Rules Advisory Committee for Transfer of Development Rights under Measure 49

Meeting Notes for September 22, 2014

RAC members attending:
Chair, Greg Macpherson
Joe Fennimore
Steve McCoy
Dan O’Connor (via phone)
Gordon Root

Staff attending:
Matthew Crall
Katherine Daniels
Diane Lloyd - DOJ
Sarah Marvin (via phone)

RAC members absent:
Joe Fennimore
Mike McCalister
Representative from COLT

Guests:
Phil Grillo

1. Welcome
Commissioner Greg Macpherson called the meeting to order welcomed the members of the rules advisory committee.

2. Utilization of transferable development credits
Audio begins in middle of a discussion on buildability:
Joe, no properties in Marion County that would fit into this
What about Jackson County?

Joe asked if this buildability test would be optional to the counties. Katherine answered that it would be optional and that a county could produce their own GIS

Dan O’Connor joined the discussion via phone. Greg explained that we are talking through a timeline drafted by staff. (see materials)

Katherine said that in Step 3 the county determines the buildability of the sending property. She explained that staff had not been able to find any properties that could readily be identified as “unbuildable” using statewide GIS layers of slope and roads. Sarah explained that the identification of such properties would have to be done on a local level, because the type of data available at the
statewide level can only show slopes and roads in relation to a polygon of the entire claim property. Our results can only show whether or not the property is 100% >40% slopes or whether or not a road of some kind is within a certain distance of the property boundary. The results for Clackamas and Lincoln Counties found no M49 properties that were entirely composed of >40% slopes or had no roads within 100 feet of the property boundary. This does not take into account whether or not the <40% slope portion of the property is a feasible building site or if the road in the GIS layer can be used to access the property.

Katherine explained that counties could have two choices: the county could create maps of unbuildable areas and provide this in a GIS layer to DLCD who would incorporate that information into the state database. Or if counties wanted to do a review on a case-by-case basis they could do that. The question is, do we want the counties to be able to determine buildability?

Gordon asked on step number 1, consulting the registry of M49 claims is just to affirm that a person has a claim, because they already know that they do. Steve added that the purpose of the registry is to put in the overlays so you can calculate the numbers of credits.

Gordon asked for clarification on step 2, Diane answered that this what we were talking about last time, whether the owner would want to extinguish just their M49 home sites or all residential development and place a deed restriction or conservation easement on the property to ensure no residential development would occur and in doing so get some sort of bonus.

Katherine brought the discussion back to buildability. She asked Dan about Jackson County. Dan said the county said only a few parcels in the county would be considered unbuildable based on the county’s slope and hazard overlays. The real buildability issue is the parcel cannot meet the access requirement, that is the issue with many M49’s in Jackson County. Katherine asked Sarah if the state could address this issue. Sarah answered that the situation is similar to googling directions, the data show detailed roads and give you directions, but that doesn’t mean you will actually be able to go that way. Accessibility needs information from the ground.

Katherine asked if counties were to determine buildability from their own mapped data such as hazards, not septic and well, would this be considered a land use decision subject to LUBA review? Phil felt it would be a discretionary land use decision. Katherine thought there could be a way for counties to make it a non-discretionary determination, the goal of which is to keep costs down for the applicant so they would want to participate in the program.

Matt suggested two options for counties: 1) If a county, in adopting their ordinance to create the whole system, drew a line on a map and said this “is area is unbuildable,” that would not be a land use decision at the time the claimant showed up. Katherine added that that would be a legislative decision. Sarah added that counties would be much more able to identify these areas accurately than the state. 2) What if counties had “clear and objective” criteria? Phil responded that there is the exception for building permits, maybe there could be a way of couching this as a building permit feasibility decision that would fit into the building permit exception.

The group debated the trade-offs of restricting transfers from properties that would not likely be developed under a M49 authorization due to being too expensive to develop or unable to get legal access to the property. Steve wanted to ensure that the TDR program did not result in increasing development overall by allowing unbuildable or likely unbuildable properties to transfer development.
out, especially with a bonus. The group debated options for creating a streamlined process for proving some type of buildability. In general, the group felt it would be difficult to implement a buildability analysis that was not discretionary and expressed concern that few owners would participate in the program if they had to take the time and expense to go through a type 2 analysis to prove the property from which they are transferring rights is buildable. Potential ideas were to limit the buildability test to “legal access,” to couch the test into a non-discretionary process, such as a check-off issue for obtaining a building permit. Ultimately, the group decided to leave the buildability as an option for the counties to choose whether or not to implement and whether to use a legislative process to establish areas that are not buildable or to use a case-by-case process. A buildability restriction to transfers would not abridge any M49 rights, because participation in TDR is voluntary and does not take away existing M49 rights. Steve said this would be like destination resort planning.

Katherine explained the next steps in the process, creating certificates, sellers and buyers finding each other, the transfer of the rights to the new property, and recording of the transfer. The group debated the need for creating certificates or if we could rely on the existing final orders and the existing database be enough to keep track of credits. The reason for creating a certificate is to allow for a market for buying and selling credits, without needing to have a receiving property up front. However, even these do not necessarily need to be paper, they can be represented in the database. Gordon stressed that the managing of credits should all be managed at the State, that we need to relieve the counties of any additional work. Mike Mc explained that, at the county level the process would consist of filing the amended final order away with the development file. If someone came to develop that property, the file would be pulled, and the county would say the rights had been transferred. That would be the extent of their management of transferred credits.

Phil and Gordon asked if a credit could be used on the property from which they came. Issues raised with this were that the sending property cannot be a receiving area and any bonus credits cannot be used on the same property from which they came. Matt suggested we look into a method of canceling the credits if a seller changed their mind or could not sell the credits. Diane warned that this could introduce a lot of complexity to the program (e.g. conservation easements).

The next step in the process was preservation of the sending property. For landowners who want to get bonus credits by transferring their M49 rights and placing a conservation easement on the property, what development is being restricted? Just residential or all development? The discussion tangented to what effect a deed restriction would have on development in the future if the zoning on the property changed to allow more development than existing zoning. Gordon and Matt suggested that the deed restriction should not restrict development potential if the zoning changed. Diane said the purpose here is to allow landowners to get bonus credits and in so doing they are giving up these potential future development rights, regardless of future zoning. If they want to transfer their M49 rights and hang on to the ability to develop the property in the future, they can transfer their M49 rights and not request bonus credits. Gordon and Phil were concerned that this type of transfer would create “donut holes” in future urban planning.

Transferring credits: The group discussed how to track subsequent transfers of credits, before use on a receiving property. There was debate whether or not subsequent transfers need to be recorded with the county clerk. Some felt that this would be adding another layer of unnecessary complexity, when the status of credits can be tracked on the DLCD database. The general consensus was that DLCD’s database would be the ultimate means of tracking credits; the conversion of development rights to credits would be recorded as an amended final order altering the development rights on the sending property under
M49 and stating the number of credits created and assigning serial numbers to the credits; subsequent transfer of credits would be similar to parties transferring title of a car or like SDC’s, and would only need to be verified by DLCD and tracked in DLCD’s database; and the final landing of the credits on a property would be recorded as an enhancement with the deed for the receiving property.

Landing the credits: A buyer of credits seeks property designated as a receiving area and applies to the county for a type 2 administrative permit per the local TDC ordinance; turns in the appropriate number of credit certificates (which may or may not be all of the credits purchased); records the number of credits and their serial numbers with the deed; and county sends notice to DLCD that the credits have been used. There was discussion about whether the process of developing the receiving property could be a type 1 administrative decision as a permitted use. The county representatives explained that placing a dwelling on an existing lot could be a type 1, but if a partition is required, it would have to be a type 2. In most cases, a partition will be required.

Steve asked about vacating new parcels on the sending property created pursuant to an M49 authorization. Phil said this could be a condition of the amended order. Steve asked how many of these there could be. Sarah said the minimum number could be around 20%, including partitions created under M37. Steve was concerned, and Katherine confirmed, that if vacating the parcels was not completed immediately, these small parcels would be developed under current land use regulations, e.g. through a lot line adjustment or a forest template dwelling or a nonfarm dwelling. Staff agreed that it would be necessary to require the vacation of lot lines before creating credits, and perhaps there could be a means of canceling the vacation if the landowner could not sell the credits. Phil suggested using a deed restriction instead to state the parcels are unbuildable. But they could still be sold off separately, breaking up the farm unit.

Joe asked about the M49 “ten-year rule”: Greg said the purpose of the 10-year clock was to avoid putting pressure on older folks so they could sell (imposing no time limit on them), but having some passage of time that would scrub away these old rights that had come into existence. The group generally agreed that the creation of a credit should begin the 10-year clock. Gordon, who anticipates using or buying and selling these credits, felt the 10-year clock was reasonable. The 10-year clock needs to be in the amended final order and on the certificates themselves. The database would also show when credits expire.

Katherine brought up another timing issue. She said that we would have to anticipate that a county might undo its TDR program. So in rule, we need to state that a county must honor any development credits that were created. A county can decide to not allow any new credits, but must honor existing credits.

3. Draft Rule

Katherine started the discussion on Section 0080, utilization of credits. Comments on number one were: Steve wanted a mention or a mechanism in this part of the rule for permanently retiring development credits. Phil suggested changing the word “purchase” to “acquire.” Gordon added that the process of transferring credits between people could be as easy as a notice of sale at the DMV. All you need is a paper notorized by both the seller and the buyer and send in to DLCD.

Katherine listed the rest of the steps. Minor comments were made.
The discussion turned to comments from the group about any part of the draft rule. Steve asked why we had dropped the coastal regionalization for sending and receiving areas for Lane and Douglas Counties. In earlier meetings we had agreed that Lane and Douglas Counties would be divided by the coast range so that development would not be transferred from the valley to the coast. The group again agreed that Lane and Douglas Counties would be split such that areas outside of the CMZ would be separate from those within the CMZ. The group agreed that, although parts of Benton County crossed the coastal summit, to be simpler Benton County should remain a part of the valley.

The group discussed whether or not counties would need IGA’s to transfer with counties in their region. County representatives indicated that they would want to do this anyway. Diane said she would research further to determine if this was required and should be put in the rule or not.

There was clarification that this TDR program only deals with former Measure 37 claims that went through Measure 49. We are not, at this point, talking about TDR for future Measure 49 claims. However, those future claims could be dealt with under a TDR program.

Receiving properties in exception areas in rural reserves was still a contentious issue. Deed restrictions and conservation easements in rural reserves “in the path of future development” was also still contentious. Several ideas were raised for possibly buying back credits if a property under a conservation easement became surrounded in urban levels of development. Diane said she would look into how this could be dealt with.

4. Next Meeting and Next Steps

The results of the Doodle Poll show that the next meeting will be November 3, 2-4 at Stoel Rives offices.