascadepolicy.org/pdf/env/I_106.pdf
2. Charles Reich, *The Law of the Planned Society*, 75 Yale L.J. 1227, 1237 (1966)
3. Douglas R. Porter, Patrick L. Phillips, and Terry J. Lassar, *Flexible Zoning—How It Works*, Urban Land Institute, Washington, D. C., 1988, p. 92.
4. Both Jacksonville and Portland are using performance zoning techniques in limited circumstances: Ashland for historic preservation purposes, and Portland in the regulation of accessory dwelling units.
5. In the early 1990's, the DLCD commissioned a study of development patterns in four metropolitan areas. The consulting firm ECO Northwest looked at development both inside and outside UGBs in Portland, Medford, Bend and Brookings. The consultants found that all of these regions developed land inside UGBs at densities lower than zoned for and developed land outside UGBs at densities higher than zoned for. All four metropolitan areas placed single-family houses in multiple-family zones. In each of the areas studied, "residential development resulted in low-density housing outside and around most or all of the UGBs."
6. Elizabeth Brubaker, *Property Rights in the Defence of Nature*, Earthscan Publications Limited, 1995, p.31.
7. Brubaker, p. 32.
8. 226 F.Supp. 169 (D. Ore., 1963).
9. Roger E. Meiners and Burce Yandle, *The Common Law: How it Protects the Environment*, Political Economy Research Center, www.perc.org/ps13.htm, 1998.
10. *Ream v. Keen*, 838 P.2d 1073, 314 Or. 370.
11. The legislature also imposed acreage caps on burning in

1991, and it could be argued that legislative action, rather than litigation, prompted the industry to reduce its burning. But the actual reductions in burning dropped at a much faster rate than that dictated by the acreage cap program, suggesting that potential liability of a common law suit was a greater motivator for the grass seed industry.

12. *Renken v. Harvey Aluminum (Inc.)*, 226 F. Supp. 169.
13. *Aldridge v. Saxey*, 409 P.2d 184, 242 Or. 238.
14. *Capital Press*, December 5, 1997.
15. Daniel R. Mandelker, *The Zoning Dilemma*, Bobbs-Merrill Co., 1971, p. 27.
16. Reid Ewing, *Is Los Angeles-Style Sprawl Desirable?*, APA Journal, Winter, 1997, p. 115.

Appendix I: Typical development standards in a performance zoning system

Is the criterion applicable?

Will the criterion be satisfied?

Criterion	Yes	No	If no, please explain
Neighborhood compatibility			
1. Social compatibility			
2. Neighborhood character			
3. Land use conflicts			
4. Adverse traffic impact			
Public facilities and safety			
5. Street capacity			
6. Utility capacity			
7. Design standards			
8. Emergency access			
9. Water hazards			
Resource protection			
10. Soils & slope hazard			
11. Wildlife habitat			
12. Historical landmark			
13. Ecologically significant areas			
14. Agricultural lands			
Environmental standards			
15. Air quality			
16. Water quality			
17. Noise			
18. Glare & heat			
19. Vibrations			
20. Exterior lighting			
21. Sewage & wastes			
Site design			
22. Site organization			
23. Natural features			
24. Privacy			
25. Open space arrangement			
26. Building height			
27. Vehicular movement			
28. Parking			
29. Active recreational areas			
30. Pedestrian convenience			
31. Pedestrian conflicts			
32. Landscaping/open areas			
33. Landscaping/screening			
34. Public access			
35. Signs			

Source: Flexible Zoning—How it Works, *Urban Land Institute*

Appendix II

Controlling land uses through deed restrictions and homeowner associations: a brief history—

I. Definitions

There are three basic types of Community Associations (CAs): planned, condominiums, and cooperatives. All CAs have 3 characteristics: (1) all property owners automatically become members; (2) governance documents bind all owners to mutual obligations; (3) lien-based assessments are used to fund CA operations.

Single family homes in planned communities are the dominant segment of the market. In 1998, there were 16.4 million CA units: 64% were single family homes; 31% were condominiums; and 5% were cooperatives.

II. Important milestones

Phase 1: Medieval England. Covenants are used to prevent individual landowners from destroying the agricultural commons.

Phase 2: 18th and 19th century. The rise of suburbanization. Covenants and deed restrictions are used to ensure the protection and maintenance of commonly held open spaces as large farm estates are subdivided for residential development.

- 1743 Leicester Square, London
- 1831 Gramercy Park, New York
- 1844 Louisburg Square, Boston
- 1870 Ocean Grove, New Jersey

Phase 3: 1890-1930. The rise of “community builders.” The use of extensive planning to create entire communities with restrictive covenants. Small developers begin to give way to larger ones.

- 1902. “Garden Cities of Tomorrow” published by Ebenezer Howard, heavily influencing modern planning. Howard’s vision includes two key elements: (1) comprehensive planning, and (2) an institutional structure for implementing plans (CAs)

and deed restrictions).

- 1908-1916. First public zoning ordinances enacted, borrowing from concepts of deed restrictions and CAs.
- 1917. U.S. Supreme Court rules that a racially segregated zoning ordinance in Louisville is unconstitutional — though such ordinances continue to be enacted as late as 1926.
- 1928. Followers of Ebenezer Howard build a community modeled on the “Garden Cities” concept in Radburn, NJ; for various reasons, the utopian community falls short of the vision.

Phase 4: 1936-1960. A dramatic rise in the popularity of CAs.

- 1934. National Housing Act passes, creating the Federal Housing Administration. FHA consciously promotes large-scale development and CAs with one primary tool: insuring residential mortgages against losses.
- 1938. *Neponsit Property Owners Association v. Emigrant Industry Savings Bank*, New York Supreme Court: first court ruling upholding the power of CAs to collect assessments.
- 1948. *Shelley v. Kraemer*, US Supreme Court: racially restrictive covenants declared unenforceable.
- 1941-1960. Developers begin building large scale planned communities for the middle class. Home ownership rate across the country skyrockets from 41% of families to 61%, after having been stagnant for years.

Phase 5: 1961-present. Explosion in the use of CAs to provide housing and consumer amenities.

- 1961. Urban Land Institute (ULI) report launches frontal assault on public zoning restrictions that mandate minimum lot sizes, so that cluster development can proceed.
- 1963. ULI followup report calls for more zoning flexibility to allow higher densities.
- 1963. Federal Homeowner Association Manual published, making it clear that FHA will not approve applications for

planned unit development mortgage insurance without CAs and the power to enforce protective covenants. Manual described as “a watershed event in the history of common interest developments (CIDs) because it announced to the building industry that FHA had decided to insure CIDs.”

- 1964. ULI “Homes Association Handbook” becomes “the most influential document of the CID boom.”
- Between 1962 and 1998, the number of CAs rises from 500 to 204,882.
- Between 1975 and 1998, CAs as a percent of total housing units in the US rises from 2.6% to 15%.

Sources: *Evan McKenzie, Privatopia: Homeowner Associations and the Rise of Residential Private Government, Yale University Press, 1994; Community Association Institute Factbook, 1998*

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