

Rules Advisory Committee for Transfer of Development Rights under Measure 49

June 5, 2014

RAC members attending:

Chair Greg Macpherson
Dan O'Connor
Mike McCallister
Joe Fennimore
Steve McCoy
Gordon Root
Kelley Beamer
Gordon Root

Not attending: Jim Johnson

Staff attending:

Katherine Daniels
Matthew Crall
Sarah Marvin

Guests:

Joy (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.

2. Introductions

Committee members briefly re-introduced themselves and their affiliation or interest in the rulemaking.

3. TOPIC 1: SENDING AREAS/PROPERTIES

Katherine began the conversation by explaining the list of potential sending areas, ranging from all claims in all zone types to various limits (see briefing paper #2). The greatest amount of discussion revolved around the issues of limiting sending areas only to M49 properties that can pass a “buildability test” and excluding M49 properties zoned rural-residential.

Greg summarized the list: A-J includes all new dwellings authorized by M49; B-J is a potential narrowing of that universe; K, M37 Vested Rights Decision (VRD) would add a whole other category of people who did not go through M49 and have a VRD by the county or courts. Greg questioned if we know the legality of including this group. Sarah stated that we are waiting to hear from DOJ if we can include M37 VRD’s.

Greg suggested that for the sake of developing a program that works well for M49 claims, we limit our discussion to just M49 authorized claims. At a later meeting, we can circle back and study the potential inclusion of M37 VRD’s.

Greg invited input from committee.

Steve stated that the briefing paper treats “buildability” as a legal issue, the reasons a county would deny a permit. His organization sees buildability as including the likelihood that a claimant would even seek a permit to build, based on economic issues. 1000 Friends is concerned that we would transfer building rights that were highly unlikely to ever be built to someplace where they will be built. Ideally, such feasibility criteria should be determined at the state level and include, for example, distance from a public road.

Most RAC members expressed a concern that these criteria would be hard to identify and that we have to develop clear and objective standards based on mappable criteria, such as 40% slopes and floodplains. Mike stated that probably no properties in Clackamas County would fail any buildability criteria and that most criteria, even septic feasibility, cannot be made a “clear and objective standard” because of engineering solutions, which would then require a land use decision. He added that the issue could be different in other counties, but any criteria must be clear and objective, such as “if you are not within 10 miles from a public road, your property is excluded from the transfer program,” in order to avoid turning it into a local land use decision. Steve concurred that the issue of buildability is different in other parts of the state and that his organization’s big concern is in coastal areas, where many current M49 properties are likely not feasible to develop and a TDR program without limits could end up greatly increasing development on the coast by making these M49 claims developable and even adding bonus dwellings.

Most RAC members expressed concern that using buildability criteria that are not clear and objective and not mappable could be so costly and complicated to counties and applicants that it would prevent the overall goal of the TDR program to move authorized development out of resource lands and consolidate it closer to urban areas. This was another reason for supporting a buildability determination at the State level: to remove the step of going to the county. This saves counties the work and landowners the cost of the process as well as geotechnical studies to prove buildability.

Gordon questioned if it would be legal to exclude a class of M49 right holders and Steve responded that anyone not meeting the criteria would still get to keep their M49 rights, they would just not be allowed to transfer them to another site.

Sarah stated that in her sample analysis, a buildability criteria based on 40% slopes was unlikely to limit transfers, because so far no such properties were found in the two study counties, Clackamas and Jackson.

Kelley brought up issues that a holder of an easement would be concerned about: 1) The tool, the easement, is in perpetuity. But the issue of buildability can change over time. 2) What is the dynamic between state level and county level priorities in terms of sending areas? 3) Members/implementers, in purchasing easements, need that larger conservation nexus. Where would this be defined? For prioritizing sending areas in B and C.

SENDING AREA CONCLUSIONS

The RAC member opinions expressed on “sending areas” ranged from “no restrictions on any sending areas” to “restrict sending areas to properties in resource/conservation zones that pass a clear and objective building feasibility test at the state level.” Everybody wants to simplify the process so it will be used, but several members are worried about sacrificing something important in that simplification, i.e. 1) Allowing too much development, especially those properties that could qualify for bonuses, when no development at all may have been feasible, either physically or economically. 2) Missing the opportunity to move development out of highly sensitive or hazardous areas that are zoned rural residential.

Sending area zones: For now, develop a program that focuses on all M49 home site authorizations in resource/conservation zoned lands (base zones in Goals 3, 4, 5, 7 and coastal resource zones). Come back to at a later date: 1) M37 claims with vested rights; 2) M49 home sites in RR, until we are talking about receiving areas. Revisit resource and hazard area overlay zones that apply to non-resource base zones, such as RR.

Buildability: 1) Include buildability as a factor if we can develop clear and objective standards, bright lines, that the state can map, that do not impose any need for a county land use decision and that capture enough non-buildable properties to make it worthwhile; 2) Staff will explore the potential number of claims that would be affected by a sample of bright line factors: a) property has less than 1 acre of slopes <40%; b) property has less than 1 acre outside of a floodway; c) property is more than a range of distances (1 to 15 miles) from a public road; 3) Whether or not we can develop statewide standards, allow counties to develop or expand upon buildability factors for their individual circumstances.

4. TOPIC 2: SENDING SITE INCENTIVES (bonus credits)

Katherine explained that the rationale for offering bonus credits is to incentivize M49 landowners to transfer their development rights out of resource zones. Some, who have contacted us, already want an alternative to developing their own property. But there are plenty of others who would need an incentive to move their development off of valuable/sensitive M49 property to more suitable receiving area.

Assignment of bonus points to incentivize transfers fall into two categories: 1) Positive attributes, to move development off of lands we want to protect from development, and 2) Negative attributes, to move development out of hazard areas.

Refer to materials handed out for a list of these attributes. All attributes must be mappable and allow us (the state) to determine what enhancements each property qualifies for and to post on our M49 registry.

Sarah explained that the examples provided are just a one-brush approach, what would happen if we did it this way. So, the purpose of these examples is to get the discussion going on what are the right negative and positive attributes we want to move development from and what are they worth, what level of incentives do we want to offer to get the right balance between preventing development in the mapped attribute areas and not offering too much new development. Greg asked how the fraction bonus points would work. How do you get a whole additional dwelling? Wouldn't this be awkward to buyers? Matt asked the group for feedback whether or not these fractions would be a problem.

Sarah explained that the M49 registry maintained by the state would help developers shop for the appropriate number of fractions to get the number of dwellings they need.

Gordon, developer and potential buyer of credits, explained he would not have a problem with this because he could use the registry to find and buy multiple fractions that add up to whole houses. With fractions, you just buy more. He explained a scenario of how he would seek a seller of three home sites with bonuses to develop a 10-ac site.

Mike agreed, you can bank the fractions and recombine them with other fractions, he doesn't see any problem with selling and buying these. Gordon agreed.

Katherine explained that the quarter credits we came up with is just a first stab at the idea. We are looking for a balance between incentivizing and not doubling the amount of development that would otherwise have occurred.

Phil felt we should avoid fractions, that it would be easier to just give all M49 claims one bonus dwelling. Assume that the average landowner will sell two dwellings, simplify the entire process and just give them a single bonus dwelling for a total of three. He thinks we should make it easier for non-developers to buy these credits.

For figuring out the bonus credits, the group determined the typical case would probably be someone selling two home sites, since the average number of new dwellings authorized across the state was two. A property qualifying for two, 0.25 credits (e.g. high-value farmland and floodplain), would result in a total of one bonus dwelling.

Sarah explained the example of Sea Lion Caves, which resulted in a total bonus of one home site per M49 dwelling. There was a general level of comfort that this was an appropriate level of bonus to move development from the Sea Lion Caves site to a more suitable place for development.

Joy was concerned about mapping the conservation resources, like wildlife habitat. If it's not inventoried or on a Goal 5 inventory how would that be taken into account?

Sarah explained that we used ODFW's Conservation Opportunity Maps for these examples.

There was general agreement that a doubling of new dwellings, as could occur with a Sea Lion Caves transfer, is a notably large amount, but that for a place that is so clearly special it would be an appropriate cost to save the M49 property from development.

In response, Steve added that it will be important to make sure the receiving site for all of these bonus dwellings is not a valuable site.

Matt asked if this level of incentives is too generous?

Kelley said it recognizes all the attributes. This method identifies the most important places for preservation, it gives them the highest value. She sees this as the purpose of the M49 TDR program.

Sarah explained some other examples to discuss how different scenarios can result in potentially less equitable incentives, for example a very small parcel could get more incentives than a large parcel, because the small parcel falls 100% within incentive areas, whereas a larger parcel may only have a smaller percentage in sensitive areas and may not qualify for any incentives. Different details emerge in a one-size-fits-all program.

Mike said he thinks the factors are good. He doesn't know about the values, whether 0.25 or 0.5 is the right level, but maybe we should instead look at setting a maximum, such as doubling the number of dwellings. This could smooth out the inequities of the examples. No matter how many mapped areas a property falls into, it tops out at double.

Gordon liked that limit. The three-acre parcel should not be racking up development credits.

Mike also suggested allowing rounding-up, for example if a property adds up to 3.75 and you're transferring two houses, it should round up to 4. He also brought up that a bonus credit should not be allowed to move to an area that has same attribute. Others concurred, but how do we treat this? The seller (who sells the bonus credits) probably will not be the one using them and we will not be keeping track of where credits came from after they are bought (except for interjurisdictional). [This is a receiving area issue: we are not allowing receiving areas in floodplains or high-value farmland, etc]

Matt stated that a credit is credit. We could charge extra in some receiving areas instead of trying to change the value of a sending area credit. There was general concurrence that, to keep the program from getting too complex, we need to keep the sending area credit value separate from the receiving area attributes.

Katherine asked the group what they thought about the list of potential enhancement categories. She explained that in some cases, we want to include adjacency to a mapped area, because development tends to cluster along scenic areas, for example.

Steve added that we should avoid development along the urban-wildland interface.

Joy explained that the Conservation Opportunity Areas are in the process of being remapped and will not be ready for another year. She is concerned if we use the existing maps we will be missing areas ODFW really want to conserve. Staff explained that for Rulemaking, we have to be able to refer to specific maps with specific dates, but we can amend these references later in Rulemaking. [Sarah and Katherine discussed this with Joy at the end of the meeting and agreed that a solution would be to initially determine bonus credits with the existing maps. When the revised maps are ready, we can check if any M49 properties correspond to new conservation areas and assign credits to these properties as well. We would not take away any credits assigned to M49 properties based on the original maps.]

Joy also expressed concern that ODFW's maps remain a purely non-regulatory tool, which is their intent. Staff explained that the M49 TDR program is purely voluntary, so any use of maps will not have a regulatory purpose.

The group discussed alternative conservation maps, but Joy explained there are none that capture everything. Rare and endangered species maps? Similar to the wetlands maps, in that not all wetlands have been mapped. Nothing is consistently mapped from county to county.

Katherine asked how accurate the 2006 mapping is, what percentage might change. Joy will try to find out from the conservation strategy coordinator. Katherine asked if the land trust community has adopted maps with dates on them of their priority areas. Kelley answered that each service area member has done some mapping of their own priority areas, based on their individual conservation strategies. These aren't coordinated between service areas.

Dan said he is on the board of the Southern Oregon Land Conservancy. They have maps of focused areas in Jackson and Josephine Counties. Examples are online.

Phil asked if the bonus is for the seller to sell or for the receiver; Greg explained it was for the seller. Katherine added that the incentive for the buyer is to be able to build in a location or density where s/he could not before.

Greg summarized the discussion: The idea of bonus enhancements is sound; the magnitude of bonus dwellings in the examples presented may be okay in some cases, but may be too high in others. There is a consensus to cap the enhancements at twice the original dwellings.

Phil maintained that we should round the fractions up, because we should not be forcing buyers to be developers. However, the rest of the group felt that a market would develop and the fractions would not matter, as they would add up to round numbers. Just like SDC credits, developers hold them.

Sarah reviewed the table of Clackamas County countywide statistics generated from the data currently in the project database, which is incomplete. These statistics are a maximum summation of potential bonus credits if we had no limitations on what it takes to get credits (e.g. no predominance or minimum acreage required) and no cap on the maximum a seller can get and everyone in the county wanted to transfer their development rights. Virtually 100% of claims fell into high-value farmland or forestland and would qualify for the enhancement.

Matt observed that establishing a cap of double on bonus credits would only affect a few properties, because that would correspond to four enhancements, and not very many properties appear to fall within four or more enhancement areas.

Greg stated that the total number of potential new dwellings from this example would be a very high premium, and Sarah explained that this scenario is not realistic, rather it is a starting point to whittle down from.

The group would like to see new numbers based on a lower bonus fraction, a cap on the total enhancement, and requiring predominance or some other limit on qualifying for the enhancement. Greg requested information on a “typical” case for these properties in terms of how much is prime, how much is hazard.

Sarah requested that the group consider for the next meeting what criteria a property must meet to be considered “in” or “out” of an enhancement area.

The group discussed the use of the bonus for transferring “all” authorized home sites. Some believed that the bonus should only go to those that leave a vacant property. Others believed that a seller should get the bonus if they transfer all of the new dwellings, even if that leaves an existing dwelling on the property. There was no consensus on this issue.

SENDING SITE CONCLUSIONS

The group needs to continue to work on this balance of moving M49 development off of attribute properties and ending up with too much new development in receiving areas. The group needs more real examples of potential impact to determine how to keep the bonus development under control.

The commission needs maps of all enhancement areas with dates to specifically reference in the Rule. Staff needs to be able to determine whether a property falls inside or outside of these areas.

5. Next Meeting

July 16, from 2-4 in Portland.