



Oregon

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TO: Land Conservation and Development Commission

FROM: Bob Rindy, Senior Policy Analyst
Katherine Daniels, Farm and Forest Lands Specialist

SUBJECT: **Agenda Item 11, January 20-22, 2010, LCDC Meeting**

PUBLIC HEARING AND POSSIBLE ADOPTION OF PROPOSED RULES REGARDING TRANSFER OF DEVELOPMENT RIGHTS PILOT PROJECTS

I. AGENDA ITEM SUMMARY

This agenda item is a public hearing on proposed new administrative rules to implement the Oregon Transfer of Development Rights (TDR) Pilot Program, established by the 2009 legislature under House Bill 2228. This agenda item includes public testimony on the draft rules, and is also intended for commission deliberation and possible adoption of the proposed new rules. The department's previously issued public draft of the new rules, under OAR chapter 660, division 28, is Attachment A to this report.

Sections of HB 2228 pertaining to the pilot program are currently codified as Or Laws 2009, ch 636, Sections 1, 6, 7, 8, 10, and 11. This law establishes the pilot program, and requires the commission to select up to three "TDR Pilot Projects" intended primarily to test TDRs as a method to conserve forest land for forest uses. HB 2228 is Attachment B to this report. The new statute authorizes LCDC rules pertaining to this program, and it is the department's recommendation that, at a minimum, those rules should include criteria for LCDC to use in pilot project selection given the possibility that more than three applications for pilot projects may be submitted.

In its 2009–2011 Policy Agenda, the commission directed the department to adopt these TDR rules early in 2010. LCDC initiated this rulemaking at its November 5, 2009 meeting, and a staff report was provided at that time describing the program. The commission agreed that a rulemaking "work group" was not necessary for this project because the statute is very direct about the various criteria for projects and as such, there are few if any policy decisions to be made by a work group regarding the content of the proposed rules.

For additional information on this item, please contact Bob Rindy at (503) 373-0050 ext. 229, or by e-mail bob.rindy@state.or.us, or Katherine Daniels at (503) 373-0050 ext. 329, or by e-mail katherine.daniels@state.or.us.

II. SUMMARY OF RECOMMENDED ACTION

The department recommends that the commission hear testimony and comments regarding the proposed rules and, at the conclusion of the public hearing, adopt the proposed new administrative rules.

III. BACKGROUND AND HISTORY

The 2009 legislature enacted the Oregon Transfer of Development Rights (TDR) Pilot Program, as a part of HB 2228, to be implemented by the Department of Land Conservation and Development (DLCD) working with local governments, the Oregon Forestry Department and other state agencies.

HB 2228 was legislation proposed by the department and the commission specifically intended to establish a pilot program “for the transfer and/or purchase of residential development rights, from at-risk but currently functional forest lands and agricultural lands to conflicted resources lands or to urban areas.” The department’s initial bill (HB 2228) was substantially amended by the legislature. The final legislation included a revised version of the department’s proposed pilot program, and also included other provisions to limit resorts in the Metolius basin and to protect the “Skyline Forest” near Bend.

The enacted legislation directs the department to oversee a TDR pilot program that includes up to three pilot projects. The projects are intended to test TDRs as a method to conserve forest lands that may be under threat of conversion to other uses (those portions of the department’s proposal that focused on farm land were not enacted). The department intends that this program lead the way toward broader use of TDRs statewide, as part of an effective strategy to conserve forest land, and ultimately for other purposes as well. TDRs have been popular and successful in other states, but so far this tool has had little use in Oregon.

HB 2228 requires LCDC to adopt rules to “establish a process for selecting pilot projects from among potential projects nominated by local governments.” It also authorizes the commission to do additional rulemaking to implement the program, if desired. Providing a “process for selecting pilot projects” is the primary intent of the proposed rules described by this report, but additional limited provisions are also included in the draft, either to help interpret or clarify statutory requirements or as necessary to help local governments propose and administer a TDR pilot project.

IV. SUMMARY OF PROPOSED ADMINISTRATIVE RULES

The proposed administrative rules would occupy a new “division 28” of Oregon Administrative Rules, Section 660. It is proposed that this division include three new “rules” organized so as to include the following categories: (1) Definitions, (2) Selection of Pilot Projects and (3) Requirements for TDR Pilot Projects.

According to HB 2228, the TDR pilot program is intended to:

- “(a) Explore alternative methods to encourage the continued management of private forestlands for timber production.
- (b) Protect water quality, wildlife habitat and other important natural resources by limiting location of dispersed residential development on forestlands.
- (c) Provide for an orderly and efficient transition from rural to urban land uses by establishing locations at which residential development rights or development opportunities transferred from forestlands may be used.”

As demonstration projects, the three pilots will provide insight and guidance to LCDC and to other local governments that are potentially interested in developing TDR programs. Senate Bill 763, also adopted in the 2009 legislative session, provides general enabling legislation that permits any Oregon community or communities to adopt a TDR program. The DLCDC pilot program includes similar provisions, but includes additional provisions not available to the general TDR program. The TDR pilot program relaxes certain land use laws so as to offer options to local governments and land owners in receiving areas not otherwise available under SB 763 and current law.

This pilot program is intended to explore TDR methods that encourage the continued management of private forestlands for timber production (and for other forest land uses such as wildlife habitat, natural resources, and water quality). TDRs allow the transfer of potential residential development – currently allowed under forest zoning – from forest land to other areas. Residential development often conflicts with timber production and other forest uses, but is beneficial in more appropriate locations, including in certain locations or at certain levels not otherwise allowed by current law.

0010: Definitions:

As is the standard practice for all LCDC rule divisions, this proposed division adopts by reference a number of terms defined in LCDC’s primary statute at ORS 197.015. The proposed rules also adopt by reference the definitions in the Statewide Planning Goals. Finally, the proposed rules define certain terms specific to this program, including “conservation easement,” “sending area,” “receiving area,” and “transferable development right or TDR.”

0020: Process for Selection of Pilot Projects:

This draft rule fleshes out the broad framework for pilot project selection in HB 2228 with more specifics to make it workable, particularly at section (2).

Section 2 requires that, to nominate a pilot project, local governments must submit a letter of interest along with the owners of at least 50% of the land in a proposed sending area. The proposed pilot project must be described in a concept plan that 1) proposes appropriate amendments to the comprehensive plan and land use regulations, 2) identifies and maps proposed sending and receiving areas, 3) identifies proposed transfer ratios and other incentives for participation as well as a schedule for adoption and a description of any other proposed implementation actions, and 4) includes a plan for permanently restricting development in sending areas where development rights have been transferred.

The draft rules establish a submission deadline of June 1, 2010 at subsection (2)(d) and provide a review timeline for the commission of 120 days at section (3). Section (4) sets forth standards for the department's review that reflect general good planning practice in creating TDR programs and that include a specific assessment of the beneficial qualities and attributes of the lands in the proposed sending area for forest management and the degree of risk that those qualities and attributes would be lost in the absence of the proposed project. Sections (5) and (6) describe standards for the commission's review that specifically reflect the language included in HB 2228, especially the "purpose" provided by the statute, as well as the need to avoid or minimize adverse impacts of the pilot project, particularly to significant Goal 5 resources.

0030: Requirements for TDR Pilot Projects

The proposed language of this rule very closely reflects that of HB 2228, with the exception of a proposed timeline for local pilot project adoption added in section (6).

Sending Areas: This draft rule requires that pilot project sending areas be forest land currently developed at four or fewer dwelling units per square mile. The sending areas may not exceed 10,000 acres in size. While sending areas could consist of one or more blocks of contiguous land or they could be discrete properties, such as Measure 37/49 claims, the rule does not specifically provide instructions about this or other details, so as to leave open options for proposed TDR projects.

Section (8) requires participating owners of land in a sending area to grant conservation easements or otherwise ensure that residential development does not occur once the development rights are severed. This section also requires that reasonable public access to the property be granted, as provided in the law, but does provide landowners an ability to describe reasonable limits on such access.

Receiving Areas: The draft rules prohibit receiving areas within 10 miles of the Portland metropolitan area UGB at section (2), as per HB 2228. Section (3) requires that receiving areas be selected by the local government based on the following "priorities":

- Priority one: land within an urban growth boundary (UGB);
- Priority two: land adjacent to an urban growth boundary subject to an exception from statewide land use planning goals 3 or 4;
- Priority three: land designated as a “rural community” or an “urban unincorporated community in the county’s comprehensive plan” (see OAR 660, division 22).

These “priorities” are intended to encourage local governments to first consider land inside a UGB as the potential receiving area for a pilot project. However, if a local government demonstrates that a UGB receiving area “is not likely to result in” the transfer of a significant proportion of the sending area development rights within five years, LCDC may authorize selection of lower priority land as the receiving area – land in exception areas adjacent to a UGB or in certain unincorporated communities (section (4)).

Ratios: Development rights must be transferred at a one-to-one ratio if the receiving area is outside of an urban growth boundary, but LCDC may authorize a higher ratio when the receiving area is inside a UGB. Thus, a right to a dwelling on forest land may turn into rights for two or more dwellings under a pilot project – a substantial incentive for forest land owners to participate in a pilot project. The net residential density of development authorized in certain receiving areas must be at least 10 dwelling units per acre (section (5)).¹

Local Plan and Ordinances: Within one year of the approval by LCDC of a proposed concept plan for a pilot project, participating local governments must adopt overlay zone provisions and corresponding amendments to the comprehensive plan to implement the concept plan. Counties must review an application for a pilot project as a comprehensive plan amendment (sections (6) and (7)). Local governments or others may establish a development rights bank to facilitate the transfer of development rights (section (12)).

Receiving Area Development: Section (9) reflects HB 2228 language that requires that receiving area lands that are in an adjacent exception area or a UGB expansion area that includes an exception area be authorized to develop at a net minimum density of 10 dwelling units per acre. Sections (10) and (11) set forth a process in which receiving areas adjacent to a UGB may be added to the UGB notwithstanding current UGB amendment requirements in Goal 14 and related laws. As such, up to three UGBs that might not be eligible for expansion today, under current law, could be expanded under a pilot project.

V. LCDC RULEMAKING AUTHORITY AND OUTREACH REQUIREMENTS

The commission is authorized to adopt administrative rules under ORS 197.040, as follows:

“...The Land Conservation and Development Commission shall...adopt rules that it considers necessary to carry out ORS chapters 195, 196 and 197, [and] shall:

(A) Allow for the diverse administrative and planning capabilities of local governments;

¹ The legislation does not require development to occur at this density – it simply requires that local governments authorize development of at least 10 units per acre.

- (B) Assess what economic and property interests will be, or are likely to be, affected by the proposed rule;*
- (C) Assess the likely degree of economic impact on identified property and economic interests; and*
- (D) Assess whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.*

Response: The department has completed and submitted the required notices of housing cost and economic impact for publication in the Secretary of State Bulletin for December 2009.

The commission's procedures for rulemaking derive from ORS Chapter 183 and are specified in LCDC's procedural rules at OAR 660-001-0000. These rules require that:

- (1) Prior to the adoption, amendment or repeal of any rule, the agency shall give notice of its intended action ...in the manner established by rule adopted by the agency under ORS 183.341(4), which provides a reasonable opportunity for interested persons to be notified of the agency's proposed action[.]*

Response: As part of the notices for these proposed rules and the rule hearing, the department has issued rulemaking notice for publication in the Secretary of State's Bulletin and has mailed notices to interested parties, including legislators, cities, counties, large forest landowners and land trusts.

The commission has also approved "Citizen Involvement Guidelines for Policy Development" (the "CIG"), intended to guide the commission and department in promoting public involvement in the development of commission policy on land use, including new or amended administrative rules. The CIG requires the department to:

- 1. Consult with the CIAC on the scope of the proposed process or procedure to be followed in the development of any new or amended goal, rule or policy;*

Response: The department met with CIAC at its regularly scheduled meeting on December 17, 2009, to describe this project and DLCD's efforts to notify and involve citizens and other interested parties.

- 2. Prepare a schedule of policy development activities that clearly indicates opportunities for citizen involvement and comment, including tentative dates of meetings, public hearings and other time-related information;*

- 3. Post the schedule and any subsequent meeting or notice announcements of public participation opportunities on the Department's website, and provide copies via paper mail upon request*

Response: The department has posted the information for this rulemaking on its website at the following link: http://www.oregon.gov/LCD/rulemaking.shtml#2009_11_Rulemaking_Projects.

The website will be amended once the rules are adopted, in order to provide a schedule for submission and evaluation of TDR pilot project applications.

4. Send notice of the website posting via an e-mail list of interested or potentially affected parties and media outlets statewide, and via paper mail upon request; and

5. Provide background information on the policy issues under discussion via posting on the Department's website and, upon request, via paper mail. Such information may, as appropriate, include staff reports, an issue summary, statutory references, administrative rules, case law, or articles of interest relevant to the policy issue.

Response: The department strongly encourages local governments, forest land owners and other interests to consider participating in a pilot project. DLCD met with county planning directors on November 19, 2009 and with large forest land owners on December 1, 2009 to describe the TDR pilot program and to answer questions.

Finally, the CIG provides that the commission may: "... Choose to not establish an advisory committee or workgroup, provided LCDC and the department shall explain its reasons for not doing so, either in the public notice advertising the start of a goal, rule, or other policy making project or by means of commission minutes."

Response: In initiating this rulemaking at its November 2009 meeting, the commission agreed that a rulemaking "work group" was not necessary for this rule project because the statute is very direct about the various criteria for projects, and as such there are few if any policy decisions to be made by a work group regarding the nature of the proposed rules. The commission generally does not appoint a rule advisory committee, or "work group" for projects that involve simple rulemaking to carry out clear legislative provisions, such as for the proposed rules described in this report.

VI. DEPARTMENT RECOMMENDATION

The department recommends that the commission hear testimony and comments regarding the proposed rules and, at the conclusion of the public hearing, adopt the proposed new administrative rules.

VII. ATTACHMENTS

A. Proposed TDR Pilot Project rules

B. HB 2228

C. SB 763 and other Applicable Statutes

D. Power Point Presentation Regarding TDR's

(PROPOSED) DIVISION 28
OREGON TRANSFER OF DEVELOPMENT RIGHTS PILOT PROGRAM

660-028-0010

Definitions

For purposes of this division, the definitions contained in ORS 197.015 and the Statewide Land Use Planning Goals (OAR chapter 660, division 015) apply. In addition, the following definitions apply:

(1) "Conservation easement" has the meaning provided in ORS 271.715.

(2) "Local Government" means a city, county, metropolitan service district or state agency as defined in ORS 171.133.

(3) "Receiving area" means a designated area of land to which a holder of development rights generated from a sending area may transfer the development rights, and in which additional residential uses or development, not otherwise allowed, are allowed by reason of the transfer.

(4) "Sending area" means a designated area of resource land from which development rights generated from forgone development are transferable, for residential uses or development not otherwise allowed, to a receiving area.

(5) "Transferable development right or TDR" means a severable residential development interest in real property that can be transferred from a lot, parcel or tract in a sending area to a lot, parcel or tract in a receiving area. This term has the same meaning as "transferable development credit" under Or Laws 2009, ch 504, Section 2(10), except that, for purposes of this division and the Oregon Transfer of Development Rights Pilot Program, "severable development interests" are limited to residential uses, including ancillary uses subordinate to residential uses.

Stat. Auth.: ORS 197.040

Stats. Implemented: sec. 6; ch. 636, OL 2009

Hist.:

660-028-0020

Selection of Pilot Projects

(1) This rule establishes the process for the department and the commission to select up to three TDR pilot projects from among projects nominated by one or more local governments.

(2) A proposed TDR pilot project will be considered by the department and the commission if the local governments with land use jurisdiction over the proposed sending and receiving areas submit, on or before June 1, 2010:

(a) A completed application form;

(b) A letter of interest along with the owner(s) of at least fifty percent (50 %) of the land in the proposed sending area;

(c) A concept plan consistent with the requirements of OAR 660-028-0030 that describes the proposed pilot project and that includes:

(A) Proposed amendments to the local government(s) comprehensive plan and land use regulations necessary to implement the pilot project to implement the concept plan, a

1 tentative schedule for adoption of the amendments if the pilot project is approved, and a
2 description of any other proposed actions intended to implement the concept plan;

3 (B) Maps and other pertinent information describing the proposed sending areas and
4 receiving areas;

5 (C) Proposed transfer ratios as specified in OAR 660-028-0030(5) and other
6 incentives for participation, a tentative schedule for adoption of the amendments if the pilot
7 project is approved, and a description of any other proposed actions intended to implement
8 the concept plan; and

9 (D) A letter from a qualified entity as defined in ORS 271.715 expressing interest in
10 holding and monitoring any conservation easement or similar restriction that would be used
11 to assure that development rights are transferred off of the proposed sending area.

12 (3) The commission may extend the deadline in subsection (2) of this rule if it finds
13 that additional time is necessary in order to ensure a satisfactory pool of applications for
14 consideration under this program.

15 (4) The department will review applications and submit its recommendations for
16 review by the commission within 120 days of the deadline established under section (2)
17 or (3) of this rule. The department's recommendations will be based on its assessment of:

18 (a) The beneficial qualities and attributes of the lands in the proposed sending area
19 for forest management and the degree of risk that those qualities and attributes would be lost
20 in the absence of the proposed project, based on information in the proposal and other
21 available information provided by the State Forestry Department and others;

22 (b) The location, attributes, size and configuration of proposed sending and receiving
23 areas, including the quality of the forest land intended to be conserved under the TDR pilot
24 proposal;

25 (c) The demonstrated intent and ability of the local government and other
26 participating governments and organizations to implement the proposed TDR project within
27 a reasonable timeframe; and

28 (d) The likelihood that the proposed TDR project will succeed and achieve the
29 purposes and requirements of the TDR pilot program expressed in Or Laws 2009, ch 636.

30 (5) Upon review of the applications, the commission may select up to three qualified
31 TDR pilot projects for inclusion in the Oregon TDR Pilot Program. In deciding on which
32 proposed projects to select, the commission must consider the department's
33 recommendations, the written applications and concept plans, and any other available and
34 pertinent information it deems relevant to its decision.

35 (6) When selecting a pilot project, as specified in Or Laws 2009, ch 636, Section
36 6(4), the commission must find that the pilot project will comply with the requirements
37 specified in OAR 660-028-0030 and other requirements of law, and that the pilot project is:

38 (a) Reasonably likely to provide a net benefit to the forest economy or the
39 agricultural economy of this state and achieve the purposes and requirements of the TDR
40 pilot program expressed in Or Laws 2009, ch 636;

41 (b) Designed to avoid or minimize adverse effects on transportation, natural
42 resources, public facilities and services, nearby urban areas and nearby farm and forest uses;
43 and

44 (c) Designed so that new development authorized in a receiving area as a result of
45 the transferred development rights will not conflict with:

1 (A) Significant Goal 5 resources, including natural, scenic, and historic resources,
2 open spaces and other resources and resource areas inventoried in accordance with Goal 5
3 and OAR 660, division 23; or

4 (B) Areas identified as conservation opportunity areas in the Oregon Department of
5 Fish and Wildlife's 2006 "Oregon Conservation Strategy;"

6
7 Stat. Auth.: ORS 197.040

8 Stats. Implemented: sec. 6; ch. 636, OL 2009

9 Hist.:660-028-0040

10
11 **660-028-0030**

12 **Requirements for TDR Pilot Projects**

13 (1) At the time the local government(s) submits an application for a proposed TDR
14 pilot project, the proposed sending area must be planned and zoned for forest use, may not
15 exceed 10,000 acres, and must contain four or fewer dwelling units per square mile.

16 (2) At the time the local government(s) submits an application for a proposed TDR
17 pilot project, the proposed receiving area or areas may not be located within 10 miles of the
18 Portland metropolitan area urban growth boundary. The receiving area or areas must be only
19 the appropriate size necessary to accommodate the anticipated development rights that
20 would reasonably be generated and transferred from the sending area, with consideration of
21 the proposed amended plan and zoning for uses and density to be authorized under the TDR
22 pilot project if it is selected.

23 (3) In proposing a receiving area for a TDR pilot project, the local government must
24 select the area based on consideration of the following priorities:

25 (a) First priority is lands within an urban growth boundary;

26 (b) Second priority is lands that are adjacent to an urban growth boundary and that
27 are subject to an exception from Goal 3 or Goal 4;

28 (c) Third priority is lands that are within a designated urban unincorporated
29 community or rural community, as defined in OAR 660, division 22, in an acknowledged
30 comprehensive plan.

31 (4) With respect to the priority of receiving areas described in subsection (3) of this
32 rule, the commission may authorize a local government to select lower priority lands over
33 higher priority lands for a receiving area in a pilot project only if the local government has
34 established, to the satisfaction of the commission, that selecting higher priority lands as the
35 receiving area is not likely to result in the severance and transfer of a significant proportion
36 of the development interests in the sending area within five years after the receiving area is
37 established.

38 (5) The ratio of transferable development rights to severed residential development
39 interests in a sending area must be calculated to protect lands planned and zoned for forest
40 use and to create incentives for owners of land in the sending and receiving areas to
41 participate in the pilot project. The ratio may not exceed one transferable development right
42 to one severed development interest if the receiving area is land outside of an urban growth
43 boundary, except that this maximum ratio does not apply to an exception area described in
44 subsection (3)(b) of this rule provided the TDR pilot project concept plan ensures the
45 inclusion of the receiving area within a UGB, either under applicable requirements of Goal
46 14 and other laws or the alternative provisions in section (11) of this rule. The concept plan
47 may allow the transfer of development rights authorized in this subsection prior to the

1 inclusion of the receiving area in an acknowledged UGB provided the amended plan and
2 land use regulations ensure that the transferred rights cannot be exercised at a higher ratio
3 than specified in this rule until the receiving area is included in the UGB.

4 (6) Within one year after the commission has approved a proposed concept plan, the
5 local governments having land use jurisdiction over the affected sending area and affected
6 receiving area must adopt overlay zone provisions and corresponding amendments to the
7 comprehensive plan and land use regulations to implement the concept plan and to identify
8 and authorize the additional residential development allowed through participation in the
9 pilot project. The local governments must submit and the commission must review the
10 corresponding comprehensive plan and implementing measure amendments in the manner
11 of periodic review under ORS 197.628 to 197.650. Transfer of development interests may
12 not occur prior to LCDC acknowledgment of the corresponding comprehensive plan and
13 implementing measure amendments.

14 (7) The comprehensive plan and zoning regulations must specify the type and
15 density of the additional residential development to be transferred and allowed in a receiving
16 area through participation in a TDR pilot project, in accordance with the concept plan and
17 schedule approved by the commission and in accordance with other applicable requirements
18 of this rule.

19 (8) In addition to comprehensive plan and zoning regulations implementing the
20 TDR pilot project, before any development rights may be exercised in the receiving area, the
21 participating owners of land in a sending area must:

22 (a) Grant a conservation easement pursuant to ORS 271.715 to 271.795 or otherwise
23 ensure on a permanent basis that additional residential development does not occur in the
24 sending area; and

25 (b) Allow reasonable public access to the property. The commission may agree to
26 limits on public access in the event the landowner demonstrates there are significant risks to
27 forest resources or management practices that would result without such limits.

28 (9) If lands selected for use as a receiving area for a TDR pilot project are within a
29 UGB expansion area approved under section (11) of this rule, or are in an exception area
30 described in subsection (3)(b) and section (10) of this rule, the amended comprehensive plan
31 and zoning ordinances to implement the approved pilot project must authorize a residential
32 density of at least 10 dwelling units per net acre for the receiving area.

33 (10) Notwithstanding contrary provisions of statewide land use planning Goals 11
34 and 14, and related rules, and notwithstanding ORS 215.700 to 215.780, a local government
35 may amend its comprehensive plan and land use regulations to allow transferred rights under
36 an approved TDR pilot project to develop at urban levels of residential development, with
37 sewer service, in a receiving area that consists of lands that are adjacent to an urban growth
38 boundary and subject to an exception from a Goal 3 or Goal 4, consistent with subsection
39 (3)(b) and section (9) of this rule, if the Land Conservation and Development Commission
40 has approved a concept plan for the TDR pilot project. The concept plan described under
41 OAR 660-028-0020(2)(b) must indicate whether a local government intends to change
42 comprehensive plan and land use regulations to allow urban level of development and sewer
43 service in the receiving area and must include an agreement to rezone the receiving area to
44 authorize a residential density of at least 10 dwelling units per net acre as provided in
45 section (9) of this rule.

46 (11) Notwithstanding ORS 197.296 and 197.298, statewide land use planning Goal
47 14 and its implementing rules (OAR 660, division 24), a local government may amend its

1 urban growth boundary to include adjacent exception lands in a receiving area approved as a
2 TDR pilot project under this program, consistent with an approved concept plan for the pilot
3 project. The proposed concept plan described under OAR 660-028-0020(2)(b) must indicate
4 whether a local government intends to include adjacent exception lands in a receiving area
5 approved as a pilot project under this program, and must include an agreement to rezone the
6 receiving area to authorize a residential density of at least 10 dwelling units per net acre as
7 provided in section (9) of this rule.

8 (12) Local governments or other entities may establish a development rights bank or
9 other system to facilitate the transfer of development rights.

10
11 Stat. Auth.: ORS 197.040

12 Stats. Implemented: sec. 6; ch. 636, OL 2009

13 Hist.:

14

DRAFT

1 **SECTION 1:** The Legislative Assembly finds that:

2 (1) Providing for rural unemployment reductions and living wage job opportunities
3 brings stability to economically distressed rural communities.

4 (2) Sections 1 to 9 of this 2009 Act are intended to reduce unemployment and create
5 living wage jobs in economically distressed counties.

6 (3) Working forests make vital contributions to Oregon by providing jobs, timber,
7 timber products, tax base and other social and economic benefits, by helping to maintain
8 soil, air and water resources, by reducing levels of carbon dioxide in the atmosphere and by
9 providing habitat for wildlife and aquatic life.

10 (4) Population growth, escalating land values, increasing risks due to wildfire and
11 invasive species, and changes in land ownership and management objectives, with a
12 resulting increase in conflict caused by dispersed residential development, require that new
13 methods be developed to facilitate continued management of private lands zoned for forest
14 use for timber harvest.

15 (5) It is the public policy of the State of Oregon to:

16 (a) Explore alternative methods to encourage the continued management of private
17 forestlands for timber production.

18 (b) Protect water quality, wildlife habitat and other important natural resources by
19 limiting location of dispersed residential development on forestlands.

20 (c) Provide for an orderly and efficient transition from rural to urban land uses by
21 establishing locations at which residential development rights or development opportunities
22 transferred from forestlands may be used.

23
24 (at this point language morphs into other topics of the bill not related to TDRs, including
25 Sections 2-5)

26
27 **SECTION 6:**

28 (1) There is established the Oregon Transfer of Development Rights Pilot Program in
29 the Department of Land Conservation and Development. Working with the State Forestry
30 Department, the State Department of Agriculture and local governments and with other state
31 agencies, as appropriate, the Department of Land Conservation and Development shall
32 implement the pilot program.

33 (2) The Land Conservation and Development Commission shall adopt rules to
34 implement the pilot program. The commission, by rule, may:

35 (a) Establish a maximum ratio of transferable development rights to severed
36 development interests in a sending area for each pilot project. The maximum ratio:

37 (A) Must be calculated to protect lands planned and zoned for forest use and to
38 create incentives for owners of land in the sending area to participate in the pilot project; and

39 (B) May not exceed one transferable development right to one severed development
40 interest if the receiving area is outside of an urban growth boundary.

41 (b) Require participating owners of land in a sending area to grant conservation
42 easements pursuant to ORS 271.715 to 271.795, or otherwise obligate themselves, to ensure
43 that additional residential development of their property does not occur.

44 (c) Require participating owners of land in a sending area to allow reasonable public
45 access to the property.

1 (3) The commission, by rule, shall establish a process for selecting pilot projects
2 from among potential projects nominated by local governments. The process must require
3 local governments to nominate potential projects by submitting a concept plan for each
4 proposed pilot project, including proposed amendments, if any, to the comprehensive plan
5 and land use regulations implementing the plan that are necessary to implement the pilot
6 project.

7 (4) When selecting a pilot project, the commission must find that the pilot project is:

8 (a) Reasonably likely to provide a net benefit to the forest economy or the
9 agricultural economy of this state;

10 (b) Designed to avoid or minimize adverse effects on transportation, natural
11 resources, public facilities and services, nearby urban areas and nearby farm and forest uses;
12 and

13 (c) Designed so that new development authorized in a receiving area does not
14 conflict with a resource or area inventoried under a statewide land use planning goal relating
15 to natural resources, scenic and historic areas and open spaces, or with an area identified as a
16 conservation opportunity area in the "Oregon Conservation Strategy," 2006, by the State
17 Department of Fish and Wildlife.

18 (5) The commission may select up to three pilot projects for the transfer of
19 development rights under sections 6 to 8 of this 2009 Act.

20 (6) A sending area for a pilot project under sections 6 to 8 of this 2009 Act:

21 (a) Must be planned and zoned for forest use;

22 (b) May not exceed 10,000 acres; and

23 (c) Must contain four or fewer dwelling units per square mile.

24 (7) The commission may establish additional requirements for sending areas.

25 (8)(a) Except as provided otherwise in paragraph (b) of this subsection, a local
26 government participating in a pilot project shall select a receiving area for the pilot project
27 based on the following priorities:

28 (A) First priority is lands within an urban growth boundary;

29 (B) Second priority is lands that are adjacent to an urban growth boundary and that
30 are subject to an exception from a statewide land use planning goal relating to agricultural
31 lands or forestlands;

32 (C) Third priority is lands that are within an urban unincorporated community or a
33 rural community in an acknowledged comprehensive plan.

34 (b) The commission may authorize a local government to select lower priority lands
35 over higher priority lands for a receiving area in a pilot project only if the local government
36 has established, to the satisfaction of the commission, that selecting higher priority lands as
37 the receiving area is not likely to result in the severance and transfer of a significant
38 proportion of the development interests in the sending area within five years after the
39 receiving area is established.

40 (c) If lands described in paragraph (a)(B) of this subsection are selected for use as a
41 receiving area in a pilot project, the minimum residential density of development allowed
42 under sections 6 to 8 of this 2009 Act must be at least 10 dwelling units per net acre.

43 (d) A receiving area may not be located within 10 miles of the Portland metropolitan
44 area urban growth boundary.

45 (9) The commission may establish additional requirements for receiving areas.

1 (10) The commission, by rule, may provide a bonus in the form of a higher ratio if a
2 substantial portion of the new development in the receiving area of the pilot project is
3 affordable housing within an urban growth boundary.
4

5 **SECTION 7:**

6 (1) Notwithstanding contrary provisions of statewide land use planning goals relating
7 to public facilities and services and urbanization, and notwithstanding ORS 215.700 to
8 215.780, a local government may change its comprehensive plan and land use regulations
9 implementing the plan to allow residential development in a receiving area consistent with
10 sections 6 to 8 of this 2009 Act if the Land Conservation and Development Commission has
11 approved a concept plan for the pilot project.

12 (2) The local governments having land use jurisdiction over lands included in the
13 sending area and the receiving area for the pilot project shall adopt amendments to their
14 respective comprehensive plans and land use regulations implementing the plans that are
15 consistent with subsection (3) of this section.

16 (3) When the commission has approved a proposed concept plan, the local
17 governments having land use jurisdiction over the affected sending area and affected
18 receiving area shall adopt overlay zone provisions and corresponding amendments to the
19 comprehensive plan and land use regulations implementing the plan that identify the
20 additional residential development allowed through participation in the pilot project. The
21 Department of Land Conservation and Development shall review the overlay zones and
22 corresponding comprehensive plan amendments in the manner of periodic review under
23 ORS 197.628 to 197.650.

24 (4) Notwithstanding ORS 197.296 and 197.298 and statewide land use planning
25 goals relating to urbanization, a local government may amend its urban growth boundary to
26 include adjacent lands in a receiving area, consistent with an approved concept plan, if the
27 net residential density of development authorized in the receiving area is at least 10 dwelling
28 units per acre.

29 (5) Local governments or other entities may establish a development rights bank or
30 other system to facilitate the transfer of development rights.

31 (6) A county shall review an application for a pilot project under sections 6 to 8 of
32 this 2009 Act as a comprehensive plan amendment. A county may apply other procedures,
33 including master plan approval, site plan review or conditional use review as the county
34 finds appropriate to subsequent phases of review of the pilot project.
35
36

37 **SECTION 8:**

38 (1) The Department of Land Conservation and Development, the State
39 Forestry Department, a local government participating in the Oregon Transfer of
40 Development Rights Pilot Program or a third-party holder identified by the Department of
41 Land Conservation and Development may hold, monitor or enforce a conservation easement
42 pursuant to ORS 271.715 to 271.795 or other property interest to ensure that lands in
43 sending areas do not retain residential development rights transferred under sections 6 to 8
44 of this 2009 Act.

45 (2) An entity that is eligible to be a holder of a conservation easement may acquire,
46 from a willing seller in the manner provided by ORS 271.715 to 271.795, the right to carry

1 out a use of land authorized under rules of the Land Conservation and Development
2 Commission implementing the pilot program.

3
4 (*SECTION 9 of the bill does not concern the pilot program*)

5
6 **SECTION 10:**

7
8 On or before February 1, 2013, the Department of Land Conservation and
9 Development shall make a report to the Seventy-seventh Legislative Assembly, in the
10 manner described in ORS 192.245:

11 (1) Evaluating the Oregon Transfer of Development Rights Pilot Program
12 established in sections 6 to 8 of this 2009 Act; and

13 (2) Recommending whether the pilot program should be continued, modified,
14 expanded or terminated.

15
16 **SECTION 11:**

17
18 This 2009 Act being necessary for the immediate preservation of the public peace,
19 health and safety, an emergency is declared to exist, and this 2009 Act takes effect on its
20 passage.

75th OREGON LEGISLATIVE ASSEMBLY--2009 Regular Session

Enrolled Senate Bill 763

Sponsored by Senator SCHRADER, Representative NOLAN; Senators BATES, DEVLIN, DINGFELDER, HASS, MORRISETTE, Representatives BAILEY, CLEM, GARRETT, GREENLICK, ROBLAN

CHAPTER

AN ACT

Relating to transferable development credits; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) The Legislative Assembly finds that:

(a) Working farms and forests make vital contributions to Oregon by:

(A) Providing jobs, timber, agricultural products, tax base and other social and economic benefits;

(B) Helping to maintain soil, air and water resources;

(C) Reducing levels of carbon dioxide in the atmosphere; and

(D) Providing habitat for wildlife and aquatic life.

(b) Natural resources, scenic and historic areas and open spaces promote a sustainable and healthy environment and natural landscape that contributes to the livability of Oregon.

(c) Population growth, escalating land values, increasing risks due to wildfire and invasive species and changes in land ownership and management objectives, with a resulting increase in conflict caused between resource uses and dispersed residential development, require that new methods be developed to facilitate the continued management of private lands zoned for farm use, forest use and mixed farm and forest use for the purposes of:

(A) Agricultural production and timber harvest; and

(B) Preservation of natural resources, scenic and historic areas and open spaces for future generations.

(2) The Legislative Assembly declares that transferable development credit systems:

(a) Complement the statewide land use planning system in Oregon and encourage effective local implementation of the statewide land use planning goals.

(b) Provide incentives for private landowners, local, regional, state and federal governments and other entities to permanently protect farm land and forestland, including a land base for working farms, ranches, forests and woodlots, significant natural resources, scenic and historic areas and open spaces.

(c) Benefit rural land owners, including owners of working farms, ranches, forests and woodlots, that voluntarily provide stewardship of natural resources on private lands.

(d) Provide voluntary and effective methods to help improve the livability of urban areas and to mitigate and adapt to global climate change.

SECTION 2. As used in this section and section 3 of this 2009 Act:

(1) "Conservation easement" has the meaning given that term in ORS 271.715.

(2) "Governmental unit" means a city, county, metropolitan service district or state agency as defined in ORS 171.133.

(3) "Holder" has the meaning given that term in ORS 271.715.

(4) "Lot" has the meaning given that term in ORS 92.010.

(5) "Parcel" has the meaning given that term in ORS 92.010.

(6) "Receiving area" means a designated area of land to which a holder of development credits generated from a sending area may transfer the development credits and in which additional uses or development, not otherwise allowed, are allowed by reason of the transfer.

(7) "Resource land" means:

(a) Lands outside an urban growth boundary planned and zoned for farm use, forest use or mixed farm and forest use.

(b) Lands inside or outside urban growth boundaries identified:

(A) In an acknowledged local or regional government inventory as containing significant wetland, riparian, wildlife habitat, historic, scenic or open space resources; or

(B) As containing important natural resources, estuaries, coastal shorelands, beaches and dunes or other resources described in the statewide land use planning goals.

(c) "Conservation Opportunity Areas" identified in the "Oregon Conservation Strategy" prepared in September of 2006 by the State Department of Fish and Wildlife.

(8) "Sending area" means a designated area of resource land from which development credits generated from forgone development are transferable, for uses or development not otherwise allowed, to a receiving area.

(9) "Tract" has the meaning given that term in ORS 215.010.

(10) "Transferable development credit" means a severable development interest in real property that can be transferred from a lot, parcel or tract in a sending area to a lot, parcel or tract in a receiving area.

(11) "Transferable development credit system" means a land use planning tool that allows the record owner of a lot, parcel or tract of resource land in a sending area to voluntarily sever and sell development interests from the lot, parcel or tract for purchase and use by a potential developer to develop a lot, parcel or tract in a receiving area at a higher intensity than otherwise allowed.

(12) "Urban growth boundary" has the meaning given that term in ORS 195.060.

(13) "Urban reserve" has the meaning given that term in ORS 195.137.

SECTION 3. (1) One or more governmental units may establish a transferable development credit system, including a process for allowing transfer of development interests from a sending area within the jurisdiction of one governmental unit to a receiving area within the jurisdiction of another governmental unit.

(2) If the transferable development credit system allows transfer of development interests between the jurisdictions of different governmental units, the process must be described in an intergovernmental agreement under ORS 190.003 to 190.130 entered into by the governmental units with land use jurisdiction over the sending and receiving areas and, for purposes of administration of the process, the Department of Land Conservation and Development. The intergovernmental agreement may contain provisions for sharing between governmental units of the prospective ad valorem tax revenues derived from new development in the receiving area authorized under the system.

(3) A transferable development credit system must provide for:

(a) The record owner of a lot, parcel or tract in a sending area to voluntarily sever and sell development interests of the lot, parcel or tract for use in a receiving area;

(b) A potential developer of land in a receiving area to purchase transferable development credits that allow a higher intensity use or development of the land, including development bonuses or other incentives not otherwise allowed, through changes to the planning and zoning or waivers of density, height or bulk limitations in the receiving area;

(c) The governmental units administering the system to determine the type, extent and intensity of uses or development allowed in the receiving area, based on the transferable development credits generated from severed and sold development interests; and

(d) The holder of a recorded instrument encumbering a lot, parcel or tract from which the record owner proposes to sever development interests for transfer to be given prior written notice of the proposed transaction and to approve or disapprove the transaction.

(4) A transferable development credit system must offer:

(a) Incentives for a record owner of resource land to voluntarily prohibit or limit development on the resource land and to sell or transfer forgone development to lands within receiving areas.

(b) Benefits to landowners by providing monetary compensation for limiting development in sending areas.

(c) Benefits to developers by allowing increased development and development incentives in receiving areas.

(5) The governmental units administering a transferable development credit system must:

(a) Designate sending areas that are chosen to achieve the requirements set forth in this section and the objectives set forth in section 1 of this 2009 Act.

(b) Designate receiving areas that are chosen to achieve the requirements set forth in this section and the objectives set forth in section 1 of this 2009 Act.

(c) Provide development bonuses and incentives to stimulate the demand for the purchase and sale of transferable development credits.

(d) Require that the record owner of development interests transferred as development credits from a sending area to a receiving area cause to be record, in the deed records of the county in which the sending area is located, a conservation easement that:

(A) Limits development of the lot, parcel or tract from which the interests are severed consistent with the transfer; and

(B) Names an entity, approved by the governmental units administering the system, as the holder of the conservation easement.

(e) Maintain records of:

(A) The lots, parcels and tracts from which development interests have been severed;

(B) The lots, parcels and tracts to which transferable development credits have been transferred; and

(C) The allowable level of use or development for each lot, parcel or tract after a transfer of development credits.

(f) Provide periodic summary reports of activities of the system to the department.

(6) A receiving area must be composed of land that is within an urban growth boundary or, subject to subsection (7) of this section, within an urban reserve established under ORS 195.137 to 195.145 and that is:

(a) Appropriate and suitable for development.

(b) Not subject to limitations designed to protect natural resources, scenic and historic areas, open spaces or other resources protected under the statewide land use planning goals.

(c) Not within an area identified as a priority area for protection in the "Oregon Conservation Strategy" prepared in September of 2006 by the State Department of Fish and Wildlife.

(d) Not within a "Conservation Opportunity Area" identified in the "Oregon Conservation Strategy" prepared in September of 2006 by the State Department of Fish and Wildlife.

(7) Land within an urban reserve:

(a) May be the site of a receiving area only if:

(A) The receiving area is likely to be brought within an urban growth boundary at the next periodic review under ORS 197.628 to 197.650 or legislative review under ORS 197.626; and

(B) Development pursuant to the transferable development credits is allowed only after the receiving area is brought within an urban growth boundary.

(b) That is selected for use as a receiving area may be designated for priority inclusion in the urban growth boundary, when the urban growth boundary is amended, if the land qualifies under the boundary location factors in a goal relating to urbanization.

(8) The governing body of a governmental unit administering a transferable development credit system may, directly or indirectly through a contract with a nonprofit corporation, establish a transferable development credit bank to facilitate:

(a) Buying severable development interests from lots, parcels or tracts of resource land in a sending area.

(b) Selling transferable development credits to potential developers of lots, parcels or tracts in a receiving area.

(c) Entering into agreements or contracts and performing acts necessary, convenient or desirable to achieve the requirements set forth in this section and the objectives set forth in section 1 of this 2009 Act.

(d) Managing funds available for the purchase and sale of transferable development credits.

(e) Authorizing and monitoring expenditures associated with the system.

(f) Maintaining records of the transactions, including dates, purchase amounts and locations of severed development interests and development pursuant to transferred development credits, that are sufficient to manage and evaluate the effectiveness of the system.

(g) Providing periodic summary reports of activities of the system to the governing body of a governmental unit administering the system.

(h) Obtaining appraisals of development interests and transferable development credits as necessary and pricing transferable development credits for purchase or sale.

(i) Serving as a clearinghouse and information source for buyers and sellers of transferable development credits.

(j) Accepting donations of transferable development credits.

(k) Soliciting and receiving grant funds for the implementation of this section and section 2 of this 2009 Act.

(9) A holder of a conservation easement shall hold, monitor and enforce the conservation easement to ensure that lands in sending areas do not retain development credits transferred under this section and section 2 of this 2009 Act.

SECTION 4. The Department of Land Conservation and Development shall make a report, in the manner described in ORS 192.245, to the Seventy-seventh Legislative Assembly:

(1) Evaluating the transferable development credit systems that have been established under sections 2 and 3 of this 2009 Act; and

(2) Recommending whether the program should be continued, modified, expanded or terminated.

SECTION 5. This 2009 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2009 Act takes effect on its passage.

Passed by Senate May 5, 2009

.....
Secretary of Senate

.....
President of Senate

Passed by House June 3, 2009

.....
Speaker of House

Received by Governor:

.....M,....., 2009

Approved:

.....M,....., 2009

.....
Governor

Filed in Office of Secretary of State:

.....M,....., 2009

.....
Secretary of State

Transfer of Development Rights

- A Market-based Planning Tool -
Oregon Department of Land Conservation and Development



Major Changes in Forestry

- Pressures on timber industry
- Conversion of forest land base
- Loss of forest infrastructure



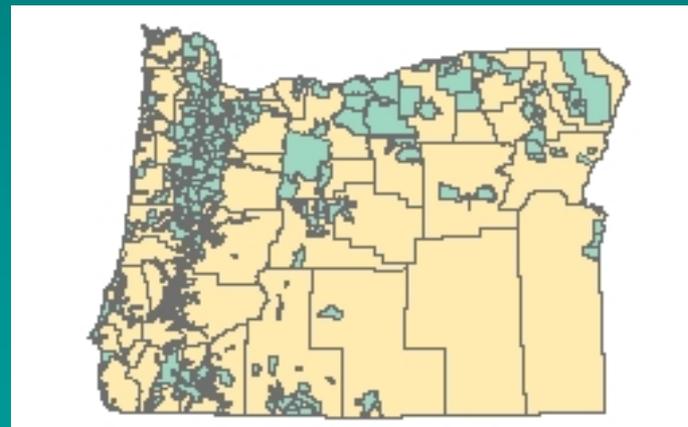
Current Options on Forestland

- Timber management
- Dwellings
 - √ 1:160 acres in western OR
(or 1:200 non-contiguous acres)
 - √ 1:240 acres in eastern OR
(or 1:320 non-contiguous acres)
- Other uses



Challenges in Siting Dwellings

- Access - roads
- Services - power, telephone
- Fire Protection - rural fire protection districts



Concerns in Siting Dwellings

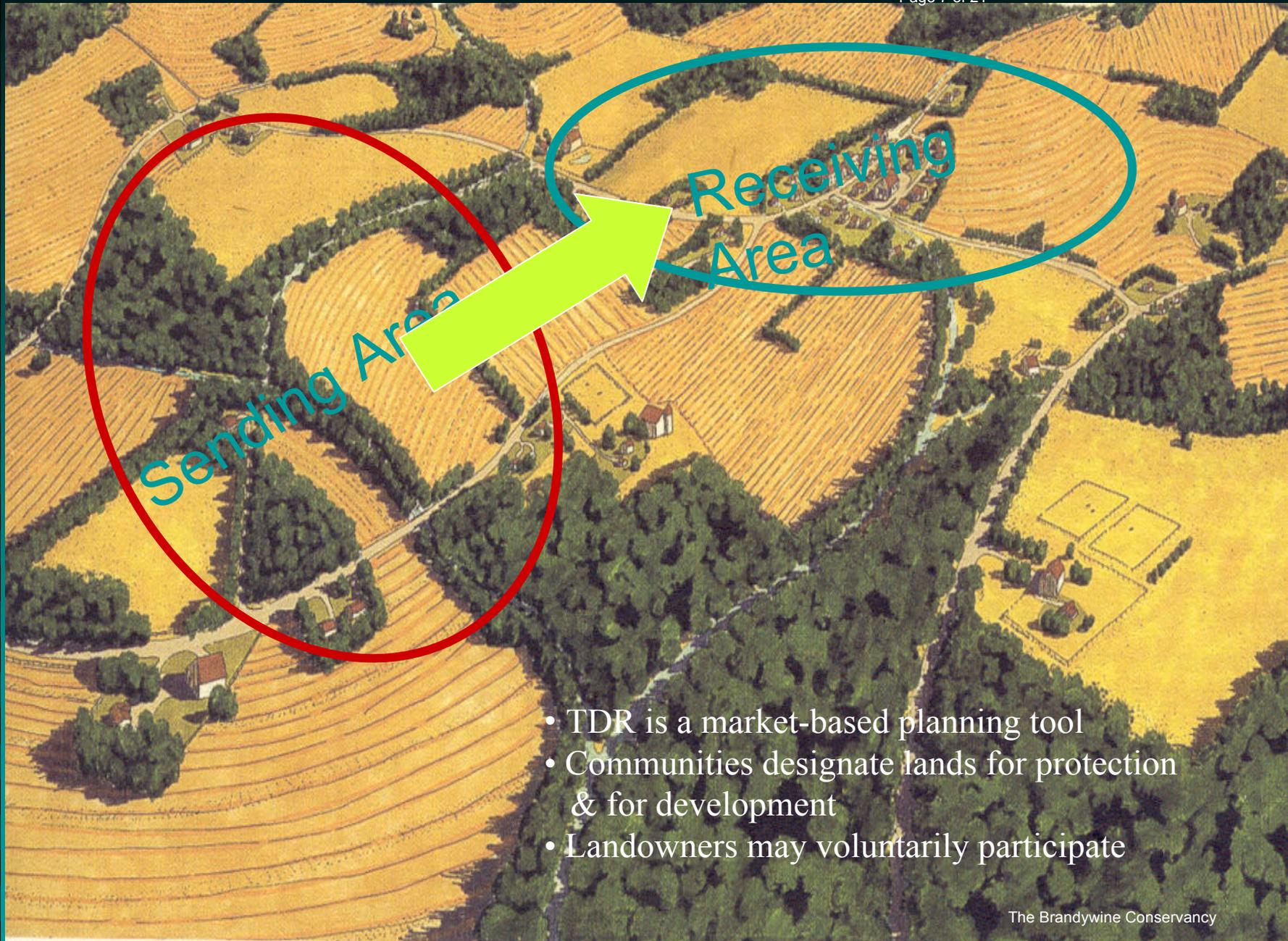
- Fire hazard
- Conflicts for timber management
- Habitat fragmentation
- Invasive species
- Biodiversity decline



TDR as a Market Option

- Provides an alternative way to capture land value
- Participation is voluntary
- Landowners receive compensation
- Developers have broader options
- Timber management & harvesting can continue
- TDR programs are flexible in design





Sending Area

Receiving Area

- TDR is a market-based planning tool
- Communities designate lands for protection & for development
- Landowners may voluntarily participate

Transfer of Developments Rights The Concept

Owner of “sending” parcel
sells development rights in
exchange for permanent
conservation easement.

preservation area



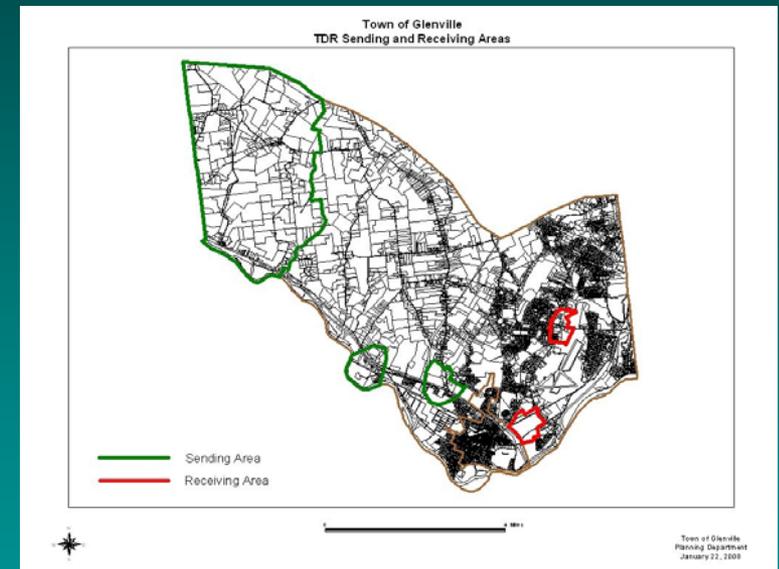
growth area



Owner of “receiving”
parcel buys development
rights to build at densities
higher than allowed under
base zoning.

Basics of a TDR Program

- State enabling legislation
- Amendments to the comprehensive plan & zoning ordinance
- Conservation easements
- Intermunicipal agreements where needed



TDR Program Challenges

- A market for development
- Availability of infrastructure
- A balance of sending & receiving areas
- Multiple steps to create
- Some planning staff time



Successful TDR Programs

- King County, WA 135,000 ac
- Montgomery County, MD 49,000 ac.
- New Jersey Pinelands, NJ 31,465 ac.
- Calvert County, MD 13,000 ac.
- Boulder County, CO 6,000 ac.

*Sources: www.kingcounty.gov; *Beyond Takings and Givings*, Rick Preutz, 2003
U.S. Experience with Transferable Development Rights, McConnell & Walls, 2009*

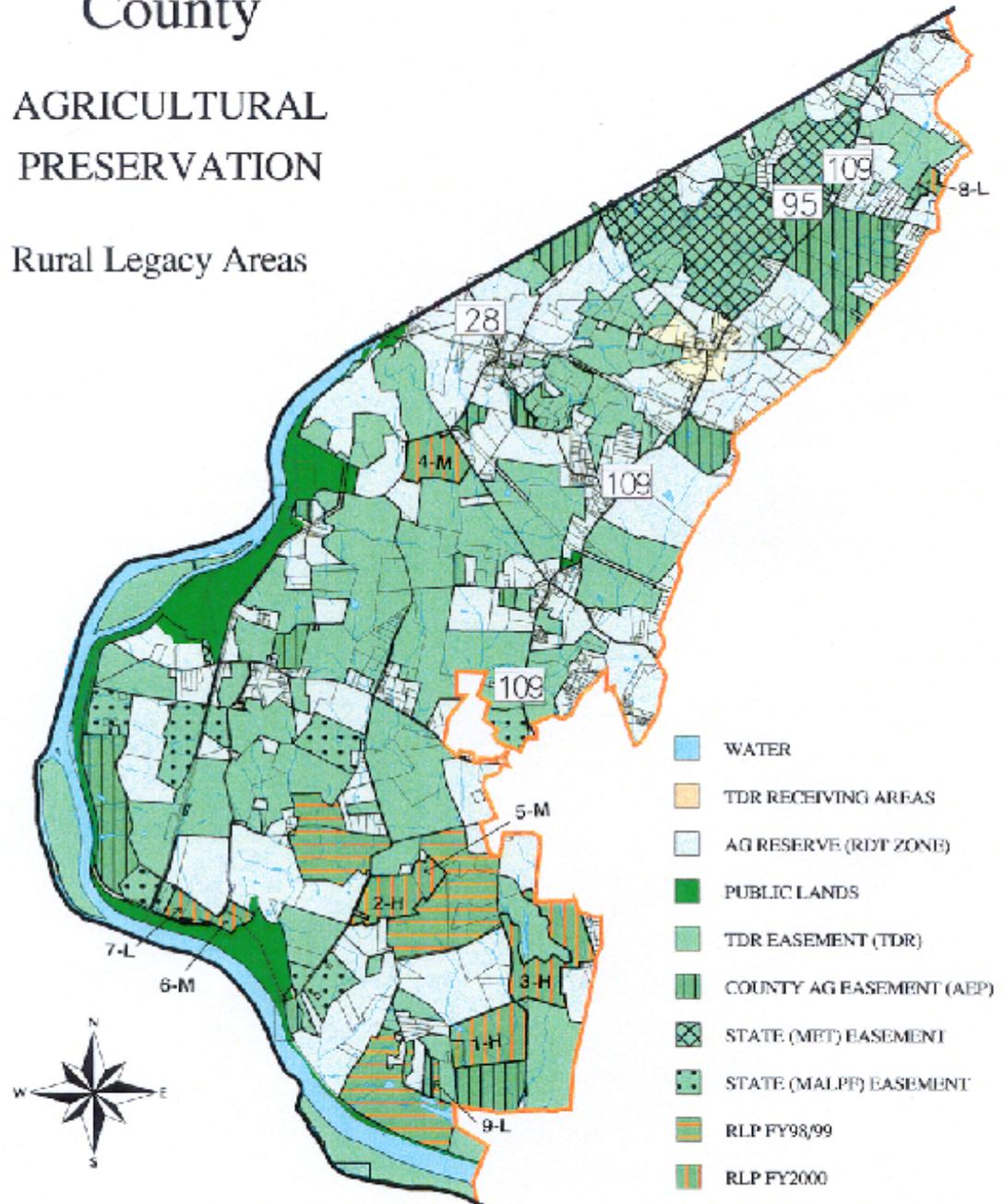
Montgomery County TDR Program

Denis Canavan

Montgomery County

AGRICULTURAL
PRESERVATION

Rural Legacy Areas



King County TDR

- **Plum Creek Timber – 2008**
 - 45,000 acres under conservation easement with county
 - Will continued to be managed as a working forest
 - Received 514 development credits to be used in urban areas
- **Hancock Timber – 2004**
 - 90,000 acres placed under conservation easement with county
 - Will continue to be managed as a working forest
 - Received \$22 million from county



Conservation Easement Options

- State agencies
 - ODF, DLCD, DSL
- Counties
- Land trusts
 - Pacific Forest Trust
 - 11 Oregon land trusts



Senate Bill 763

- General enabling legislation
- Allows intermunicipal programs
- Receiving areas may be in UGBs or Urban Reserves
- Open-ended incentives available for landowners & developers

House Bill 2228

- Authorizes 3 Pilot projects on forestland for transfer of residential development rights
- Implemented by DLCD, ODF & local governments
- Intended to explore & test alternative TDR approaches
- Local governments nominate projects & submit concept plans

HB 2228 Sending Areas

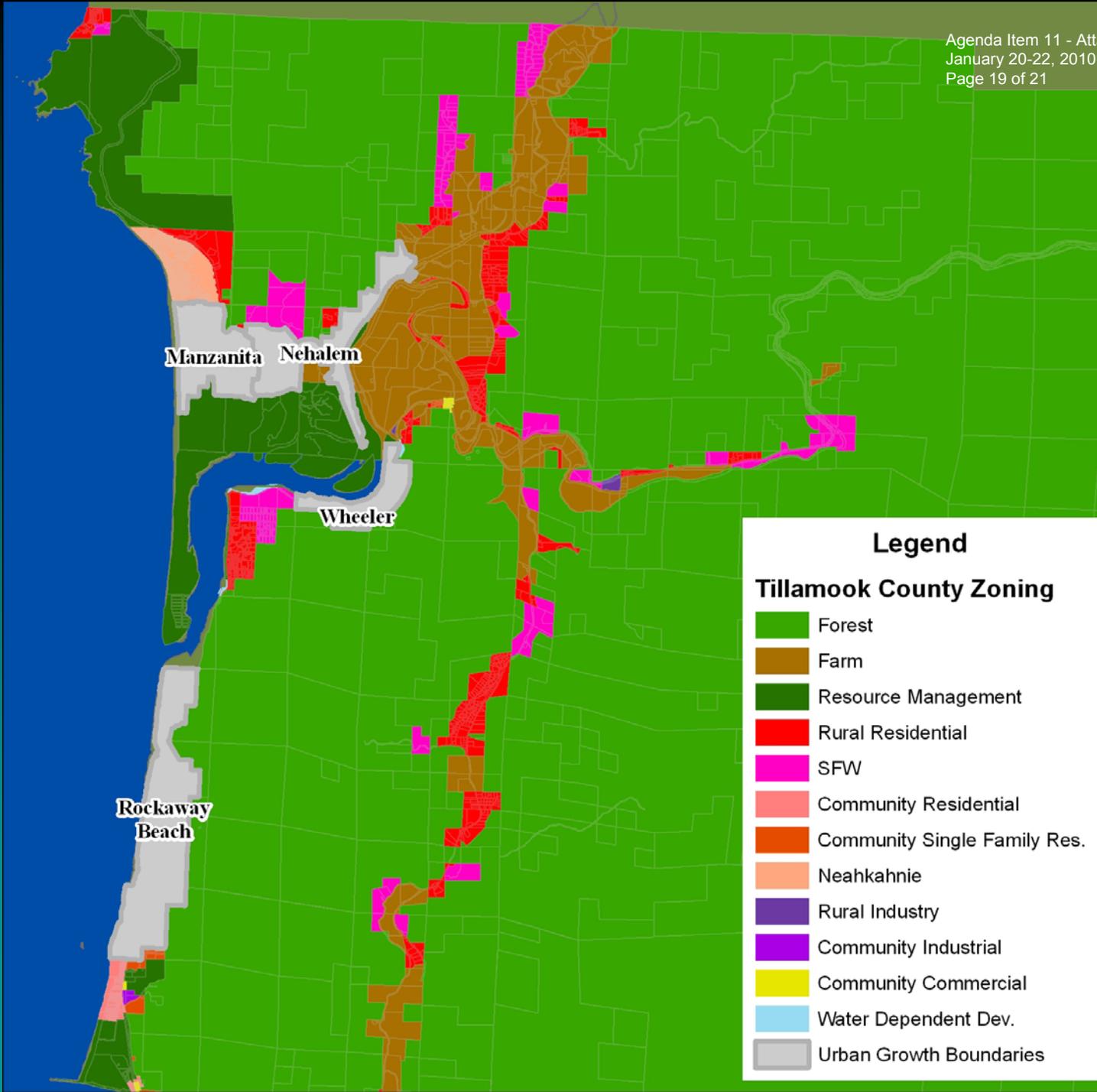
- *Sending areas:*
 - may be up to 10,000 acres
 - must have 4 or fewer dwellings per sq. mi.
 - must be zoned Forest
 - must be protected with a conservation easement



HB 2228 Receiving Areas

- *Receiving areas may be:*
 1. Within a UGB
 2. Adjacent to a UGB & subject to an exception
 3. Within an urban unincorporated community or a rural community





Manzanita Nehalem

Wheeler

Rockaway
Beach

Legend

Tillamook County Zoning

- Forest
- Farm
- Resource Management
- Rural Residential
- SFW
- Community Residential
- Community Single Family Res.
- Neahkahnie
- Rural Industry
- Community Industrial
- Community Commercial
- Water Dependent Dev.
- Urban Growth Boundaries

Sample Transfer

- 10,000 acres/160 =
 - √ 63 dwellings on site *or*
 - √ 63 dwellings in exception area or rural community *or*
 - √ 126+ dwellings in UGB

In Summary

- It provides fairness & equity for landowners
- It provides new opportunities for developers
- It allows for continued forest practices
- It permanently preserves the forestland base

