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PRACTICE RELAXED ZONING OVERLAY



The Relaxed Zoning Overlay: A Tool for Addressing the Property Vacancy Cycle

By Stephen Pantalone and Justin B. Hollander, AICP

The relaxed zoning overlay (RZO) is a planning tool for municipalities anticipating declining populations, either communitywide or within individual neighborhoods.

All images by Justin Hollander



⌚ This partially boarded-up building in Flint, Michigan, sits next to a vacant lot overrun with vegetation.

Significant population decline may lead to an excess supply of residential, commercial, or industrial structures, and evidence has shown that even a small concentration of vacant property brings a host of economic and social problems.

The purpose of the RZO is to mitigate these impacts by anticipating decline and adapting the property supply in a given community. For example, if a residential neighborhood is consistently losing population, there will be a point at which the housing supply exceeds housing demand.

At this point housing prices in these neighborhoods will begin to fall along with the respective property's profitability. Without the prospect of recovery, the continued maintenance of the residential property may become economically burdensome to owners. However, in such circumstances there may be a demand for other uses that are not currently zoned, such as cold storage facilities or agricultural uses. Currently, the inflexibility of zoning restricts the ability of communities to quickly react to decline by expanding the legally allowable uses of

property. In the example above, the property will remain restricted to a residential use despite falling housing prices and may ultimately become derelict and abandoned—blighting the surrounding neighborhood. The RZO addresses this issue by expanding the list of by-right uses in a given community when it faces declining residential demand, thereby providing owners the flexibility to adapt their properties to a use that will continue to be productive.

The RZO concept is a combination of a normal zoning overlay and an urban growth boundary (UGB). It is similar to a UGB in that it relies on a trigger mechanism designed through a planning process. And, like other overlays, the RZO sits on top of the underlying zoning. The RZO is triggered when the vacancy rate in the respective community reaches a certain level, and once it is activated, expands the scope of permitted uses.

The RZO concept was introduced in Justin Hollander's *Sunburnt Cities*, and is part of a larger body of scholarly research on planning for decline. The research has focused primarily on Rust Belt cities with large inventories of vacant property. It has taken decades for some cities to develop regulatory and market tools to acquire and demolish or reuse these properties. There is now evidence that some of the Sun Belt cities that have seen staggering growth in the last several decades are also facing decline. The RZO offers a prospective tool for these cities and others to curtail and even take advantage of decline. This is accomplished by keeping property in use and improving

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the quality of the community for the existing residents, thereby reducing the inevitable costs of would-be vacant property.

In this article we will briefly review the research on declining cities and vacant properties, making the case that these properties are tremendously harmful to communities because of the criminal activity and disinvestment they encourage. Then we will discuss tools applied by municipalities to address their large inventories, including the utilization of the property or site for alternative uses. Finally, we will introduce the basics of an RZO, including its legal foundation, its trigger mechanism, and examples of permitted uses communities might adopt.

THE PROBLEM OF VACANCY

The lifecycle of vacant property often follows a similar series of events. In the instance of a residential home, an owner may be forced to leave the neighborhood to find another job as the employment market deteriorates. However, as the excess supply of housing grows, prices continue to drop, making it more difficult for that owner to sell the property without taking a loss. When the owner is not able to pay off the remaining mortgage, the property ends up in foreclosure. The patterns for rental property and commercial real estate are similar. Rents decrease; owners defer maintenance. And eventually the property is abandoned.

Vacant properties are a significant drain to a city's resources both in terms of lost revenue from falling property values and in increased expenses from crime and vandalism. The Center for Community Progress has issued several reports documenting the

costs of vacant and abandoned property. In the 2005 report *Vacant Properties: The True Costs to Communities*, they note that “Such properties produce no or little property tax income, but they require plenty of time, attention, and money.” Over time these properties continue to be contaminated, further increasing the costs of redevelopment or demolition.

In the past, property vacancy was considered a problem confined to the old industrial cities of the Midwest and Northeast. However, the recent foreclosure crisis is bringing the issue to Sun Belt cities that, until recently, were experiencing staggering growth. The same real estate speculation

that fueled rapid construction of residential housing and commercial and retail development is now resulting in growing inventories of vacant properties. These cities present an opportunity to address decline earlier in the cycle.

Edward Glaeser uses the City of Buffalo as an example of the strategies municipalities have historically used to fight decline. During the urban renewal period of the 1960s Buffalo spent almost \$60 million to rebuild a downtown neighborhood and redevelop its waterfront (Glaeser 2007). The goal was to attract private development and new residents. Yet the city continued to lose population in most neighborhoods despite



➡ This single-family ranch home in Orlando, Florida, exhibits signs of dereliction after an extended period of vacancy.

these growth strategies. The problem with redevelopment in some cases is that cities are simply replacing the old inventory of property with a new inventory of the same property (albeit better), without increasing demand or lowering maintenance costs.

The failings of the growth strategy led to the “smart decline” (planning for decline) movement. The goal of planning for decline is to concentrate on improving the quality of life for the existing residents and to reduce the future infrastructure costs of the city. This can mean concentrating populations into smaller geographic areas and returning other land to its natural and more efficient state. To date, smart decline has generally been applied in cities that have already undergone significant population loss, such as Youngstown, Detroit, and Cleveland. Using these principles, cities have employed regulatory, administrative, and market-based tools to target vacant property for acquisition or reuse.

Regulatory approaches include requiring owners to maintain unoccupied properties, enforcing code violations, using tax foreclosure for acquisition, and creating land banks to facilitate reuse. Administrative strategies include instituting better monitoring systems to manage the inventory of vacant property and fast-tracking the permitting process for temporary or permanent reuse. Finally, market-based approaches might focus on adaptive reuse or the creation of management agreements between nonprofit organizations and landowners.

Realizing that their populations are not going to return to previous levels, cities are increasingly acquiring vacant property with the intent of demolition. Detroit had demolished approximately 3,000 homes by the end of September 2010, with the eventual goal of reaching approximately 10,000 demolitions. Even though it is the last resort for a city, demolition creates an opportunity to remove excess supply and reuse the land for more productive uses, such as recreational facilities, agricultural uses, or even renewable energy systems. And as cold as it sounds, demolition also allows a city to plan its decline strategically, deciding the geographic layout of the city in the future and determining which neighborhoods should be preserved.

THE LEGAL PRECEDENT FOR THE RELAXED ZONING OVERLAY

Federal and state courts have consistently upheld the constitutionality of zoning over-

lays because the public benefit purpose satisfies the rational basis test. However, it is important to review certain legal concepts relevant to the RZO. These concepts include procedural and substantive due process and “void for vagueness.”

Procedural due process is satisfied during the community engagement process, where local planning officials hold workshops and public meetings with residents. These meetings provide an opportunity for residents to gather information, share their opinions, and create a vision for the future of their neighborhood. There are two critical reasons why the RZO depends on com-

to the local governments in determining what is deemed a “rational relationship.” Whether the RZO works in practice is not critical, only that it is rational to think that it would work. Considering the logical relationship between allowing more uses and reducing vacancy rates, and the well-researched relationship between vacancy and community disinvestment, the RZO should also pass the substantive due process test.

To avoid “void for vagueness” the zoning language has to be worded clearly enough for a reasonable property owner to understand. The RZO passes the test of void for vagueness but is an area for caution. In



🕒 This single-family home in Fresno, California, sat vacant for over a year after foreclosure, during which time it eventually was subjected to arson and vandalism.

munity participation more so than a typical overlay. First, the expanded list of permitted uses should not create intolerable nuisances to residents. If it does, the municipality may face resource-intensive legal challenges on the back end. Secondly, the purpose of the RZO is to fill a void in the market by allowing property owners or the city to bring in services that were previously unavailable. The expanded list of uses should reflect the needs of the community or the properties will continue to remain vacant.

Substantive due process examines the public policy purpose of a regulation and its presumed effectiveness in achieving that purpose. The courts give tremendous deference

adding flexibility to the zoning regulations, the RZO must be clear in defining its trigger mechanism and identifying the expanded types of permitted uses.

In addition to the legal precedent for the RZO in overlay zoning cases, it is also useful to look to other land-use regulations that use trigger mechanisms. Donald Elliot's (2008) dynamic development standards concept provides a solid legal ground for using standards that change over time in predictable ways. Another good model in land-use regulations are Oregon's urban growth boundaries. The UGB process allows the respective cities to move the boundaries that determine developable land and den-

sity based on projected growth numbers for different land-use needs. These tools create flexibility in zoning for future demographic changes and provide precedent for the RZO.

CREATING THE RELAXED ZONING OVERLAY

The trigger mechanism for the RZO is based on the vacancy rate for a given geographic area. There are several decisions required in creating the trigger, including the geographic scope of the vacancy rate (i.e., certain neighborhoods, certain zip codes, or entire metropolitan areas), defining which properties will be included in the calculation of the vacancy rate (e.g., occupancy, tenure, and land use), and determining a vacancy rate that signals the onset of decline.

Because this is a new concept, there are no case studies on an appropriate trigger rate. However, there is some research cited by John Accordino that suggests a vacancy rate as low as three percent can signal the onset of decline, and there is a greater body of research that suggests that the domino effect of vacant property occurs quickly. Adequate planning, forecasting, and community involvement is important in creating a trigger rate that is low enough to be effective in addressing decline but not so low as to affect a relatively healthy neighborhood.

Once triggered, the RZO expands the list of by-right uses in the zoning code, essentially acting as a new use table. The community identifies the new uses in a typical planning/visioning process. This can both allow new uses that the community wants, or in a situation where the community must unhappily face the facts of decline, it allows them to identify uses that are at least tolerable and will keep the properties or land active. Decline offers a special opportunity in situations where the community desires new uses that are economically infeasible for property owners. An example of this is urban agriculture, which in any vibrant community would not be economically viable without subsidies. Yet it may make sense in a community with a declining population and falling property values.

The new uses will be unique to each situation because every community will have a different property inventory mix. The point from the research on vacant properties is that inactivity is the worst-case scenario, as there are tremendous costs to the community. The RZO, in combination with the existing tools such as land banks and fast-track permitting, allows the reuse to happen

quickly and in advance of serious decline. Instead of rezoning after abandonment happens, the RZO is a prospective tool. And while any community, whether healthy or unhealthy, could always go through a rezoning process, the RZO is most suited for cities experiencing or expecting decline. While each situation may be different, these could be communities that are generally happy with single-family neighborhoods without any commercial activity. However, if faced with the prospect of vacant properties next door, they are willing to explore new uses that may even benefit their neighborhoods. This is important in the case of decline because the reality is that expanding the list of by-right uses will not save every property from abandonment. Some properties may

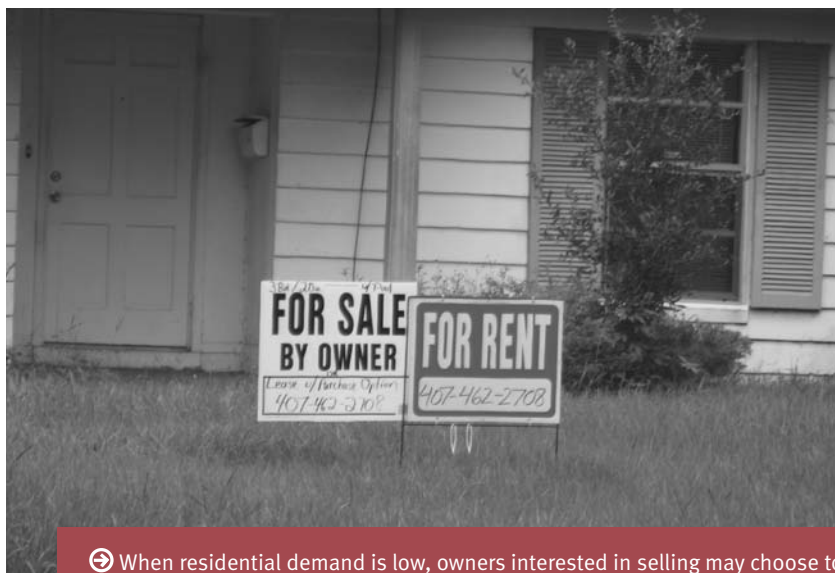
- Demolition of housing for urban agriculture or recreation centers, pocket parks, and vacant land for renewable energy

Urban multifamily neighborhoods with excess housing supply:

- Allowing commercial activity and non-profit groups, such as incubation or training centers, medical offices, small businesses (law offices, travel centers), nonprofits, artist studios
- Potential demolition for pocket parks/recreation

Large suburban-type retail centers with excess commercial or institutional space:

- Allowing all uses, such as outdoor/ indoor markets, distribution centers, industrial uses,



➡ When residential demand is low, owners interested in selling may choose to rent their homes to avoid prolonged vacancies.

be abandoned, razed, and then reused for agricultural, forestry, or recreational uses.

The following examples represent uses that could benefit the community from an economic, social, and environmental perspective; they include the reuse of both vacant property and vacant land. The examples of new uses are tailored to three general scenarios.

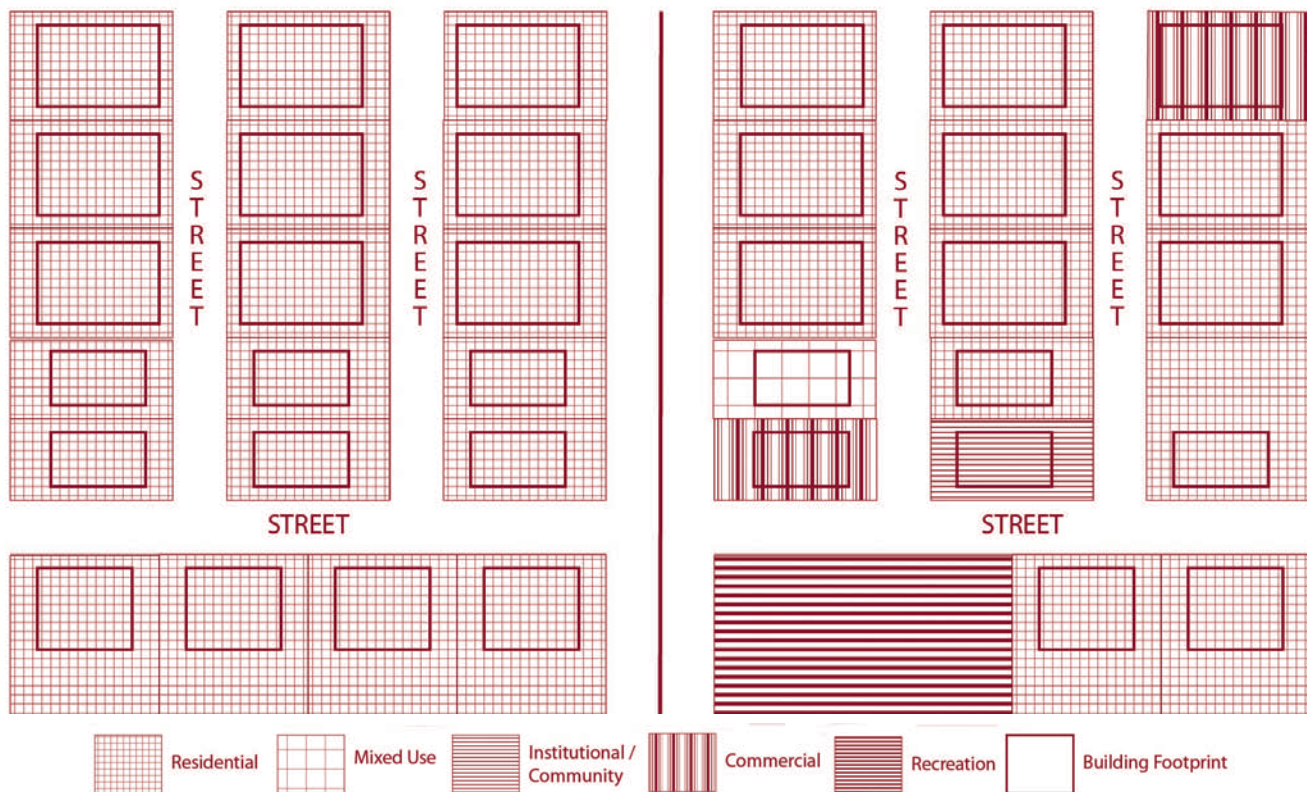
Single-family neighborhoods with excess housing supply:

- Allowing commercial activities or open space, such as small grocery/convenience stores, day care centers, home offices, markets, or seasonal temporary uses

renewable energy production, mixed use housing, parks and recreation (e.g., paintball/indoor rock climbing), reforestation, transportation centers, and music venues

In the best-case scenario, the activation of the RZO will reduce vacancy rates to a point where the neighborhood is stable. This may require a reverter rate, which causes the RZO to become dormant again so as to limit commercial development opposed by residents. A reverter rate itself creates zoning issues with respect to non-conforming uses with the underlying base code. This will create obvious problems for property owners as they seek changes in

ZONING USES BEFORE AND AFTER RZO



- ➡ This diagram shows three street blocks before and after the adoption of the RZO. The illustration on the left shows the existing zoning, which is restricted to single family uses, while the illustration on the right presents the potential expansion of uses under the RZO. Under the RZO underutilized residential buildings and land can be used for commercial purposes, community activities, and new parks.

the future. The likely solution is a special legal mechanism whereby new uses are essentially grandfathered in and allowed future zoning relief. Municipalities could also choose to simply leave the RZO in place by not adopting a reverter rate. This decision will again depend on each community and how they see their future, rather than on planning that focuses on growth and increased revenues.

A potential abuse of the RZO could be collusion between property owners to purposely increase vacancy rates even in situations when decline is not imminent. Their goal would be to trigger the RZO and transform their properties into more profitable uses. This may be particularly true in cases with larger property owners outside of the community that can afford to keep their properties vacant. Safeguarding against such abuse would be difficult to do through

zoning changes or other legal mechanisms. These are areas to be explored further by the respective municipality as they create trigger rates, geographic boundaries, and monitoring systems for vacant properties.

A final issue with the RZO is how it will interact with business licenses, building codes, and design standards. Zoning regulations require certain setbacks, height limits, and other physical dimensions, and business licenses and building codes are often specific to the use. While this article focuses on by-right uses under the RZO, it is clear that physical zoning regulations and other general business regulations will also need to be addressed.

SUMMARY

Whereas most of the planning tools for shrinking cities focus on post-decline problems, the RZO is a prospective tool. The RZO

seeks to attack the issue of excess supply early by establishing an expanded list of permitted uses in advance of decline. As a result, the RZO will allow property owners to react quickly to decline with the goal of reprogramming the uses of their buildings or land.

The most important aspect of the RZO is that its creation relies heavily on a community-driven process. The RZO will only be successful if there is demand for the expanded list of permitted uses or if it adds value from a cost or environmental perspective. Therefore, the input of residents on the type of uses they would like to see in their neighborhoods is critical. This article has shown that the details of the RZO will require a number of difficult decisions, such as how to measure vacancy and the vacancy rate, how to select the proper trigger and reverter rates, the geographic scope of the

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overlay, and the allowable by-right uses. These questions require additional research and the answers will be unique to each community. However, there are a few general benchmarks that can be established to start the conversation. The following ordinance framework summarizes the key aspects of the RZO.

RZO ORDINANCE FRAMEWORK

Purpose

The ordinance should include a stated public policy goal. An example may be "to fight the onset of blight, and specifically vacant property, in the respective neighborhood by increasing the ability of property owners and residents to make continued use of their property."

Applicability (Geographic Scope)

The ordinance should identify the geographic scope of the RZO; the demographic/economic projections and vacancy rates should be measured at this level, as should the application of expanded by-right uses. It is noted that information necessary for doing projection and trends may not be available at the desired level.

Defining Vacancy Rate

The ordinance must determine a vacancy rate that will trigger the RZO. A potential definition for a vacant property counted in the trigger rate could be any building that has been completely unoccupied for at least one year. Evidence of vacancy could be based on U.S. Postal Service information, and addresses that are no longer receiving mail could be deemed unoccupied. In addition to defining what is included in the calculation of the vacancy rate, the ordinance must also define the trigger rate itself.

Reverter Rate

The ordinance should address whether there is a "reverter" rate that would trigger the original zoning. If there is a reverter rate, the ordinance should address the issue of new nonconforming uses created under the RZO, and what the protections are for owners seeking physical changes to their properties in the future.

Permitted Uses

The ordinance should include an expanded use table with the new community-deter-

mined uses. The structure of the use table would mirror other use tables. Depending on the scope of the RZO in terms of the number of affected neighborhoods, a zoning map may be necessary.

Dimensional Requirements

The ordinance should address situations where the conversion of a property to a new use (e.g., a residence to an office or convenience store) does not meet the dimensional requirements for that new use. The ordinance should ensure that roadblocks are removed in these situations.

The historic Carriage Town neighborhood in Flint, Michigan, is an eclectic mix of urban prairie, derelict or abandoned residences, restored Victorian and Craftsman homes, and residential to commercial conversions. Cover photo © Sarah Razak; design concept by Lisa Barton.

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HOW COULD THE RELAXED
ZONING OVERLAY HELP CITIES
IN TRANSITION?

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