



Oregon Department of
Land Conservation
and Development

Rules Advisory Committee for Transfer of Development Rights under Measure 49

Discussion Topics for Meeting #2

Thursday, June 5, 2014

1. Qualifying Properties For Sending Areas

A TDR program needs to define the “sending area” from which development credits can be transferred. In this case it will not be single geographic area, but the program will need rules to determine whether each new dwelling authorized by a M49 final order qualifies as a sending property or not. The broadest definition would simply be all dwellings authorized in a M49 final order from the state. Possible qualifications include one or more of the following:

- A. All dwellings authorized in a M49 final order from the state;
- B. M49 dwellings in traditional resource zones only (e.g. exclusive farm use, forest, farm-forest);
- C. M49 dwellings in other resource zones (e.g. open space, coastal or conservation);
- D. Only M49 dwellings that counties determine are buildable using county standards as authorized by M49 that “are reasonably necessary to avoid or abate a nuisance, to protect public health or safety or to carry out federal law”;
- E. (D) as an option for counties;
- F. (D) only for those M49 dwellings seeking bonus transfer credits;
- G. Some other subset of M49 dwellings (e.g. high-value);
- H. Not M49 dwellings in receiving areas;
- I. Not M49 dwellings where all potential building sites are on slopes over 40% (see ORS 215.740 and OAR 660-006-(0035)(5));
- J. Not M49 dwellings adjacent to an urban growth boundary, unless within a Rural Reserve;
- K. Dwellings authorized by a M37 vested development rights determination by the county.

Buildable?

We initially thought it would be important to determine whether a M49 dwelling could actually be built, so as not to permit the transfer of development credits from sites that would not have been able to develop anyway. However, our conversations with planners indicate that very few

M49 dwellings are denied at the building permit stage because the sites are unbuildable. There are only a few factors that could lead to denial, including:

- Septic system non-compatibility
- Lack of space for a septic replacement field
- Inability to put 100 feet between a septic system and well
- Unsafe driveway due to limited sight distance at the public road
- Inability to provide access for emergency equipment in high fire hazard zones
- Slopes over 40%.

There are other difficulties that would only rarely result in a denial because they can generally be mitigated, although potentially at great expense. These include:

- Floodplains
- Wetlands
- Sensitive wildlife habitat

If counties were required to determine whether a M49 dwelling was buildable, this would entail an extra step, time and expense for landowners, potentially discouraging participation in the TDR program. This is both because counties would likely charge a fee for the determination and because the landowner would have to obtain professional services to determine septic system compatibility, etc. Given that the intent is for development NOT to occur on site authorized by M49, it would be wasteful of time and money to require professional services to demonstrate that the site is actually buildable.

A good compromise could be this threefold approach:

- i. M49 dwellings on slopes over 40% would not be eligible for transfer. This is already a DLCD requirement of ALL dwellings in forest zones at OAR 660-006-(0035)(5) and there is GIS mapping that would allow DLCD to make this determination without need for county review. This would keep some unbuildable sites from being able to transfer development credits.
- ii. Counties could choose to require a determination of buildability for M49 dwellings.
- iii. M49 dwellings seeking bonus transfer credits could be required to get a county determination of buildability to ensure that bonuses do accrue to an unbuildable site, although a direct transfer would be allowed without proving the site is buildable.

Please think about the above options, considering such factors as maximum protection of resource lands, efficiency of UGB expansion, ease of administration for counties and simplicity of approach for landowners.

2. Sending Site Incentives

Not all M49 properties are equal. There are positive attributes that make some sites especially valuable for protection (e.g. high value soils, important wildlife habitat, scenic or historic value),

and negative attributes that make sites especially problematic for development (e.g. floodplain, restricted groundwater). Some owners of these lands will want to exercise their M49 claims on-site no matter what, while others do not want to build and would sell their development rights if they could. Still other landowners could be motivated to sell their development rights with sufficient additional incentive to do so. This is the target audience for sending site incentives.

The most effective incentive for participation in a TDR program is probably a transfer bonus that gives a landowner more development credits for transferring the development elsewhere rather than on that site. Transfer bonuses would logically be based on the particular attributes of a given property. Each attribute would give a landowner a fraction of an additional development credit such that one M49 development right could become two or, in exceptional circumstances, even three development credits.

Examples for Consideration

Category	Bonus	Map definition
A. High value farm or forest land	+ 0.25 credits per dwelling	M49
B. Rural Reserve	+ 0.25 credits per dwelling	Adopted by county, acknowledged by DLCDC
C. Scenic, historic, cultural, or recreational resources	+ 0.25 credits per dwelling <i>(A dwelling can receive only 0.25 bonus credit for this category regardless of how many inventories it is included on.)</i>	1. County Goal 5 inventory acknowledged by DLCDC 2. Scenic Waterway designated under ORS 390.826 or ORS 390.855 3. Federal lands including, national parks, monuments, forests or rangeland. <i>(Could include properties adjacent to a mapped resource)</i>
D. Wildlife habitat	+ 0.25 credits per dwelling	Oregon Department of Fish and Wildlife (ODFW) Conservation Opportunity Areas
E. Hazard	+ 0.25 credits per dwelling <i>(A dwelling can receive only 0.25 bonus credit for this category regardless of how many inventories it is included on.)</i>	1. Special Flood Hazard Area (SFHA) on Flood Insurance Rate Map (FIRM) adopted by the county, acknowledged by DLCDC 2. Hazard overlay zone adopted by county, acknowledged by DLCDC <i>(Might not apply if a building site is available outside the hazard zone)</i>

F. Groundwater-restricted area	+ 0.25 credits per dwelling	Oregon Water Resource Department
G. Transfer of all authorized dwellings from one M49 claim property	+1.0 credit per claim for no remaining dwellings on property or + 0.25 credits per dwelling, allows a pre-M37 existing dwelling to remain	M49
H. County discretionary		

Sites adjacent to some attributes could be included because development is often drawn to the edges of state and federal protected areas, detracting from the value of these areas and, in forest areas, increasing wildfire risk.

The accumulation of fractions of additional development credits that do not equal a whole extra development credit would not be a problem because some developers will want to aggregate multiple development credits from different properties and can accumulate whole development credits this way.

What type of transfer bonus would be sufficient, but not overly so, to motivate a landowner to participate? Would this differ in different parts of the state?

All of the bonus categories would need to have a clearly mapped area. Using GIS they could be integrated into a M49 TDR registry to allow these attributes to be viewed. Maps would need to be dated to be referenced in rule. Applicable bonus credits could be automatically calculated, letting landowners and developers both know the development credits that would be available for a given property. Examples of possible GIS mapping include:

- County Goal 5 inventories of protected sites
- Federal and State Scenic Byways
- Federal and State Scenic Waterways
- National Scenic Area (Gorge)
- National monuments
- National wildlife refuges
- State parks
- State forests
- Adopted land trust maps of priority protection areas
- ODFW Conservation Opportunity Areas
- ODFW Sensitive Species Habitat

Which of these attributes should definitely be included? Which should be included at the county's discretion? Which should not be included? Should any other type of attribute be included?

3. 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, held and monitored over time by land trusts or sometimes state agencies. Because there are significant monitoring costs involved, 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.

Deed restrictions in the form of a restrictive covenant can also restrict future development on a parcel. These are recorded with the county clerk and are legally enforceable by neighbors or the county. However, they are generally less apt to be monitored over time than are conservation easements.

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. Here are some possibilities for how a county could decide whether to use a conservation easement or deed restriction:

- A. A conservation easement is acceptable for any transfer for which a land trust, county or state agency is willing to acquire, hold and monitor the easement.
- B. An easement is required for any transfer where the sending site is over ## acres.
- C. An easement is required for any transfer where the sending site is in a floodplain.
- D. A deed restriction is acceptable for a transfer not covered in B or C. The restriction must give separate and independent enforcement rights to the public, the county and the state. An example is available online:

<http://www.oregon.gov/LCD/docs/adminrules/div006a.pdf>

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