Rules Advisory Committee for Transfer of Development Rights under Measure 49

April 23, 2014

RAC members attending:
Chair Greg Macpherson
Dan O’Connor (via Zoom from Medford)
Mike McCallister
Joe Fennimore
Steve McCoy
Gordon Root
Jim Johnson (arrived ~3:30 pm)

Not attending: Kelley Beamer

Staff attending:
Katherine Daniels
Matthew Crall
Sarah Marvin
Casaria Taylor

1. Welcome
Commissioner Greg Macpherson called the meeting to order at about 2:10 and welcomed the members of the rules advisory committee.

2. Introductions
Committee members introduced themselves and their affiliation or interest in the rulemaking.

Greg Macpherson – Member of the Land Conservation and Development Commission for 5 years; lawyer in Portland; roots on a dairy farm in rural Linn County.

Gordon Root – Past president of HBA; participating as a real estate developer, not representing the Home Builders Association (HBA); builder and real estate developer since 1984; lives in the Tualatin, Lake Oswego area.

Steve McCoy – Farm and Forest staff attorney for 1000 Friends of Oregon for about 6 years.
Mike McCallister – Planning Director for Clackamas County

Joe Fennimore – Principal Planner for Marion County

Katherine Daniels – Farm and Forestlands Specialist for DLCD

Matt Crall – DLCD for past 9 years, but only last two years dealing with Measure 49

Sarah Marvin – DLCD Measure 49 Specialist, many years experience with Measure 49

Dan O’Conner – Real estate and land use attorney in Jackson County; degree in planning; worked for Lane Council of Governments and Jackson County while in law school.

Matt Crall welcomed the committee on behalf of Jim Rue, who had a conflicting meeting. He appreciated the members’ time and expertise, and encouraged members to be clear when they were speaking as representatives of their organizations, and when they were sharing personal expertise.

He explained that in DLCD’s view M49-TDR will be a win-win because it gives people with an M49 claim another opportunity for using their home site authorizations and advances conservation goals by moving M49 home sites out of places that are especially bad places for development. The rulemaking to make this work will not be easy because there will be a lot of details to work out. This process will not be making policy, but working out the details to make the M49-TDR policy work. Making a successful TDR system will require finding the right balance between development and conservation.

3. Rules Process & Public Meetings

Casaria Taylor, DLCD Rules Coordinator, gave an overview of the public meetings law. She requested that the committee members refrain from emailing amongst themselves so as to not inadvertently hold a public meeting. If a committee member wants to share any information, they should email it to staff, who will email it to the entire RAC. The meetings are public and will be recorded. Anyone can attend, but not anyone can participate. That is up to the RAC. At last or second-to-last meeting, the RAC must review the Fiscal Impact Statement and rulemaking notices before they are sent to the Secretary of State.

4. Committee Procedures

Greg explained that this is an advisory committee to the commission. The group should aim to reach consensus. If that cannot be reached then a minority opinion will be delivered to the commission as well as the group’s recommendation. Because the purpose of this committee is to advise the commission, minority perspectives are often helpful.

Katherine will send out a briefing paper prior to each meeting to get people thinking about the topics along with notes from the previous meeting.

All of the documents for the RAC will be on this website:

The next meeting will be held June 5, 1-3pm in Portland. The exactly location will be determined. Mike offered Clackamas County buildings as a meeting location.

If a RAC member cannot attend, an alternate is allowed, as long as that person has the expertise and views that will provide continuity to the RAC, rather than a radically different perspective.

5. Overview of Transfer of Development Rights (TDR) Programs
Katherine presented an overview of what makes a successful TDR program.

Greg asked whether price is always set by the free market or whether agencies ever get involved in influencing the price. Katherine replied that normally free markets set the prices, and it increases or decreases based on availability. She noted that some programs use a TDR bank to set prices, but that we are not expecting to do this.

Any state agency has the ability to hold conservation easements. (OWEB/ODF/ODFW)

Sarah presented an overview and background on M49.

Greg clarified we should be able to reach a rule that should meet the needs of a program without legislation. Sarah reported that legal counsel has agreed that there is enough authority in the general enabling legislation to conduct rulemaking for this program. ORS94.531 is the general TDR enabling authority, which limits receiving areas to UGB’s and urban reserves. The M49 TDR authorization is in Oregon Laws 2007, chapter 424, section 11(8).

Sarah explained that DLCD captures M49 development data from county notices (when they are sent) and Farm/Forest reports, but there is a large backlog of data entry right now. She expects to be able to show updated data at future meetings showing county land use decisions approving new home sites authorized by M49.

6. Framework for Measure 49 TDR Programs
Sarah presented a statewide map of potential new dwellings authorized by M49 confirming that M49 authorizations are clustered where development pressures are already highest, e.g. Clackamas and Washington Counties, the I-5 corridor and Jackson County. She added that vested rights under M37 waivers appear to be potential sending properties as well, adding at least another 1,000 dwellings. Most of these vested rights to develop dwellings have not been used to build. Greg was not sure they should be included because currently these would be considered non-conforming uses. Sarah explained that, of over 6000 new dwellings authorized by M49, 90% are in resource zones.

Sarah presented a map of Clackamas County illustrating M49 properties in relation to existing exception areas and urban and rural reserves. Current owners in exception areas can generally develop 1 dwelling per 5 or 10 acres. Mike stated that the county has approximately 70,000 acres of rural residential
exception lands, much of it in 5 and 10-acre zones. Gordon brought up the idea of “clustering” M49 development rights next to other existing, closer-in (to Metro) M49 development.

Katherine discussed the work tasks and topics for the RAC to consider:

- Qualifying M49 properties: e.g. only buildable M49 properties? Examples of potentially unbuildable: floodplain (floodway?), too steep, no road access, factors that counties already consider if development decisions; who defines buildable;
- Sufficient but not excessive incentives for landowners to part with their development rights from particularly significant properties, e.g. Sea Lion Caves;
- Methods of land protection: e.g., smaller properties, by deed restriction. Easement on larger properties, especially in priority preservation areas;
- Workable receiving areas and developer incentives: appropriate places for transfer; incentives for developers to purchase credits; what can they not do now that they would do with transfer credits. The staff will look to Dan and Gordon and their expertise on this particular issue.
- Inter-municipal transfers: options for how far transfer allowed; discuss pros and cons of transferring cheap credits to expensive receiving areas;
- Develop M49 database into matchmaking registry, with attributes to determine credits and for land trusts to search for potential conservation properties.
- Future M49 claims?

Steve and Gordon said the registry would be a huge benefit.

The group took a short break at 3pm.

7. Committee Member Perspectives

Greg explained that he served as co-chair of the Land Use Fairness Committee in 2007 and he had a birds-eye view of M49, not the details. The basic premise of M49 was that M37 development rights were not useful because they were not transferable and any development would be a non-conforming use. The M49 compromise was to scale down the development allowed under M37, but ensure transferability. Home sites authorized by M49 are a permitted use. He said this rulemaking process is an extension of that balancing dynamic; taking somewhat useful M49 rights and making them more useful by enabling claimants to get paid for their M49 rights without having to undertake development on their own property. If M37 properties are included in the TDR program, those property owners would be getting a far more substantial benefit by becoming permitted uses.

Greg opened the floor for members of the RAC to express their hopes and concerns for a M49-TDR program.

Dan said that a substantial portion of Jackson County M49 authorizations are useless, because they cannot be developed under county rules (fire safety access rules; hillside on FR zone). He is not concerned about these being developed. His difficulties working with the county commission to implement development by using the existing M49 “clustering” provisions shows that DLCD needs to
ensure there is emphasis on education for government agencies and their commissions. He has concerns with requiring a feasibility or buildability analysis in order to qualify for transfers. Simplify the process as much as possible so people actually take advantage of the process. Jackson County is changing. It was more conservative. Now it is more of a 50/50 mix. We need to tread lightly on environmental concerns, especially with inter-jurisdictional transfers. In southern Oregon, Jackson County is the most desirable location for development. If development rights could transfer across county lines, they would be coming to Jackson County.

Joe stated that, in Marion County, most claims are in EFU zones that are high-value farm land. The county doesn’t have a lot of potential receiving areas. They might be more interested in transferring development out of Marion County to another county. Farmers don’t want to develop, but they don’t want to lose their development rights. They just don’t want to deal with M49, so they’re going to leave it up to their kids. A lot of areas are groundwater limited.

Mike said that he was a big fan of TDRs, and that he wished it was easier to do. Staff could consider (receiving areas) rural reserve areas, from county to county, could be urban reserve areas, could transfer from high value to low value resource land. In Clackamas County, particularly south of Canby to the county line the land is exclusively EFU, and there are no exceptions in those areas. There are, however, a lot of old platted subdivisions in the EFU zone, with half-acre to two-acre lots in 10-20 acre subdivisions. Many lots are already developed, but the remaining undeveloped lots are not buildable because they are in the EFU zone. These could be potentially great receiving areas. He agreed with Dan that the process should be as simple as possible. He thought that cross jurisdictional transfers will be very difficult. He felt it was important to get a simple, workable program started for immediate use, and then adjust later.

Matt noted that LCDC does not have the authority to adopt a rule forcing a county to accept a transfer from another county, so it would be up to each county to decide from which other counties they would accept transfers.

Jim Johnson joined the group at 3:25pm.

Steve agreed that simplicity is good. He is interested in protecting resource lands (best farm/forest lands). He is also interested in the idea of transferring to a site that already has clustered M49 home sites on it, because these have to be on less productive land. The more urbanized an area already is the more open one could be to having that be a receiving area. He is concerned about the possibility of claims that would never be used becoming usable.

Gordon said he is the developer that represented the Campbell M37 claim that went to court but did not get vested. The claimants do have a successful M49 claim which he pointed out on the Clackamas County M49 map. He is concerned about using UGB’s or urban reserves as receiving areas. The UGB provides certainty for developers, and needs to be saved for more dense development, not for lower density M49 transfers. He prefers transfers into exception lands, onto M49 lands where development already exists, or to lower value lands. He sees a big economic opportunity for “senior management
housing” on 1.5 acre lots clustered near business and the urban area, to take the place of Dunthorpe, which is almost built out.

Jim said clustering in general sounds good, but it puts urban density into rural areas. He is concerned about the implications of these urban densities on surrounding agricultural areas and rural infrastructure. He has two issues with conversion in receiving areas: 1) The footprint issue (the receiving parcel) – agricultural use of different classes of soils changes over time; one must look at all classes of soils and long-term trends in agricultural products when evaluating the appropriateness of a potential receiving area. 2) The shadow issue – the implications of clustering on surrounding farm and forest areas. Finally, he reminded the group that there is no place in statewide planning goals mandating housing in rural areas.

Sarah asked the group what kind of information would be helpful to the members in this process.

- Steve requested the same sort of map for other counties with many M49 claims (e.g. Yamhill, Lane, Jackson, and Washington Counties)
- Jim asked to see the same sort of map for Hood River County

8. Next Meeting
June 5, 1-3pm in Portland.