Rules Advisory Committee for Transfer of Development Rights under Measure 49

Meeting Notes for August 12, 2014

RAC members attending:
Chair Greg Macpherson
Dan O’Connor (via phone)
Mike McCallister
Joe Fennimore
Steve McCoy
Gordon Root
Jim Johnson
Mike Running (COLT, replacement for Kelley Beamer)

Staff attending:
Katherine Daniels
Matthew Crall (arrived late)
Sarah Marvin (arrived late)
Diane Lloyd - DOJ

Guests:
Joy Vaughan (Land & Water Use Coordinator, Oregon Department of Fish and Wildlife)
Phil Grillo (land use attorney)

1. Welcome
Commissioner Greg Macpherson called the meeting to order welcomed the members of the rules advisory committee. Requested comments on notes be sent to Katherine.

2. Methods of Land Protection
Katherine: Refer to two-page discussion draft. This topic covers how to protect the sending area properties from which we are severing the development right. Next meeting will be all about the development end.
- Conservation Easements

Land trusts and state agencies, organizations, to protect larger or more significant lands. Provides the highest degree of long-term protection, because there is a clear and active oversight authority and a requirement for managing the property for conservation. Diane added that the strength in the conservation easement tool derives from uniform federal conservation easement act that most states have adopted as statute that enables requiring the conservation to run with the land. Typically, common law disfavors long-term restrictions on the land.

Greg asked why the act of simply taking away (through transfer) the development right that was granted under Measure 49 isn’t enough to restrict development on the sending property. Diane explained that as long as record-keeping was sufficient to ensure that the transfer of the Measure 49 home site off the property was tracked, there would be no need for further restriction to protect the property from M49 development. However, in previous discussions, it became apparent that we felt we needed greater certainty that there would be no M49 development on the sending property if the transfer benefit was being used. Jim Johnson added that in the past that those aren’t tracked well unless they show up in the title. New owners will know. Diane, in the rules we developed for between claim transfers dIcD decided to require a deed restriction be recorded on the sending properties. Katherine, are we transferring all development rights or just M49 home site rights. Katherine thought we were transferring all rights, except maybe ag use.

Dan has done one of these transfers in Jackson County. Developed the M49 rights off of the sending property, had to record a covenant that there is no further right based on M49.

Mike Mc, conservation easement may not be the right protection, because it implies conservation. Diane said there is flexibility within the easement tool. Jim Johnson says the word “conservation” makes people think they cannot do anything with their land. They use the term ag land easement or working lands easement, etc. to not raise peoples’ worries. Mike Running, good discussion but don’t get tripped up over the word conservation. It’s a tool, doesn’t have to be tightly defined around conservation. Every easement is different. Has an example to show. In every TDR around the country, there is either a deed restriction or a covenant, but most use conservation easement because it provides perpetual protection enforceability. And the monitoring, but how the heck do you monitor all these? The focus should be on the word easement. Diane added that in order to get the full protection, we have to use the term “conservation easement.”

Phil Grillo thinks we shouldn’t use easements, because that would be locking up property permanently. If EFU land is near the UGB, it may be that in the future that land would be desired for development. With an easement, this would not be possible, because even if the zoning were changed to allow development, the easement would prevent that use. There are mixed views in the group about whether that would be a good or bad outcome.

Gordon Root stated that the only restriction we should be focusing on is the removal of the M49 development right and that can be done through DLCD tracking. Conservation easements will get in the way of future use.
Mike Mc stated that the deed restriction is the more practical tool. See existing multi-tract dwelling deed restriction. Standardized form, easy to implement.

Katherine commented that we should discuss whether we are attempting to restrict just M49 development or all potential development on the property.

Dan agrees we are just transferring the M49 rights, nothing more. Attaching other covenants will discourage participation in the program.

Steve Mc says we are talking about significant enticements to transfer, perhaps this is the flip side of that.

Katherine explained that if a landowner exercises their M49 development right (which they wanted and applied for themselves) by developing the property with M49 home sites, the landowner would not be allowed to develop another use on the property. All development would end with the use of the M49 home site that the landowner requested. Should they then be given enticements to transfer the M49 home sites so that they can develop the property with another use?

Several people felt that, (as expressed by Joy) if a landowner gains two home sites to sell for transferring one home site off of farm or forest property, and then gets to come back and develop the farm or forest property anyway, that seems counter to the intent of the RAC’s purpose to provide TDR in order to protect farm and forestland from development. If there is to be some certainty in protecting the land in perpetuity in exchange for enticements, then there needs to be an easement.

Gordon explained that his concern is that lands with conservation easements would induce poor land use planning. Creating donut holes in an area that will be designated for urban development in the future is bad planning. Katherine said that there are programs that allow you to buy back those development rights when that happens.

[Sarah Marvin arrived at meeting]

Diane said that typically TDR is transferring an existing right. Our situation is unique in that we are talking about rights that didn’t exist, that have now been granted, and don’t exist under current law, so once the home sites transfer, we could rely on the existing law to protect the property. Mike R. added, as long as something is recorded with the property so it gets flagged. Greg asked what is the record of existing M49 rights? Diane answered that the recording statute was amended to allow recodration of M49 final orders. Sarah explained that counties are not recording M49 final orders. The recording is voluntary, most landowners have not done this and the only complete record of M49 rights is DLCD’s database and files.

Mike Mc said there will be a recording of a deed transfer anyway, as an outgoing. You could record as a memorandum that the M49 right on that property is gone.

Steve: question to Diane, can a property that has had a M49 claim on it for past land use regulations qualify for a new M49 claim based on new regulations? Diane and Sarah answered yes, it has happened.
already in Prineville. Steve said Friends would want to prevent this from happening. Steve asked Greg, what was the policy intent of M49, was it to extinguish the M37 claims, or be the final adjudication of what was to happen to the land, or a stop-gap measure? Greg answered that the purpose of M49 was to fix the flawed M37 rights by substituting rights that were more tangible (M37 rights were not transferrable), but much more limited. Greg thought the intent of the M49 TDR was that we weren’t trying to do anything more than shift the M49 rights themselves. If we are more restrictive and complicate the process, we risk making it harder for the landowner to evaluate participation in the program. Jim Johnson agreed that the intent is to move M49 development, but we should not preclude the option of restricting other development and this could more appropriately be done by offering enticements to the owner to voluntarily restrict other development rights. Mike Mc added that transferring off the residential use of the property should not require restriction of rights allowed under the current zoning, such as building a church or use as a private park. He says that, currently, you can have a M49 house on the property and add a commercial use [I don’t think this is true...Diane?? We told Sea Lion Caves they would have to get rid of the commercial use if they wanted to put a dwelling on the property? Look at the fo].

Mike R: an easement can be as flexible and specific as needed. Issues of what is and isn’t allowed can all be addressed in the easement. Jim Johnson says that conservation easements should be allowed to be used where appropriate, not required, but another tool. He added that subsequent owners of a M49 property are not going to know there is a M49 TDR registry, there needs to be something like a deed restriction or conservation easement recorded with the property that will come up in a title search. Gordon said he can record a memorandum of understanding against a property and it will show up the title report. It does not need to be more than that. Diane said there is a way to write the deed restrictions that show the M49 rights have been transferred from the property that would encourage recorders to record them and we can find a way to make these run with the property. Mike R added that it should also give an entity enforceable rights.

Katherine asked if there is consensus that we are only transferring the M49 rights. Greg said that the M49 TDR program is not the appropriate tool to fix the existing flaws in the EFU zone’s allowable uses. Greg summarized where he is landing and asked if the group agrees: We want these rights to be transferred off of prime lands onto more suitable lands for development; we don’t want to make it so complicated and worrisome that landowners won’t participate. In order to accomplish these objectives, we need to focus on just the M49 development rights and use a method of recordation to ensure transferred rights cannot be used again and confers the right of enforcement to someone. An easement specifying that M49 rights once existed on the property and now they don’t would accomplish these objectives and county recorders will record easements. Jim J added that the rule can require that proof of the recordation of the deed restriction is required before any use of the credits.

Katherine asked the group if we use deed restrictions for the transfer of M49 rights for the majority of properties, how do we feel about using conservation easements for the larger properties with greater value. Land trusts deal with conservation easements, not deed restrictions.
Mike R brought up Jim J’s idea of offering enticements to give up additional development rights. Land trusts aren’t going to be interested in holding a whole bunch of these conservation easements, because it would require a lot of monitoring. Washington has a passive monitoring system. If a development permit is applied for on a property that has a TDR recorded, flags go off. Counties hold the easements. Oregon counties are not interested. Jim J said soil conservation districts do hold these types of easements. Katherine asked what proportion of the M49 properties are over 20 acres. Sarah guessed at least half. What is the magic number? Why 20 acres? Arbitrary, to start the conversation. Steve Mc: The acknowledged lot size. Mike R: these types of easements would be different than standard easements, in that monitoring would be passive, so no need for endowment, etc. The easement is just there to stop anyone from developing it. If we were to incentivize these, there would be more conservation value and that complicates the language of the easement and involves monitoring costs. Stewardship funds would be needed for the holder of the easement.

Mike R, Jim and Diane agreed that the type of easements we are talking about are simple yes/no documents that can be recorded, meet the common law requirements, they run with the land and provide enforcement power all without requiring active monitoring by anyone.

The group discussed that in exchange for gaining the right to use one’s M49 home sites elsewhere, the property should be restricted from all future M49 claims. There was no consensus on this.

Greg suggested that all bonus credits are available only to those who transfer more than just the M49 rights.

Just M49 rights: deed restriction

Deeper restrictions to get bonus: conservation easement, grantee could be DLCD, without duties, to keep it in the record.

Sarah: double-dipping can already occur, if the M49 development occurs first, they can then develop additional dwellings under current law. This is already happening.

Gordon: partial conservation easements, do I get a bonus? Jim, that’s a policy discussion.

3. Deed of Transferable Development Credits

- Purpose and process
Katherine explained that this is the instrument that conveys the development credits to the person who will use or sell them. This deed is generated by DLCD when the M49 landowner shows evidence of a deed restriction or conservation easement. This deed states the number of development credits and can be held by the original owner, sold to another party, etc.

The group discussed how the credits would be transferred and used. General consensus that it was best to make the process flexible, allowing for both creation of credits that can be bought and sold like
System Development Credits (SDC’s) and simultaneous transactions (deed restriction on sending property filed at the same time as the purchase and assignment of the credits on a receiving property). The credits would be tracked in DLCD’s registry and as well as in the form of “deed of transferable development credits.”

In answer to Katherine’s question, Mike R said that a conservation easement requires a title search and a good legal description of the property; a deed restriction does not. Jim said this can be specified in the rule. Mike R added that it is important to make sure that liens are subordinate to the deed restriction, that’s the main issue for an easement as well. This is revealed in a title search, as are other potential problems.

Diane clarified that we are transferring home sites, which includes division and dwelling, but must include a dwelling. So the right only to divide cannot be transferred. This is relevant, because many people received the right to divide a property in order to place existing dwellings on separate parcels.

4. Draft #1 M49 TDR Ordinance
Matt arrived.

- Identification of Sending Areas
Katherine briefed the group on the first half of the draft ordinance (see materials). The group had agreed that sending areas would consist of resource zoned lands. We put off for later a decision on what additional, non-resource zoned, properties could qualify as sending areas. She proposed to the group that all properties that are within identified receiving area exclusion areas should also qualify as sending properties. For example, a rural-residential property in an identified hazard zone would qualify. This would not include high-value farm and forestland.

Dan was disconnected from the meeting due to thunderstorm in Jackson County.

Jim suggested changing the terminology from “resource zones” to “zones adopted pursuant to Goals 3, 4, 5 and 7. Joy added the coastal goals, 16, 17 and 18. The group agreed listing the goals would more inclusive of valuable lands. Add goal 15 (Willamette).

The group talked about allowing non-resource properties to transfer M49 rights and restricting bonus credits only to sending properties that are in these resource zones and not to rural-residential. Matt said we may want to offer the bonus, if we really want to move development out of these areas. Sarah said moving these developments is less important, because they are already surrounded by development. Matt added that the ability to transfer from non-resource property in a floodplain is a bonus in itself. There was general consensus to allow non-resource properties to transfer away M49 rights and to make them ineligible for bonus credits.

Steve renewed Friend’s objection to wording in 3(g), excluding receiving areas in rural reserves within 3 miles of a UGB, desiring instead that all rural reserves be excluded as receiving areas. Sarah commented
that the group may want to consider that in Washington County, there are almost no receiving areas outside of the rural reserve due to large groundwater restriction areas and a huge rural reserve. Steve thought that about one-third of Washington County was outside of the reserves and that should be adequate for receiving areas. Jim added that the rural reserves in Washington County protect larger tracts of intact farmland than the rural reserves in Clackamas County and that these should stay protected by moving the M49 home sites from Washington County to Clackamas County. Gordon agreed.

Katherine moved the discussion to “excluded sending areas.” Katherine explained that a M49 property would be designated unbuildable if it were entirely on slopes >40%, as already defined in forest rules, or more than x miles (to be determined after research) from a public road or parcels/lots otherwise determined to be unbuildable by the county. The discussion revolved around the rule needing to provide parameters within which counties could declare a property unbuildable and requiring counties to adopt clear and objective standards or a specific cross reference in their ordinance. There was concern from some sides that counties would overstep and declare any properties they want as unbuildable.

- Calculation of Transferable Development Credits

The group discussed the list of sending properties that would qualify for bonus credits, starting with M49 properties within a rural reserve within 3 miles of a UGB. Discussion kept diverting to the matter of exclusions to receiving areas. Matt explained that we are talking about providing an incentive to move M49 development off of high-value farmland parcels, zoned EFU, within 3 miles of a UGB, where development pressure is greatest, onto exception areas. Discussion could not stay away from rural reserves as receiving areas. Katherine asked Mike Mc how he would feel about allowing transfers to exceptions areas within the rural reserves. Mike Mc asked if there was a restriction within the rural reserves rule prohibiting transfers from outside of the rural reserves into the rural reserves. Jim thought not, that the big preclusion in rural reserves was on urbanization and taking new exceptions. Since our receiving areas are only within existing exceptions areas and we are avoiding urban densities, there should not be a preclusion in existing rule prohibiting transferring M49 development into the rural reserves. Katherine said we may need to adjust a couple of other rules to allow this as well as to allow adoption of overlay zones allowing rural residential densities down to two acres. Diane said we should investigate the legal requirements of all receiving areas further. Mike Mc thinks it is okay to transfer into the rural reserves if they are exception areas, because the exception areas in Clackamas County are already heavily parcelized. Jim also is fine with the idea, as he doesn’t see two and five acre lots as “urbanized.” His main concern is that there be an analysis for possible shadow-effect from more development in an exception area to neighboring farm use. It’s the number of homes that concern him, not the parcel sizes. The group agreed they have consensus that no urban reserves could be receiving areas, but there was no consensus on rural reserves. Jim said he needed to think about it more and Steve said he wanted to see mapping.

Katherine resumed the discussion of bonus credits. She explained that staff suggested two changes to the calculation of credits: lowering the bonus to 0.2 instead of 0.25 in response to concern that there
were too many potential bonus dwellings being created; and restricting bonus credits only to those M49 properties that transfer all eligible M49 dwellings. There were no questions or comments from the group.

- Identification of Receiving Areas
Katherine explained fleshing out the conditions around receiving areas. (see materials) She discussed the restrictions that would apply to use of M49 TDC to partition a parcel in the EFU zone to separate existing dwellings. Steve requested that we add “hardship dwelling” to the list of exclusions and use the M49 parcel sizes of 2 and 5 acres for the smaller parcel. Matt asked if the deed restriction would also prevent future development of all dwelling types currently allowed in the EFU zone. Katherine said that under current zoning, these types would already be excluded because the new parcels have existing dwellings. The only exception would be a hardship dwelling. There was group consensus that this receiving area option would be a useful tool.

Phil asked if we anticipated the designation of receiving areas by counties to be a legislative decision or quasi-judicial decision. Katherine answered that it would be a legislative decision. We anticipate this being a decision made up front with maps to be clear for everyone. Others commented that this needs to be clear in the draft ordinance. Staff will put this in the rule, that a map must be adopted in the ordinance. Only thing that wouldn’t be legislative is the land division, that will have to be quasi-judicial. Phil was concerned that counties would be so burdened with the mapping that it may take two years before they can adopt an ordinance. He asked if the state could provide assistance to the counties with this. Sarah suggested that staff could help with mapping if counties requested it.

Mike Mc was concerned about receiving area option 2 (see materials) being legislatively determined, because it would be a lot of work. This option requires selecting receiving areas to minimize conflicts with agricultural and forest use. Clackamas County has 70,000 acres of rural residential land and hundreds of rural subdivisions in the EFU zone. Will the county have to go through each of these areas and evaluate them for potential impacts on ag/forest use just to transfer five or ten M49 dwellings? Jim said he would much prefer this evaluation be done up front in a legislative manner, because if it were done on a quasi-judicial case-by-case basis, they could be appealed to LUBA by the neighbors or an area designated for receiving would have the first five dwellings approved and then the next person to apply would get denied.

Greg wrapped up the meeting, requesting that further discussion on the issues aired today be sent to staff.

5. Next Meeting and Next Steps
Monday, September 22, 2-4 at Stoel Rives.