1. Methods of Land Protection

Transfer of development rights programs use two different tools in different situations to ensure that land from which development credits have been separated is not later developed. These include both permanent conservation easements and property deed restrictions.

Conservation easements are typically acquired by sale, short sale or donation by land trusts or government agencies, and held and monitored over time. Because there are significant monitoring costs involved – typically $20,000 or more per property that goes into an endowment fund – easements are usually applied only to larger properties with significant natural or cultural resource attributes. Conservation easements offer the highest degree of long-term protection of resource lands because there is a clear and active oversight entity, and because there is a legal duty to monitor. There is often a secondary oversight entity in the event that the primary entity is dissolved or becomes unable to monitor easements.

Conservation easements are recorded with the county clerk and attach to the property deed. They can be highly variable in terms of what they do. They generally prohibit development that is not directly farm- or forest-related and can sometimes involve a duty to restore habitat or limit generally-accepted farm or forest practices in some way. Landowners are free to work these details out with prospective easement holders, or choose another easement holder.

Deed restrictions in the form of a restrictive covenant can also restrict future development or other activity on a parcel. These are recorded with the county clerk and are legally enforceable by neighbors. However, they are generally less apt to be monitored over time than are conservation easements and so are viewed as less protective. They can be made more protective by giving separate and independent enforcement rights to the public, the county and the state.

Because M49 claims involve both small and large properties as well as properties with and without special attributes, some properties will be better suited for conservation easements, while other
properties can be more practically managed using deed restrictions. The challenge in requiring conservation easements for certain properties is that we do not yet know whether land trusts and government entities will step forward to hold easements. Conservation easement acquisition is still in a relatively young phase in Oregon, compared to other parts of the country. If we are too strict in requiring conservation easements on certain properties and an easement holder doesn’t step forward or a landowner won’t agree to the terms of a prospective easement holder or an endowment fund isn’t budgeted, the potential M49 TDR transfer won’t be able to go forward. If, on the other hand, we don’t require conservation easements for certain properties, landowners and developers will almost certainly opt for a less-protective deed restriction. Here are some possible options:

A. A conservation easement is acceptable/required:
   (1) On any M49 property for which a land trust or government agency is willing to acquire, hold and monitor an easement; or
   (2) On all M49 properties of 20 acres or greater.

B. A deed restriction is acceptable:
   (1) On any M49 property of less than 20 acres; or
   (2) On any M49 property of 20 acres or greater, if the applicant has first provided 60-days notice to area land trusts and government agencies of the opportunity to acquire an easement, and none of these entities has offered to hold the easement.*

* This option would have to be carefully-defined, possibly to require the acceptance of an offer deemed to be acceptable by a county or DLCD.

2. Deed of Transferable Development Credits

The instrument for the acquisition of development credits will be a deed of transferable development credits. Following the recording of a conservation easement or deed restriction for a M49 property, a landowner may request the issuance of a deed of transferable development rights by DLCD by providing a copy of the easement or deed restriction and including a legal property description and title search. DLCD would compute the applicable development credits and issue the deed. This process effectively severs the M49 development rights and acknowledges them as transferable credits. The deed of transferable development credits should be recorded by the county clerk.

Prepared July 8, 2014 by DLCD Staff:

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