

Zoning Bias II: A Study of Oregon's Zoning Commission Composition Restrictions

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I. Introduction

FOR MANY CITIZENS, A ZONING DECISION is the most life-affecting government allocation of rights they will ever encounter.¹ The planning and zoning (P&Z) commission may recommend to the city council that the land next door, currently a wheat field zoned agricultural, be rezoned commercial for a new shopping mall, with the traffic routed right through a previously quiet neighborhood. The board of zoning adjustment (BZA) may give your neighbor a variance to allow a go-kart track in your backyard. Your property value may be adversely affected—and along with it, your life. Yet, despite the importance of these decisions, relatively little has been done to ensure that the decision makers are impartial.

In an earlier article,² researchers Jerry L. Anderson and Erin Sass found that a vast majority of states impose no controls on the composition of zoning boards.³ A few have relatively minor occupational restrictions. For example, in Iowa a state statute requires that a majority of each BZA must be comprised of people not “involved in the business of purchasing and selling real estate.”⁴ This limitation provides little

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**Associate, Andereck, Evans, Milne, Peace & Widger, L.L.C., Jefferson City, Missouri; Drake Law School, 2005.

1. See David D. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J. ENVTL. L. 279, 280 (2004) (describing the effects of variance).

2. Jerry L. Anderson & Erin Sass, *Is the Wheel Unbalanced? A Study of Bias on Zoning Boards*, 36 URB. LAW. 447 (2004) [hereinafter “Anderson & Sass”].

3. *Id.* at 453–54. The term “zoning board” is used here to mean both the planning and zoning commission, which typically reviews zoning amendments and plats of development, and the board of zoning adjustment, which typically rules on variances and special permits.

4. IOWA CODE § 414.8 (2004).

protection against bias, however, because others involved in the development process, including contractors, lenders, and architects, are not covered by this limitation. The empirical data from Iowa confirmed that, without meaningful restrictions on board appointments, the occupational distribution of board members is skewed.⁵ Especially in larger cities, blue-collar citizens—and presumably their concerns—were significantly underrepresented. Moreover, the study found that occupations tied to development—such as contractors, real estate agents, and lenders—made up a large percentage of these zoning boards, potentially resulting in a systemic bias in favor of development.⁶ The composition of the boards may partially explain why surveys have consistently found that about three-quarters of variance requests are granted.⁷

Oregon has one of the nation's most comprehensive land use management programs, shifting more control to the state level.⁸ Moreover, Oregon is one of the few states to have imposed greater controls on the composition of zoning boards. First, Oregon law attempts to achieve broader occupational distribution by prohibiting the selection of more than two P&Z commission members from the same occupational category.⁹ Second, Oregon's land-use statute allows "no more than two members of the commission [to be drawn from those] engage[d] principally in the buying, selling *or developing* of real estate."¹⁰ Iowa's limitation on real estate interests applies only to those engaged in "purchasing and selling" property and requires only that a "majority" of the board members be drawn from other occupations.¹¹ Thus, at least on the surface, Oregon's law should result in less occupational bias on P&Z commissions.

We decided to survey Oregon commissions to determine whether the occupational restrictions result in improved board composition. The

5. Anderson & Sass, *supra* note 2, at 460–68.

6. Anderson & Sass, *supra* note 2, at 449–50. This article found that, in cities with populations over 25,000, approximately 75 percent of BZA members and 80 percent of P&Z members were from professional, technical, or managerial occupations. *Id.* at 462–63. In addition, about half of the members of both boards had occupations that would benefit directly or indirectly from additional development. *Id.* at 467. Some individual boards were "packed" with pro-development interests. See Jim Pollock, *Drake Study Looks into Potential Bias on Zoning Boards*, DES MOINES BUS. REC., Oct. 4, 2004, at 12 (6 of 7 West Des Moines zoning commission members had ties to development activity).

7. Owens, *supra* note 1, at 309 (noting 72 percent of variances granted in North Carolina survey); *id.* at 296–98 (describing other studies with similar results).

8. See, e.g., Edward J. Sullivan, *Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100*, 77 OR. L. REV. 813, 840 (1998).

9. OR. REV. STAT. § 227.030(4).

10. *Id.* (emphasis added).

11. IOWA CODE § 414.8 (2003).

results indicate that Oregon's law restricting commission membership represents some progress in reducing the potential for bias. The law does result in lower percentages of commission members whose occupations are tied either directly or indirectly to development interests. Nonetheless, the survey identified loopholes in the law that still allow for potentially biased boards in some municipalities. Moreover, the law does not cure the overrepresentation of white-collar occupations on zoning commissions. This article recommends that states adopt a modified version of the Oregon statute to achieve better representational results.

After describing Oregon's unique land use control system, this article will detail the results of our survey of Oregon municipalities.¹² We will compare the results to the similar Iowa survey, published in 2004,¹³ to determine whether Oregon's more stringent law is achieving better representation. Finally, we will suggest improvements to the law we think may result in zoning boards with even less potential for bias.

II. Oregon's Land Use System

The Iowa survey focused on the composition of the state's P&Z commissions and the BZA, which are typical bodies with zoning authority in states whose systems are based on the Standard State Zoning Enabling Act (SSZEA).¹⁴ The BZA typically rules on variances and special exemptions, while the P&Z commission recommends zoning amendments to the city council or county board of supervisors and has authority to approve plats for development.¹⁵ Oregon, however, created a unique land use control system, which features greater control and coordination at the state level. The local zoning bodies also differ, in terms of their powers and responsibilities, from the commissions and boards found in SSZEA states. Therefore, a brief explanation of Oregon's system is required.

In 1973, Oregon enacted a statewide comprehensive land use management scheme, the Oregon Planning Act (the "Act").¹⁶ The Act requires each city and county to adopt a comprehensive plan.¹⁷ Each local

12. The complete survey can be accessed at <http://facstaff.law.drake.edu/jerry.anderson/Oregonresearch.html> [hereinafter Oregon Survey].

13. Anderson & Sass, *supra* note 2.

14. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1926), available at <http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf> (last visited Dec. 3, 2005).

15. See Anderson & Sass, *supra* note 2, at 450. This article and the Iowa article focus solely on city, rather than county, zoning boards.

16. 1973 Or. Laws ch. 80 (codified as amended at OR. REV. STAT. §§ 197.005–197.860).

17. OR. REV. STAT. § 197.175(2)(a).

plan and its implementing regulations must comply with a set of state-wide goals adopted by a state agency, the Land Conservation and Development Commission (LCDC).¹⁸ There are currently nineteen state goals, covering everything from the conservation of agricultural land and beaches, to addressing energy and transportation needs.¹⁹ For example, Goal 14 addresses urbanization and “requires cities to estimate future growth and needs for land and then plan and zone enough land to meet those needs.”²⁰ The urbanization goal requires establishment of an “urban growth boundary” to “identify and separate urbanizable land from rural land.”²¹ Goal 10 requires planning and accommodation for needed housing types.²²

The LCDC reviews each local plan for consistency with the state goals. If the plan and its implementing regulations meet a state goal, the LCDC “acknowledges” them and the local government may use them to make land use decisions.²³ Until acknowledgement, however, the state’s goals are directly applicable to local land use decisions.²⁴ After being “acknowledged,” local land use plans and regulations must be reviewed periodically to ensure that they remain in compliance with the goals, or any new or amended criteria.²⁵ This review process takes on crucial significance, because Oregon is one of only a few states to give the comprehensive plan the force of law.²⁶

In order to provide for more efficient and uniform review of land-use decisions, the Oregon legislature created a state board, the Land Use Board of Appeals (LUBA), to hear appeals in land use cases.²⁷ Its jurisdiction encompasses both “land use decision[s],”²⁸ which includes the “adoption, amendment or application”²⁹ of comprehensive plans and land-use regulations, and “limited land use decision[s],”³⁰ which

18. *Id.* §§ 197.175(2)(a), 197.040(2).

19. Land Conservation and Dev. Comm’n of Or., *A Summary of Oregon’s Statewide Planning Goals*, www.lcd.state.or.us/LCD/docs/goals/goalssummary.pdf. (last visited Dec. 2, 2005).

20. *Id.*

21. *Id.*

22. *Id.*

23. OR. REV. STAT. § 197.175(2)(d).

24. *Id.* § 197.175(2)(c). A plan may be acknowledged as meeting some goals but not others, meaning that the applicable law will consist of a mixture of the local plan and state goals.

25. *Id.* § 197.629.

26. Sara C. Galvan, *Gone Too Far: Oregon’s Measure 37 and the Perils of Over-Regulating Land Use*, 23 YALE L. & POL’Y R. 587, 589 n.10 (2005) (citing Edward J. Sullivan, *Comprehensive Planning*, 36 URB. LAW. 541 (2004) (only a handful of states elevate comprehensive plan to status of law)).

27. OR. REV. STAT. § 197.830.

28. *Id.* § 197.015 (10).

29. *Id.*

30. *Id.* § 197.015(12).

includes subdivision approvals or denials and the application of discretionary standards.³¹ LUBA will reverse a land use decision that is not consistent with an acknowledged comprehensive plan or, if the plan is not acknowledged, with the statewide goals.³² It will also reverse an amendment to a comprehensive plan that it determines is not consistent with the state's goals.³³ Appeals from LUBA decisions are filed directly with the Oregon Court of Appeals.³⁴

In most states, which use the SSZEA as the basis of land use control, primary zoning authority rests with two separate bodies: the BZA and the P&Z commission.³⁵ Although generalizations cannot capture the variety of zoning structures in use, typically the BZA has the authority to grant variances and special exceptions from zoning regulations.³⁶ The P&Z commission makes recommendations to the city council regarding zoning amendments, and may have the power to grant or at least make recommendations regarding special permits.³⁷ The P&Z commission also typically is the body that reviews and approves subdivision plats.³⁸

Oregon law authorizes only one local zoning body: the planning commission.³⁹ The commission makes preliminary recommendations to the city council regarding zoning districts and the comprehensive plan.⁴⁰ The commission also approves development plats,⁴¹ discretionary permits,⁴² and zoning changes.⁴³ If a hearing officer makes the initial decision regarding discretionary permits or zoning amendments, the planning commission may hear appeals from those decisions.⁴⁴ Thus, the planning commission in Oregon seems to have even more authority over development activity than the typical P&Z commission in SSZEA jurisdictions.

31. *Id.* § 197.825.

32. OR. REV. STAT. § 197.835(5).

33. *Id.* § 197.835(6).

34. *Id.* § 197.850(7)(a).

35. Anderson & Sass, *supra* note 2, at 450.

36. U.S. DEP'T OF COMMERCE, *supra* note 14, at § 7.

37. *Id.* at § 6; ANDERSON'S AM. LAW OF ZONING § 21:16 (West 2005), available at Westlaw as AMLZONING § 21:16 (last updated Nov. 2005).

38. ANDERSON'S AM. LAW OF ZONING § 25:10 (West 2005), available at Westlaw as AMLZONING § 21:10 (last updated Nov. 2005).

39. OR. REV. STAT. § 227.020.

40. *Id.* § 227.090.

41. *Id.* § 227.100.

42. *Id.* § 227.173; *see, e.g.*, Corp. of Presiding Bishop v. City of W. Linn, 86 P.3d 1140 (Or. Ct. App. 2004).

43. OR. REV. STAT. § 227.175.

44. *Id.* § 227.180; *see id.* § 227.165 (hearing officer duties); *see also* Dep't of Transp. v. City of Mosier, 984 P.2d 351 (Or. Ct. App. 1999) (city may also use hearing officer for other categories of zoning matters).

The commission does not issue variances, however. Hardship-based variances, the primary purview of the BZA in SSZEA states, do not go through citizen board review at all in Oregon. Instead, the variance application is dealt with by city staff, with a possible appeal to a hearing officer and then to the city council. The grant or denial of a variance may then be appealed to the LUBA.⁴⁵

Oregon state law places several limitations on the appointment of planning commission board members. First, the law specifies that no more than two members of the city planning commission may be city officers, and even those members may serve only in an *ex officio* non-voting capacity.⁴⁶ Second, to prevent one particular profession from dominating a commission, the law prohibits more than two voting members who are “engaged in the same kind of occupation, business, trade, or profession.”⁴⁷ Finally, the statute deals directly with development interests, prohibiting more than two members who “engage principally in the buying, selling, or developing of real estate for profit” either as individuals or as employees or officers of a business in that line.⁴⁸

Oregon law specifically addresses conflicts of interest of planning commission members.⁴⁹ This type of specific conflict of interest law at the state level, especially one directed specifically at a planning commission, is rare and reflects the legislature’s recognition of the power these bodies have.⁵⁰ The conflicts law prohibits a planning commission member from participating in any commission proceeding or action in which he or she has a “direct or substantial financial interest.”⁵¹ The statute further prohibits participation if the member’s spouse, sibling, child, parent, father-in-law or mother-in-law has a financial interest.⁵² Finally, the statute prohibits participation if a business in which the member has served within the previous two years has a direct interest.⁵³ This limitation also extends to any business with which the member is negotiating for or has an arrangement or understanding concerning prospective partnership or employment.⁵⁴ While this statute would seem to prevent the most blatant forms of self-dealing, the term “direct or

45. *See, e.g.*, Kelley v. Clackamas County, 973 P.2d 916 (Or. Ct. App. 1999).

46. OR. REV. STAT. § 227.030(1).

47. *Id.* § 227.030(4).

48. *Id.*

49. *Id.* § 244.135.

50. Anderson & Sass, *supra* note 2, at 451.

51. OR. REV. STAT. § 244.135(1).

52. *Id.* § 244.135(1)(a).

53. *Id.* § 244.135(1)(b).

54. *Id.* § 244.135(1)(c).

substantial financial interest” is not defined, which may allow it to be interpreted narrowly.⁵⁵ As of the writing of this article, there are no reported cases construing the statute.

Oregon has made one of the few attempts to achieve a better composition of zoning board members, and its law is certainly the most far-reaching.⁵⁶ The question is whether it has had any real effect on achieving its purpose. By comparing the composition of Oregon zoning boards with those in Iowa, which has minimal restrictions on board membership, we hoped to determine whether the law is working or whether further restrictions would be desirable.

III. The Oregon Planning Commission Survey

In the fall of 2004, we sent a survey to every Oregon municipality with a population greater than 1,000 people.⁵⁷ The survey questionnaire asked the municipality to list the occupation and employer of each member of its planning commission. The questionnaire also asked the city to detail any restrictions that city ordinances imposed on the composition of the commission, and any city policy regarding conflicts of interest. We also asked the participants to identify whether any of the commissioners’ family members were engaged in occupations connected with development.

We received a good response from the Oregon municipalities. Out of the 150 municipalities surveyed, seventy-one responded, resulting in a 47 percent response rate. As Table 1 on page 70 shows, all sixteen of the larger cities responded; the level of response was relatively consistent among all other population size categories.

The responses we received indicated that Oregon’s law has not reduced the general overrepresentation of white-collar occupations on zoning commissions. The occupational restrictions, however, have apparently reduced the percentage of commission members who have a direct pro-development interest. Nevertheless, the results indicate that the law does not go far enough to eliminate the potential for commissions to be populated largely by those with some development interest.

55. *Id.* § 244.135(1).

56. Anderson & Sass, *supra* note 2, at 453–54 (only Michigan and Minnesota have any kind of occupational restriction on zoning board membership; Tennessee has a gender and racial diversity requirement for some cities).

57. We used population data from the 2000 census for selecting these municipalities and analyzing the data. Census data is generally available on the internet at www.census.gov.

Table 1—Response Rates of Municipalities Surveyed

Population	Cities Surveyed	Responses	Response Rate
1,000 to 2,499	56	23	41%
2,500 to 4,999	27	10	37%
5,000 to 9,999	25	10	40%
10,000 to 24,999	26	12	46%
Over 25,000	16	16	100%
Total	150	71	47%

A. Occupational Distribution

The Iowa survey article explained the importance of appointing a representative cross-section of the community to zoning boards.⁵⁸ An early survey, conducted by Robert Walker in 1937, found that planning commissions in large cities were composed mainly of businessmen, realtors, lawyers, architects, and engineers.⁵⁹ These occupations accounted for about 80 percent of all commission members.⁶⁰ Walker worried that the tilt toward white-collar occupations resulted in commissions that would be more sympathetic to development interests than to the interests of the common citizen.⁶¹

The Iowa survey found that, almost seventy years later, this skew toward white-collar occupations remains, especially in larger cities.⁶² The Iowa results indicate that, overall, about 60 percent of the occupations represented on the state's P&Z commissions fell into the professional/technical/managerial category—almost double the percentage of those occupations in the public at large.⁶³ This overrepresentation increased along with city size; in cities over 25,000, the percentage of “white-collar” commission members rose to about 80 percent.⁶⁴ We concluded that appointing a more representative cross-section of the community would probably better reflect the values of the entire population.⁶⁵

Oregon law prohibits more than two persons from any one occupational type on a zoning board.⁶⁶ We wanted to determine whether this

58. Anderson & Sass, *supra* note 2, at 458–65.

59. *Id.* at 459 (citing ROBERT A. WALKER, *THE PLANNING FUNCTION IN URBAN GOVERNMENT* 150 (2d ed. 1950)).

60. ROBERT A. WALKER, *THE PLANNING FUNCTION IN URBAN GOVERNMENT* 150 (2d ed. 1950).

61. *Id.* at 152–53.

62. Anderson & Sass, *supra* note 2, at 464.

63. *Id.* at 463–64.

64. *Id.*

65. *Id.*

66. OR. REV. STAT. § 227.030(4).

Table 2—Occupational Demographics of Overall Population

Occupational group	Iowa	Oregon
Professional, Technical, Managerial	31.3%	33.1%
Clerical/Sales	25.9	26.1
Service	14.8	15.3
Agricultural	1.1	1.7
Processing, Trades, Labor	27.0	23.8

restriction results in a better cross-section of occupational categories. In terms of their populations' occupational distribution, the demographics of the two states are almost identical. Table 2 shows the percentages of the overall Iowa and Oregon workforce in various occupational categories, drawn from the 2000 census.⁶⁷ In both states, only about a third of the workforce falls into the “professional, technical, and managerial” class.⁶⁸

The demographic data in Table 2 are drawn from the 2000 census.⁶⁹ However, in order to match these categories with those in our survey data, we have collapsed the census categories of “construction, extraction, and maintenance” and “production, transportation, and material moving” into one category, called “processing, trades, and labor” which corresponds with the Department of Labor classifications we used. Moreover, the census category “agricultural” does not include farmers who own their land.⁷⁰ They are instead classified in the managerial group.⁷¹ Our data below, however, categorize farmers as “agricultural.” In addition, our survey data included “housepouse” and unemployed persons, while the census categories do not.⁷² As a result of these differences, “white-collar” workers represent an even smaller percentage of available commission appointees than these statistics show.

The Oregon survey indicates that the state's zoning board restriction has not been effective in achieving a better cross-section of occupational groups.⁷³ In fact, the Oregon results are strikingly similar to Iowa's. Table 3 on page 72 shows the distribution of occupations on P&Z commissions in Oregon including retired members (categorized by their last occupations). Table 4 on page 73 gives the same infor-

67. Peter Fronczek & Patricia Johnson, U.S. Dep't of Commerce, *Occupations 2000*, at 1–2, 8 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-25.pdf>.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Oregon Survey, *supra* note 12.

**Table 3—Occupations of Oregon Zoning Board Members
(including retired members by last occupations)**

Occupations	Total	1,000– 2,499	2,500– 4,999	5,000– 9,999	10,000– 24,999	25,000 +
Prof./Tech./Managerial	306 74.6%	85 68%	50 83.3%	39 65%	63 77.8%	69 90.8%
Clerical/Sales	26 6.3	8 6.4	3 5.0	5 8.3	8 9.9	2 2.6
Service	32 7.8	9 7.2	6 10.0	8 13.3	6 7.4	3 3.9
Agricultural	3 .7	2 1.6	0 0.0	1 1.7	0 0.0	0 0.0
Labor/Proc./Trades	30 7.3	12 9.6	7 11.7	5 8.3	4 4.9	2 2.6
Unemployed/Housespouse	13 3.2	9 7.2	2 3.3	2 3.3	0 0.0	0 0.0
Total	410	125	60	60	81	76

mation with retired respondents excluded.⁷⁴ Again, while only a third of Oregon's workforce can be classified as professional, technical, or managerial, about 75 percent of the state's P&Z board members come from that occupational category.⁷⁵ Thus, white-collar occupations continue to be significantly overrepresented, having approximately twice their respective percentage of the population. As in Iowa, the distributional skew is worse in larger cities.⁷⁶ In municipalities over 25,000, the percentage of white-collar zoning board members rises to almost 90 percent, with or without retired workers.⁷⁷

Some of the overrepresentation of the white-collar occupations may be understandable. A significant percentage of the population listed under "service" occupations, for example, may be students or younger people working in restaurants or other service occupations as they go through school. Indeed, labor statistics indicate that the median age of

74. It could be argued that retired individuals do not have the same occupational biases as those currently employed. Conversely, one could argue that a worker will retain at least some of the bias inherent in whatever occupational class they devoted their working life to.

75. Oregon Survey, *supra* note 12.

76. Anderson & Sass, *supra* note 2, at 464.

77. As in the Iowa survey, these numbers exclude responses indicating that the occupation of a board member was "unknown." This response was made for a total of fifty-one board members, or 11 percent, again very similar to the Iowa survey results. Anderson & Sass, *supra* note 2, at 462. Thus, the tables more properly could be said to summarize the percentages of *known* occupations of zoning board members.

**Table 4—Occupations of Oregon Zoning Board Members
(excluding retired members)**

Occupations	Total	1,000– 2,499	2,500– 4,999	5,000– 9,999	10,000– 24,999	25,000+
Prof./Tech./Managerial	268 74.7%	68 68%	44 74.6%	36 65.5%	55 75.3%	65 90.3%
Clerical/Sales	24 6.7	6 6.0	3 5.1	5 9.1	8 11.0	2 2.8
Service	25 7.0	5 5.0	4 6.8	7 12.7	6 8.2	3 4.2
Agricultural	3 .8	2 2.0	0 0.0	1 1.8	0 0.0	0 0.0
Labor/Proc./Trades	26 7.2	10 10.0	6 10.2	4 7.3	4 5.5	2 2.8
Unemployed/Housespouse	13 3.6	9 9.0	2 3.4	2 3.6	0 0.0	0 0.0
Total	359	100	59	55	73	72

service employees is a full four years younger than the median age of the workforce as a whole, while the median sales employee is two years younger.⁷⁸ The median age of the managerial/professional occupation, conversely, is forty-three; six years older than the median service worker.⁷⁹ Thus, if we assume that most people appointed to city posts are middle-aged or older, it may be that part of the skew is due to the relative maturity of the white-collar group. It does not help explain the under-representation of the labor group, however, as the median age of that group is about the same as the national median.⁸⁰ As we discussed in the Iowa article, the white-collar group may simply be more involved in local politics and more comfortable with public roles. They may also have more time flexibility and therefore be more willing to serve.

Regardless of the reasons, Oregon’s law limiting these commissions to no more than two individuals per “kind of occupation” has not had an appreciable effect on the overall occupational distribution.⁸¹ The failure of the statute to achieve much diversity may be traced to the ambiguity of the restriction. If the term “kind of occupation” is construed narrowly to mean the specific job rather than the job category,

78. Labor statistics indicate that the mean age of the workforce is 40.5 years, while the average for service workers is 36.5 and sales is 38.7 years. Bureau of Labor Statistics, *Employment and Earnings, Annual Average Data*, T.15 at 1, 5, 7 (Jan. 2005).

79. *Id.* at 1.

80. *Id.* at 11.

81. OR. REV. STAT. § 227.030(4).

the limitation would not constrain many appointments. Thus, having two lawyers and two accountants and two architects would not violate the law, even though the board would end up with six “professionals.”

Some specific examples from the survey illustrate how difficult it is to interpret and apply the occupational restriction. The survey turned up one seemingly clear violation of the law: one city near Oregon’s high-tech Sunset Corridor listed three “software engineers” on its board.⁸² Regardless of whether “type of occupation” is construed broadly (i.e., engineers, or even more broadly, professionals) or narrowly (software engineers), this would violate the limit of two members per type of occupation. Another city listed four “small business owners.”⁸³ If the term is construed broadly, these four are involved in the same “type of occupation.” Yet the differing nature of their businesses would seem to avoid the harm at which the law was aimed. If their occupations are defined more narrowly, such as “floral shop owner” and “hardware store owner,” for example, the statute’s restriction is easily avoided. Another city listed three persons in “sales,” which is one “kind of occupation,” but again, the differing types of products they sell could distinguish them.⁸⁴ On the other hand, City #93 listed two “general contractors” and one “home builder,” which could easily be deemed one category (i.e., building industry) and could be more of a concern.⁸⁵

The term “type of occupation” should be interpreted and applied according to the legislative intent, of course. Presumably, the law attempts to achieve occupational diversity. The legislative goal may have been to prevent one occupational viewpoint from dominating any particular board and thereby biasing decisions in its favor. If that is the goal, it may not matter if there are three software engineers, or three salespeople, or three business owners on a commission, unless they represent a coherent development bias. As long as they are objective, fair arbiters, the commission will presumably function well.

On the other hand, the legislature may have had a broader goal in mandating occupational diversity. The law may, in fact, originate in the concern voiced by Robert Walker that drawing too much from one occupational group will not reflect the values and interests of society as a whole.⁸⁶ If that is the goal, however, the restriction should be

82. Oregon Survey, *supra* note 12.

83. *Id.*

84. *Id.*

85. *Id.*

86. Anderson & Sass, *supra* note 2, at 459–60 (citing WALKER, *supra* note 60, at 150–55).

construed broadly and four small business owners, regardless of the differences in what they sell, would violate the restriction. Replacing a doctor with a lawyer or an accountant may not make much difference in terms of diversity of viewpoints. Construing the term “type of occupation” broadly would serve its purpose better, it seems.

Amending the law to better achieve the goal of occupational diversity may be difficult. It would be possible to define the term “type of occupation” in terms of the broad census or labor department categories. Moreover, just as some types of boards require a balance of Democrats and Republicans, or require an equal number of men or women, the law could mandate diversity by requiring the appointment of at least one member of each occupational group. However, attempting to fix a quota for labor, service, and professional commission members may unduly hamper the appointment process and, especially for smaller cities, pose problems in trying to find qualified, interested participants. For this type of thankless and often time-consuming service, appointing those who are enthusiastic about serving may be the most important criterion.

B. *Occupational Bias*

The Iowa survey attempted to identify certain occupations that would have a generalized, inherent bias in favor of development.⁸⁷ Some occupations were identified as having a “direct” connection or benefit from increased development, such as real estate agents, contractors, appraisers, and lenders.⁸⁸ Other occupations could be said to “indirectly” benefit from increased development, including owners of flooring or hardware stores, or even the owner of a local motel. Occupations with no development bias include teachers, postal workers, government workers, and computer programmers. Undoubtedly, the classification is subjective, but we believe that most people would disagree with these classifications only at the margins. The idea that architects or landscapers would, in general, favor increased development seems to be a safe assumption.

The Iowa survey found that about 30 percent of P&Z commission members had occupations associated with direct bias, while another 20 percent had indirect bias positions.⁸⁹ About half of the commission members had “unbiased” occupations.⁹⁰ BZA members had similar bias

87. *Id.* at 465–68.

88. *Id.* at 465.

89. *Id.* at 467.

90. These numbers included retired persons in their last known occupation and excluded members whose occupations were “unknown.” Excluding retired persons, about 48 percent of P&Z members had unbiased occupations. *Id.*

numbers.⁹¹ While Iowa's attempt to limit the number of board members directly interested in real estate development represented at least some progress in selecting balanced boards, it apparently had not achieved its goal.

Because Oregon has enacted the strictest law concerning zoning commission bias in the country, we wanted to see whether it had made a difference in these numbers. In addition to the occupational restrictions discussed above, Oregon law prohibits the appointment of more than two commission members who are engaged in buying, selling, or developing real estate.⁹²

Our survey reveals that the law seems to have reduced the percentage of members with pro-development bias, but only by a modest amount. The numbers may be affected somewhat by the large number of survey responses in which members were identified as retired, with their previous employment listed as "unknown" (9 percent of total). Because they are retired, it may be legitimate to include them in the "no bias" category, based on the likelihood that they do not stand to gain from development, regardless of their previous careers. On the other hand, one could also exclude them on the ground that their previous occupation could be relevant to a determination of bias. In the end, we listed the results both ways. The Iowa survey excluded anyone whose occupation was listed as "unknown," including retired persons.⁹³ While Iowa has a slightly higher percentage of persons older than sixty-five (14.9 percent versus 12.8 percent for Oregon),⁹⁴ the Oregon survey included several towns with a high percentage of retirees, in which all or most of the board members were listed as "retired."⁹⁵

As Table 5 illustrates, the Oregon numbers represent only a slight improvement from the Iowa board composition. Roughly one-fourth of board members have a direct stake in development projects, while another 17 percent to 19 percent could be said to be indirectly biased. Overall, about 60 percent of the state's board members have no occupational pro-development bias. In contrast, Iowa's P&Z commissions had only 50 percent unbiased occupations. While the improvement over

91. The survey found 54 percent unbiased BZA members, excluding those retired. *Id.*

92. OR. REV. STAT. § 227.030(4).

93. Anderson & Sass, *supra* note 2, at 462.

94. State-by-state statistics regarding various demographics can be accessed at www.factfinder.census.gov.

95. For example, King City (median age 76.4) listed all board members as retired/unknown, while six of seven board members in Rockaway Beach and four out of five in Lakeside were retirees.

Table 5—Potential Pro-Development Bias on Oregon P&Z Commissions⁹⁶

Type of Interest	Including Ret./Unk.	Excluding Ret./Unk.	Iowa P & Z	Iowa BZA
Direct	24%	26%	30%	30%
Indirect	17	19	20	16
No Bias	59	55	50	54

Iowa is slight, at least a clear majority of board members in Oregon have no occupational bias.

For many, these bias figures may raise little concern. After all, as we pointed out in the previous article, those with development experience bring valuable expertise to these issues and, of course, their interest in the proceedings may make them conscientious and active members. Moreover, the pro-development view should be represented on the board just as much as any other interest. While the improvement over Iowa is slight, at least a clear majority of board members in Oregon have no discernable occupational basis.

Nevertheless, the survey also uncovered individual cases of boards dominated by development interests. The best illustration of the Oregon law's failure to eliminate occupational bias might be City #139.⁹⁷ The city's zoning commission is composed of a real estate agent, a planner (engineering firm), a landscape architect, an appraiser, an architect (retired), a motel manager, and a small business owner.

Every single member of this board has at least an indirect occupational bias in favor of development. The first four members listed are directly involved in development activity and would have a direct occupational bias.⁹⁸ Preservation of open space, for example, would not provide additional business for the landscape architect, the appraiser, the engineer, or the real estate agent. The architect, who would otherwise be in the direct bias category, is retired, but may retain connections to and be influenced by his or her previous occupation. Finally, both the motel manager and the small business owner would likely favor growth, which would provide them additional customers. Moreover, every single commission member is drawn from the professional, managerial, and technical class. If this were an economic development com-

96. Oregon Survey, *supra* note 12.

97. *Id.*

98. *Id.*

mittee or a chamber of commerce, this occupational composition would be desirable; but for a body that is supposed to be ruling neutrally on zoning changes and special permit requests, a more balanced occupational mix would be preferable.

Nevertheless, City #139 is not in violation of Oregon's composition restrictions, which illustrates that the restrictions do not go far enough to solve the problem.⁹⁹ The law states that the commission is limited to two members engaged in buying, selling, or developing real estate.¹⁰⁰ This may apply only to the real estate agent in our example. A broad reading of the term "developing" real estate would also encompass the landscaper, perhaps. However, it does not clearly apply to an appraiser or a planner or even an architect. Nor does the prohibition on more than two members from the same "type of occupation" apply either, unless the term is construed broadly to mean "something to do with property development." Thus, the law does not prevent the domination of individual commissions by development interests.

As in the occupational diversity category, the problem may lie in how the term "developing" real estate is construed. In order to fulfill the legislature's presumed intention to reduce direct occupational bias, we believe the term should be interpreted broadly to encompass any occupation that directly assists or is involved in the land development process. The legislature should amend the restriction to make this definition clear.

Arguably, the bias of Oregon commissions is less important than in SSZEA states because of the prominence of statewide development goals that are, at least in theory, strictly adhered to in comprehensive plans. Moreover, the availability of LUBA review may ameliorate the bias problem. This article does not discuss whether the reality of Oregon's statewide system matches the theory. Nevertheless, it is safe to assume that local commissions still retain significant discretion in this process and that their decisions are given deference in any review.

IV. Conclusion

Oregon's land use law represents a good first step toward achieving better zoning board composition. By limiting members tied to real estate interests, the law has resulted in fewer boards dominated by those who stand to gain from development activity. Nevertheless, the law

99. See OR. REV. STAT. § 227.030.

100. *Id.* § 227.030(4).

cannot be deemed a complete success. It has not made any impact on the distributional skew in favor of white-collar occupations. The fear remains that, without better representation of labor and service occupations, boards may tend to give less credence or value to blue-collar concerns and more value to development that favors business interests.

Second, the occupational limitations have reduced, but have not eliminated, pro-development bias. The law does not control occupations that are closely tied to development, such as architects or landscapers. It also fails to deal with persons who are retired from development positions but who may still have strong ties to those interests. As a result, there remain instances of boards almost totally dominated by pro-development interests.

We therefore recommend that zoning composition laws follow the Oregon model, but with a few alterations to improve distributional representation. The limit of two members engaged in buying, selling, or developing real estate should be expanded to include anyone who contracts directly with real estate developers (e.g., architects, appraisers, contractors, and landscapers). Moreover, the law should clearly specify that the limitation include those who actively engaged in those occupations within the last five years.

Addressing the white-collar bias is more difficult. The Oregon law restricting more than two members of a “type of occupation” could be amended to define occupational categories broadly, in accordance with Labor or Census Department classifications.¹⁰¹ Alternatively, the law could simply mandate that a board achieve “a broad cross-section of occupations,” but such a restriction would be vague and presumably unenforceable.

A first step toward solving the board diversity problem is to raise awareness among those with appointment authority and encourage them to seek to achieve a broader mix of individuals. Because these positions often entail time-consuming and thankless work, it may be difficult to attract volunteers outside of those with some direct or indirect development interest. Therefore, constant awareness of the tendency to select pro-development members can help guard against it. Perhaps cities could explore offering remuneration for board service in order to attract those who otherwise would have no interest in such an appointment. It may be that turning over some decisions to professional staff members who are supposedly neutral, as Oregon has done with certain categories of zoning decisions, may be an answer.

101. See Fronczek & Johnson, *supra* note 67.

Whatever approach is taken, the surveys show that the representational skew is not limited to one state. The decisions made by these boards are important enough to merit action and further study to ensure a balanced playing field for all interests in this process.