

Planning in the Portland Metropolitan Area after Measure 37

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“The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right... The only part of the conduct of anyone for which he is amenable to society is that which concerns others.”

- John Stuart Mill (1859)

Background on the Russill Fellowship:

Created in the aftermath of Measure 37, the Russill Fellowship is aimed at examining non-regulatory land use planning tools and their potential application in the Portland Metropolitan area, with a particular emphasis on habitat conservation. The above-mentioned ballot initiative and the larger private property rights movement have given an indication that Oregon voters perceive inequities in the State's land use planning system. It is also clear that Oregonians still place a high value on the conservation of our state's natural resources.

According to a March, 2005 statewide survey, protecting farmland for farming is very important to 67% of respondents, protecting the environment is very important to 61%, and protecting wildlife habitat is very important to 58% (CFM Research, 2005). According to a more recent survey commissioned by Metro, 72% of respondents indicated that a policy to "add houses in existing neighborhoods" comes closer to how they feel while only 16% chose "convert farm and forest land for growth" (12% responded with "don't know") (Davis, Hibbits, & Midghall, Inc., 2006).

Regardless of the legal status of Measure 37 or any future regulatory takings initiatives, the planner's toolbox needs to be expanded, providing a wider variety of options to accomplish the Statewide Planning Goals. However, as the research for this paper progressed, a more complicated picture of planning and the use of regulations has emerged. It has become clear that non-regulatory planning instruments are no substitute for regulation in upholding Oregon's Statewide Planning Goals. The above-cited survey indicates that Oregonians do still see the importance of the Goals. Thus, this paper has focused on the need for long-range planning, the relationship between planning and property values, the threat of sprawl in the Portland region, planning instruments that help to control such sprawl, and whether such instruments are able to attain Oregon's Statewide Planning Goals.

The need for a long-range vision in land use planning:

The phenomenon of the “tragedy of the commons” is unfortunately all too familiar in natural resource management (Hardin, 1968). Despite the long-term benefits of cooperating to preserve the shared environment, individuals typically make choices that seek to maximize their short-term gains, resulting in harms to the shared environment. This problem is not only to be found on publicly held lands (the commons); one only need look at the disregard with which private lands have been contaminated to see that private land ownership is not always the cure to the problem. As Jacobs puts it, “. . .we disagree about property rights and land, in part, because we disagree about the economics of land, especially what motivates individual land users and how they respond to the signals they receive from the economic, political, social, and cultural systems within which they live” (Jacobs, 1999).

Unfortunately, the repercussions of an individual’s land use choices do not start and stop at the property boundary. This, in essence, is what is behind the real estate mantra of “location, location, location.” That is to say, the value, both monetary and as habitat, of one’s land is largely dependent on the land use decisions being made by neighbors and public agencies.

Many of the most important land use decisions are being made on private lands. Attempts at identifying habitat conservation needs throughout the United States have indicated that 15% to 30% of land should be held in some form of conservation status in order to preserve biodiversity. Approximately half of that land is in private ownership (Defenders of Wildlife 2002). Unlike land in public ownership, the use of private land is, to some degree, determined by the individual owner. Unfortunately, actions on private and public lands alike can have negative impacts that extend beyond the property lines. A clearer understanding of the impacts of land-use decisions that transcend property boundaries is necessary.

As Tideman (1990) points out, Pareto improvements in which an action makes at least one person better off and no one worse off are the “Holy Grail for economists.” Tideman summarizes this as it applies to land use decisions by stating “...for any activity that a person might undertake at any site, if the net benefit to all persons at all other sites were positive, there would be a subsidy of that magnitude for the activity...” As a corollary, “...if the net benefit to all persons at all other sites were negative, there would be a tax on the magnitude of the activity.” Of course, what is difficult here is determining what actions are positive and which are negative, measuring the degree of the magnitude, and ascribing a monetary value to it. That said, the underlying point is that such decisions carry trans-boundary effects.

Land-use regulation and private land values:

The determination of property value is not simply a product of the land use decisions being made by neighboring property owners. Many factors, including regulations, affect value. These effects are the background against which Measure 37 passed. Unfortunately, the discussion of these impacts has been drastically over-simplified and has focused on diminished property values with little mention of the tremendous amount of private land value attributable to regulation and planning. An exploration of both the negative and positive impacts of regulations on property values adds nuance to this discussion. Regulations frequently result in higher property values through their amenity and scarcity effects (Jaeger 2006; Brueckner 1990).

Land use regulations have an amenity effect on values by protecting or enhancing a property and its neighbors. Protection of a property may take the form of prohibiting conflicting land uses, managing urban growth, or controlling pollution and congestion (Carruthers 2002; Byun & Esparza 2005). Enhancement of a property may result from the provision of roads, sewer and water service, parks, schools, etc. These protections and enhancements that constitute the amenity effect are typically the result of public investments that are funded through property

taxes. In this case, the property tax itself imposes a cost, but the net benefits to private land owners drastically outweigh those costs. Without such services, a property's value is limited.

Jaeger draws attention to the legal concept of "average reciprocity of advantage" which has been used as a justification for denying compensation in some regulatory takings claims (the taking of private property for public purposes without just compensation as described in the 5th and 14th Amendments to the U.S. Constitution). In essence, the concept can be explained as follows: "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." (Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987) as quoted in Jaeger, 2006). This benefit is not simply an abstract concept, but translates into higher property values that are the result of land use regulations.

Regulations also have a scarcity effect on property values; by limiting potential uses of properties in a particular location, regulations reduce the supply of available lands for any given use, thus increasing the value of those lands where the use is allowed. Because this scarcity effect is more indirect, its benefits are less obvious to property owners. For instance, the exclusive farm use (EFU) designation used to preserve agricultural lands in the Willamette Valley has the effect of constraining the supply of developable lands, thereby increasing the value of lands not designated EFU.

It would be wrong, however, to conclude that owners of EFU lands are bearing the burden of propping up the property values of others. Farming, like many industries, benefits from agglomeration and economies of scale. The presence of other farms supports necessary farm services such as suppliers, transport networks, and processors (Jaeger, 2006). EFU zoning encourages such economies of scale by limiting conflicting uses such as residential development (conflicts may arise over noise, odors, traffic, dust, etc.).

In their study of lands zoned exclusive agricultural use in Wisconsin, Henneberry and Barrows (1990) reached the conclusion that such zoning may have a negative or positive effect

depending on individual site characteristics. Such regulations are typically positively capitalized into land values for large contiguous blocks of farmland which are more distant from urban areas. Conversely, agricultural zoning is negatively capitalized into land prices for smaller blocks of lands that are closer to urban areas. Rather than zoning, it would seem that the more important determinant of value is the proximity of urban land uses and the size of the agricultural parcels. These factors diminish the afore-mentioned economies of scale that may make agriculture more profitable.

Though regulations frequently have positive effects, in some cases they may reduce property values. According to Jaeger, this may occur under several circumstances. Firstly, if the amenity effects of a regulation are not sufficiently valued by the market and thus not reflected in consumers' willingness to pay for such lands, there may be a reduction in price.

Secondly, if a regulation produces an over-supply of lands dedicated to a particular purpose (for example, too many lands are zoned industrial), diminished values will be reflected in the market's willingness to pay for such lands. There is thus an onus on planners to carefully consider market demand when applying zoning designations.

A third situation under which regulations may decrease property values is when the regulation benefits society, but that benefit is not sufficiently reflected in the value of those properties subject to the regulation. This is essentially the free-rider problem that affects public goods, whereby there is no need for individuals to pay for the public good as they may benefit from it without such payment.

A fourth circumstance where property values may be diminished due to regulations is more difficult to describe in classical economic terms. Here, there may be, for instance, a personal desire to subdivide timber lands to provide buildable lots for family members. The

personal attachment to the property makes it difficult to determine value based on comparable sales (Jaeger, 2006).

Finally, Jaeger points out that the land market is ever-changing and that profitable uses of a property may change over time. A land use regulation that was not an impediment to profits at the time of its enactment may become one as new opportunities present themselves. Under Measure 37, government agencies are put in the untenable position of having to anticipate future market conditions when instituting regulations.

To further complicate these issues of the effects of regulations on land values, it should be noted that the exemption of a single property from regulation will almost inevitably increase that property's value. This increase is likely to occur regardless of whether the regulation originally had a positive or negative impact on the property's value. The increased value would not exist, however, if exemptions to the regulation were handed out to everyone. It is the amenity and scarcity effects created by regulations on surrounding lands that would make an exemption valuable to a particular property. For instance, an exemption from an EFU designation would increase a property's value because that property is surrounded by beautiful farm land still subject to regulations. The exempted land also benefits from the fact that is a scarce developable property.

The diminution of value attributable to a regulation is frequently confused with the value of the land in the absence of the regulation. As Jaeger puts it, "...an appraiser's estimate that a property's value would rise if a given land-use regulation were removed tells us nothing definitive about whether the land-use regulation reduced the property's value." These complex interactions between market forces and regulations deserve greater attention and are at the core

of this paper. Given the perceived inequities of our current planning system, a more nuanced conversation should be encouraged.

The need for planning at regional and state levels

The effects of land use decisions may be seen not only on neighboring properties, but on neighboring jurisdictions. The spatial patterns of urban growth are largely shaped by three major public policy tools: land use regulations such as urban growth boundaries, the provision of urban infrastructure (streets, sewers, etc.), and open space protection (Fulton et al, 2006). Because urban growth management has extra-local implications it is unlikely that any one of these three tools would sufficiently control sprawl on its own; limiting growth in one jurisdiction may simply encourage sprawl elsewhere.

The multiple benefits of growth management must be made explicit. Though important, the preservation of prime agricultural lands cannot be the sole goal. Such a single purpose will prove politically insufficient in the long-term (Richmond, 2000); the goals must be, more broadly, about making Portland more livable, lowering property taxes (which have subsidized sprawl), improving air and water quality, and minimizing disparities between rich suburbs and impoverished inner cities (Carruthers, 2002). We all stand to benefit from a thoughtful approach to urban growth.

Managing such growth at the regional or statewide level holds greater promise for minimizing the impacts of sprawl (Bollens 1992; Byunn & Esparza 2005). An urban growth boundary without a mandate at the regional or, preferably, statewide level will not perform properly in limiting sprawl. A growth management mandate at the regional or state level not only creates the regionally agreed upon boundary, but prohibits development outside of the boundary, thereby slowing the conversion of vacant land to urban uses (Downs, 2005; Richmond, 2000).

Anthony's study of state growth management regulations found that the success of such programs varied from state to state. This is attributable to variations in the details of the programs and their strength at statewide and local levels (2004). Georgia is an example of a state with a growth management program that has been largely unsuccessful in controlling sprawl. Georgia's decrease in population densities from 1982 until 1997 is possibly attributable to the fact that the region, not the state, has primary authority over growth management, thereby constraining the effectiveness of the program.

Other growth management states, particularly Washington, have seen greater success in controlling sprawl. Despite the fact that Washington had a 49% increase in urban land between 1982 and 1997, population densities increased by 1.5%. Anthony points out several potential reasons for Washington's success in increasing densities. Its program focuses on fast-growing counties rather than applying strict regulations to all counties. These fast-growing counties are required to closely follow local comprehensive plans and are allowed to allocate up to .5% of real estate transfer taxes for funding capital improvements. There is thus an incentive that accompanies the regulation.

According to Anthony (2004), Oregon has witnessed a 32.11% increase in urban lands from 1982 until 1997. This is, in and of itself, not necessarily problematic. Our statewide growth management program has no intention to stop growth, but rather to slow it down and make more efficient use of lands currently within urban growth boundaries before expanding. Population density is a good measure of the efficiency of the conversion of rural land to urban use. Unfortunately, Oregon has seen a decrease, albeit small at -2.02%, in population densities during the years 1982 to 1997. This is compared with an average decrease in population density of -15.77% for states without growth management regulations (Anthony, 2004).

The control of urban sprawl is at the heart of this paper's discussion for it is sprawl that poses the greatest threat to the Portland metropolitan region's agricultural lands and natural areas as well as the livability of the city. Furthermore, it provides a fairly concise illustration of the benefits of planning and the costs of not doing so. Beyond sprawl's impacts on the landscape, it is becoming clear that there are substantially higher infrastructure costs associated with a sprawling urban layout (Carruthers, 2002). This is particularly the case for services such as roads, water, and sewers. Speir and Stephenson (2002) identify the larger lot sizes and greater distance to existing service centers that are typical of sprawl as the factors which have the greatest impact on water and sewage costs. An increase in lot size from .25 to 1 acre nearly doubles the costs of providing water service. Unfortunately, these costs are not fully borne by the developers and passed on to home buyers. Rather, existing tax payers subsidize wasteful growth patterns, raising issues of equity (Carruthers, 2002).

Further difficulties mark the pricing and timing of infrastructure provision. Ideally, infrastructure would be priced at marginal cost (Knaap et al 2001), that is, the cost of providing the extra unit of infrastructure. Doing so would reflect the true costs of new development. Given the economies of scale associated with infrastructure such as roads and sewers, it is typically not possible to increase capacity as needed without large investments and is thus not practical to determine marginal costs. Thus, infrastructure is priced at long-run average cost (total cost divided by total payers), resulting in sprawling urban growth (Knaap et al 2001). Given this shortcoming, other land use planning instruments must accompany the provision of infrastructure in order to ensure the efficient use of land and public services (Knaap et al 2001).

In order to better coordinate development and the provision of infrastructure, the state of Florida, as a part of its 1985 Growth Management Act, enacted a policy of concurrency requiring

that appropriate infrastructure be in place at the time of new developments. The policy has had mixed results. On the positive side, concurrency provides a linkage between planning and implementation. Unfortunately, the result has been reluctance on the part of legislators to make key decisions on infrastructure for lack of funding sources. Local bureaucracies have implemented concurrency, but with frequently ambiguous and inconsistent practices in order to maintain its political feasibility (Ben-Zadok and Gale, 2001).

Federal policies that encourage sprawl

It is worth noting that any argument that the free-market knows best when it comes to where and when to develop is drastically over-simplified. Beyond the above-mentioned allocation of the costs of sprawl, the Federal government has a number of policies that have undermined small scale agriculture and led to the over-valuation of urban lands. These policies include massive investments in highways and other infrastructure, Federal Housing Administration mortgage guarantees, and income tax policies that allow for the deduction of mortgage interest and property taxes (Jackson, 2000). While these policies have done much to bring prosperity to the United States, it has been at the expense of long-term environmental health. Any discussion of regulation's negative impacts on property values must also acknowledge these policies that have inflated values and encouraged unsustainable urban sprawl.

Oregon's Measure 37 has forced a reassessment of the regulations that form the backbone of Oregon's statewide planning system. It is the purpose of this paper to look specifically at the economic and societal motives for controlling sprawl and conserving ecosystems in the Portland metropolitan region, with a particular emphasis on how society may share the benefits and burdens of regulation. This is with the recognition that regulation plays an important role in the function of such land use planning tools. It will also be the purpose of this paper to identify the

characteristics of a “good” land use planning tool with particular attention paid to the issues of equity (who pays and who benefits).

The grey area between regulatory and non-regulatory land use planning tools:

A review of existing land use planning tools quickly leads one to the conclusion that most such tools are neither purely regulatory, nor purely non-regulatory. Most conservation mechanisms that are regarded as being non-regulatory have, on some level, a regulatory component that allows them to function. The fuzzy distinction between regulatory and non-regulatory approaches shows up in programs like carbon banking that attempt to ascribe a market value to conservation activities. While a polluting firm is not explicitly compelled to offset carbon dioxide emissions, the company may find that, in light of regulations that limit emissions, purchasing carbon credits makes more economic sense than investing in new technology to cut emissions. Similarly transferable development rights (TDR) programs, typically regarded as being a market approach to conservation, will not function absent regulations limiting development in the area to be conserved. Without such regulation, it is entirely up to the private landowner to decide whether to develop their property or sell their development credits. Similarly, it is zoning regulations that create the framework and, ideally, the demand for transferring development credits in the area to be developed at increased density (the “receiving” area).

Thus, it appears to be the case that land use planning tools fall into four broad categories with frequent overlap and hybridization:

1. Pure regulation – In this category are, for example, urban growth boundaries, classical Euclidean zoning, building codes, and federal regulations such as the Endangered Species Act (ESA). While not technically a land use planning tool, the ESA has profound implications for the management of both public and private

lands in the United States. In mandating that listed species will be protected regardless of costs, the ESA sets a fairly rigid standard for how lands may be used.¹

2. Mitigation – Included here are many of the market-based strategies for mitigating pollution or the adverse effects of development: transferable development rights, mitigation banks, development impact fees, carbon banking, and tradable pollution permits. In essence, these mechanisms attempt to attach market values to public goods such as ecosystem services and clean air. The decision to comply with a regulation or to purchase an exemption is up to the individual.
3. Subsidies and Incentives – Included here are programs in which government agencies use incentives or subsidies to encourage private landowners to manage their properties according to standards which would otherwise not be required. An example of such a program is the USDA's Conservation Reserve Program.
4. Purely voluntary programs – This category includes land use planning tools such as the government purchase of lands from willing sellers, purchase of conservation easements from willing sellers, and government-sponsored education programs to encourage, but not require, good stewardship practices.

Many land use planning tools have elements from several of these categories. This is perhaps a reflection of the growing consensus that in order for conservation efforts to achieve long-term success, there needs to be a regulatory component, an economic incentive, and an underlying societal environmental ethic. (Uphoff and Lanholz, 1998; Shogren 2005) Each of these components needs to be reinforced by the other two. The application of these three

¹ The rigidity of the ESA has been tempered with the increased popularity of Habitat Conservation Plans in meeting ESA requirements. HCP's allow for the incidental taking of a species if the HCP produces a net positive effect on the species.

