

**OREGON ASSOCIATION OF REALTORS®  
2006 LEGISLATIVE CONFERENCE  
RESEARCH PAPER**

**LAND USE REFORM**

**QUESTION PRESENTED:**

**Should OAR initiate or support legislation that would reform Oregon's land use system by: (1) limiting opportunities for development opponents to appeal land use approvals; (2) restoring landowners' rights to build a house on their land; and (3) ensuring that Measure 37 waivers are transferable?**

**EXECUTIVE SUMMARY:**

- The land use appeals process allows almost any individual to have standing to appeal a land use decision. These appeals can drive up transaction costs significantly.
- One of the main stated goals of the land use system is to protect farm and forest lands from development and other conflicting uses. The system uses a variety of regulatory restrictions to accomplish this goal, in contrast to other states that have used market based approaches to protect their resource land.
- This regulatory regime has resulted in much unfairness and inequity as landowners are prohibited from using their property according to their expectations. This frustration led the voters to pass Ballot Measure 37, which requires compensation for regulatory takings. In lieu of compensation, government entities may "remove, modify or not apply" the regulation. These decisions have been referred to as "waivers."
- The state of Oregon and many local governments have taken the position that these "waivers" are not transferable to new owners. This presents a major problem for REALTORS® and their clients in transactions affected by Measure 37.
- A simple bill that finally allows landowners to build a home and live on their property may restore some fairness to the land use system and present landowners with an alternative to filing a Measure 37 claim.
- Transferable development rights programs have had some success in preventing development from occurring in sensitive areas in other states. Such a program would require a wholesale revision of the land use system in order to be effective in Oregon.

## **Introduction**

In 1973, Oregon became the first state in the nation to adopt statewide land use planning with the passage of Senate Bill 100 (SB 100). SB 100 was pushed through the Legislature by Republican Governor Tom McCall who insisted that Oregon must be protected from “sagebrush subdivisions” and “condominium mania.”

SB 100 was also created to protect two of Oregon’s largest industries: agriculture and forestry. In 1973, agriculture and forestry were the two largest industries in terms of contribution to the state’s gross product and total jobs. This particular purpose continues to be the one used most strongly by planners and other advocates in defense of the program.

During the first half of the 1980s, Oregon was mired in recession and land use planning was not a very controversial issue because there was little growth. Interest rates were high, the State’s natural resource economy began to slide (especially timber), and Oregon actually experienced an out-migration of population. Beginning in the late 1970s and continuing through the 1980s, the statewide land use planning system survived several ballot measures aimed at its repeal.

By 1990, Oregon’s political leaders started to recognize that Oregon was shifting from its natural resource base to the “new economy.” This shift to high tech began because technology firms sought out Oregon for its cheap land (as compared to land costs in the Silicon Valley), cheap water and cheap labor.

However, the land use system continued to focus on the economy that existed in 1973. Changes to the land use system during the 1990s actually added new restrictions to “protect” farm and forest lands, while making it more difficult for local jurisdictions to provide for the needs of Oregon’s new economy.

Today, the land use system is fraught with controversy. Long time owners of rural property are enraged when they learn that they cannot build the single home that they had been planning to build on their land when they retired. Large employers look to other states to site their manufacturing plants. The cost of housing in urban areas continues to escalate much faster than inflation, pushing more and more potential homeowners out of the market.

And the voters of Oregon, sensing that something is awry, pass Ballot Measure 37. This measure requires compensation to be paid to longtime landowners for land use regulations that cause any loss in the property’s value. In lieu of paying compensation, government entities may choose to remove, modify or not apply the offending regulation.

It was against this backdrop that the 2005 Legislature created the Oregon Task Force on Land Use Planning (“Task Force”). The purpose of this Task Force is to make recommendations to the 2007 and 2009 Legislative Assemblies regarding how to most effectively remake Oregon’s land use system.

Specifically, the Task Force is charged with making recommendations about: (1) the

effectiveness of Oregon's land use planning program; (2) the respective roles of state and local governments in land use planning; and (3) land use issues specific to areas inside and outside of urban growth boundaries and the interface between these areas. These recommendations to the Legislature could very well shape Oregon's land use system for the next 30 years.

## **The Appeals Process**

Most land use applications begin innocuously enough. In quasi-judicial applications, an applicant meets with a local government planner during a pre-application conference and they discuss approval criteria that will need to be met. The applicant then files the application containing the facts and evidence that the applicant believes meet those criteria. The local government either holds a public hearing or issues an administrative decision after providing notice to neighbors and certain community planning organizations. For most quasi-judicial applications, the final local decision must be issued within 120 days.

For many applications, the real problems begin after the final local decision is issued. A single opponent with standing can derail a land use application by using the land use appeals process to drive up transaction costs. Appeals of land use decisions go to the Land Use Board of Appeals ("LUBA"), which may then remand the case back to the local government or itself be appealed to the Court of Appeals. The process becomes circular, with decisions bouncing back and forth between one level or another, sometimes for a period of many years.

Additional process pitfalls occur when local governments attempt to make legislative decisions. These decisions are also subject to appeal and become mired in appeals that move up and down the appellate ladder.

A solution to this problem would be to limit standing to appeal land use decisions to those individuals who can actually show an actual adverse affect. For example, the Oregon Court of Appeals has already limited the standing of organizations seeking to appear before the judicial branch (but not LUBA, which is part of the executive branch) in land use appeals.

This reasoning could be extended to include individuals and be made applicable to appeals to LUBA. However, any such proposal to limit standing would encounter significant opposition from groups that purport to advocate for citizen involvement in land use decisions. Given the history of similar attempts, the fate of such a broad bill in the Legislature would be uncertain.

Another land use appeals problem was supposed to have been addressed by the 2005 Legislature. House Bill 2356 ("HB 2356") was passed by the Legislature at the request of a coalition of groups, including the Oregon Association of REALTORS®.

HB 2356 was designed to reverse a Court of Appeals decision [Hammer v. Clackamas County, 190 Or App 473 (2003)] in which the Court declared a county surveyor's review and approval of a final plat in a subdivision to be a land use decision. The Hammer decision made the surveyor's review subject to land use notice and appeal, despite the fact that opponents to the subdivision

already could have appealed the tentative plat approval. In effect, the Hammer decision gave subdivision opponents two chances to derail the project.

HB 2356 was designed to fix this problem by reversing the Hammer decision. It passed and was signed by the Governor. However, at least one county counsel believes that HB 2356 did not go far enough in reversing Hammer. He has published an article indicating that, while HB 2356 may have fixed the problem for county surveyors, it does nothing to address the situation where the planning department staff reviews the final plat, which happens in many jurisdictions. Thus, at least according to this county counsel, final plat review remains a land use decision subject to notice and appeal. The Association may wish to revisit this issue in 2007.

### **Building a Home on “Resource Land”**

In Oregon, at least 93% of the private land outside of urban growth boundaries is zoned for resource use under Statewide Planning Goals 3 and 4.<sup>1</sup> Such resource land is protected from all “conflicting uses.” According to state law, most types of single family dwellings are among the uses that are deemed to be in conflict with natural resource use and, therefore, not permitted on resource land. This differentiates Oregon from all 49 other states.

Many states with high agricultural production as a percentage of gross product, such as Washington and Vermont, have restrictions that prohibit residential subdivisions on farmland. Other states, such as Maryland, Illinois and Virginia, have used market based approaches such as landpooling and transferable development rights to focus development away from productive farmland. However, this author knows of no other State in the Union that actually prohibits a landowner from living on his or her property merely because some planning authority has zoned it as farmland.

Additionally, much of Oregon’s “resource land” cannot actually be farmed or used for timber production. For example, 16 million acres are zoned Exclusive Farm Use (EFU) statewide. Yet, only 2 million of the 16 million acres are prime, productive farmland.

This begs the question of whether Oregon’s statewide land use system is, in reality, being used to protect open space. Reasonable minds could find that using Oregon’s resource protection zoning to protect open space is overkill, considering the fact that 54% of Oregon’s total land mass (33.3 million acres out of 61.3 million acres) is already owned by the public and will remain undeveloped open space in perpetuity.

This situation is perennially brought before both LCDC and the Legislature. However, it has never been addressed. In fact, LCDC has made it even more difficult to build a home on

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<sup>1</sup>The 93% figure comes from the Department of Land Conservation and Development. Other groups have estimated this figure as high as 97%.

“resource land” through creation of administrative rules. These rules have defined what constitutes a farm dwelling, the only type of dwelling that is considered a permitted use on farmland.<sup>2</sup> Granted, some bills have passed the Legislature which create processes for the establishment of “lot of record” dwellings, nonfarm dwellings and forest template dwellings. But, these dwellings are only allowed as conditional uses with criteria that are very difficult to meet.

During the 2005 Legislative Session, the Oregon Association of REALTORS® requested House Bill 2549 (HB 2549) which would have allowed a landowner to site one single family dwelling on a lawfully created lot if the landowner had the authority to do so when they acquired the property. This bill could have provided a reasonable alternative to a landowner who was thinking about filing a Ballot Measure 37 claim.

HB 2549 contained numerous protections for the public including requirements that the dwelling not constitute a nuisance; that it comply with all fire, health and safety codes; and that it have access to both water and sewage. HB 2549 passed the House of Representatives 39 to 20, only to die in the Senate where it got wrapped up in the failed negotiations on Ballot Measure 37.

The Association may want to bring this issue back to the Legislature. Groups that have traditionally opposed allowing any dwellings on resource lands have begun to rethink their position. In addition, a bill that fast tracked approval of these dwellings outside of the normal land use process would be an effective way to encourage landowners to avoid filing Measure 37 claims for more intense development.

### **Ballot Measure 37**

Until recently, land use regulations that reduced property values in Oregon did not require the payment of compensation unless the offending regulation deprived the landowner of all economically viable use of the property. This is still the case in most other states and under federal law.

However, in November, 2004, the voters of Oregon passed Ballot Measure 37 which provides, “if a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.”<sup>3</sup>

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<sup>2</sup>LCDC rules allow for 4 types of farm dwellings: (1) dwellings on high value farmland that can meet the \$80,000 income test; (2) dwellings on not high value farmland that can meet the \$40,000 income test; (3) dwellings on not high value farmland that are sited on parcels of at least 160 acres;(4) dwellings based on potential gross farm sales of the land (only in Jackson County)

<sup>3</sup>Oregon Secretary of State’s Online Voters’ Guide, General Election - November 2, 2004, Measure 37, Section 1.

The measure also allows for a government entity responsible for enacting the land use regulation to, “in lieu of payment of just compensation . . . modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.”<sup>4</sup>

The Oregon Supreme Court recently ruled that Measure 37 is constitutional. This ruling overruled a lower court decision which found the measure to violate several provisions of both the state and federal constitutions. At the time of this writing, appeal to the United States Supreme Court is still possible, but unlikely.

Government entities have been receiving Measure 37 claims since December, 2004. However, rather than paying compensation to claimants, they are choosing to modify, remove or not apply the offending regulations. These decisions are commonly referred to as “waivers,” even though the ballot measure did not specifically use this term. The legal effect of these “waivers” is still undetermined and was one of the key issues left unresolved by the Legislature in 2005.

The Oregon Association of REALTORS® requested that the Legislature clearly provide that a waiver of a land use regulation created an outright permitted use that could be transferred with the property. Some jurisdictions, including the State of Oregon, have taken the position that a waiver is a personal right that cannot be transferred.

This interpretation could result in a buyer receiving a property that contains an unpermitted or illegal use. In addition to the litany of problems this will create for landowners, developers and lenders, this situation creates significant potential liability for REALTORS®.

The Association also requested that the Legislature specifically delegate to state agencies and local governments the authority to waive a land use restriction adopted by the State in lieu of the payment of compensation. Measure 37 is unclear on this point, and prior case law indicates that the Legislature may need to specifically delegate this authority.

Finally, the Association requested that the Legislature require uniformity in the processing of claims across all jurisdictions. Some jurisdictions are welcoming Measure 37 claims by requiring simple applications, charging little or no fees, and avoiding landowner notification or public hearings. Other jurisdictions are doing everything they can to dissuade claims by requiring extensive documentation, charging excessive fees, and creating causes of action for neighbors to sue neighbors. A uniform claims process would provide some measure of certainty and clarity to the process no matter where in Oregon the claim is brought. None of these issues were dealt with by the 2005 Legislature.

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<sup>4</sup>Oregon Secretary of State’s Online Voters’ Guide, General Election - November 2, 2004, Measure 37, Section 8.

One proposal that the Association successfully defeated was the creation of a new tax to fund Measure 37 claims. A “development rights equalization assessment” was proposed in several bills as a funding mechanism for payment of claims. This “assessment” was a new type of capital gains tax equal to 20% of the gain on all real property brought inside of an urban growth boundary or otherwise upzoned. The seller could elect to pay the tax at the time of transfer of the property (which makes the new tax look a lot like a real estate transfer tax) or on April 15 of the year following the transfer.

The 2005 Legislature had several opportunities to adequately address these issues, but failed to act after pressure was applied by certain groups unwilling to consider land use reform. Now that the Oregon Supreme Court has ruled that the measure is constitutional, these issues will come back into play. The Association needs to be able to respond to these issues, and possibly take the lead on the most important ones, such as the transferability of waivers.

### **Transferable Development Rights**

A Transferable Development Rights Program (“TDR Program”) is a market based program intended to discourage development in certain areas while encouraging it other areas. The idea is for landowners in certain areas known as “sending zones” to sell their development rights to developers who wish to build in “receiving zones.”

In return for money paid by developers, landowners in sending zones record deed restrictions that prohibit their land from ever being developed. The developers that buy these TDRs receive the ability to build at higher densities in the receiving zones. They usually can do this automatically, without the need to go through a timely and expensive zone change process.

TDR programs have had some success in preventing farmland from being developed in states such as New York and Maryland. However, in Oregon, a TDR program in Deschutes County failed to achieve its goal of diverting development away from an area with groundwater problems and is no longer active.

A TDR program has been proposed in the Portland region as a way to compensate landowners for loss of development rights due to habitat restrictions imposed under Statewide Planning Goal 5. The Portland Metropolitan Association of REALTORS®, concerned about the potential impact on housing availability and affordability, has adopted a policy opposing TDRs. The fact that the Metro Regional Government would have run the program, and charged fees for doing so, also created concern.

It is questionable whether a TDR program could actually work under Oregon’s existing land use system because one of the fundamental components of a TDR program is the need for a receiving zone to receive high density development. In a typical TDR program, purchasers of TDRs can automatically upzone these receiving areas to high density development, without needing to go through a rezoning process.

Oregon's land use system already has areas designated for high density development: land located inside of urban growth boundaries. Under the current system, there would be no market for TDRs in Oregon because a developer already has the right to develop at high densities. He or she would not be willing to pay money for a right that already exists.

The only way that a TDR program could possibly work in Oregon would be a wholesale change to the existing land use system so as to allow for new receiving zones outside of urban growth boundaries, most likely in today's resource zones. That is where the demand for new housing (i.e. rural homesites) could be great enough for developers to be willing to pay money to purchase TDRs in return for the right to build. However, under current Oregon land use law, this concept would violate numerous statewide planning goals, rules and statutes.

### **Conclusion**

Oregon's 33 year old land use system is at a crossroads. The passage of Measure 37 has shown that the public is not content with a land use system that is better at planning than doing, overly protective of lands that have little or no value, and has become an insiders' game dominated by lawyers, consultants, planners and ideologues.

The Oregon Task Force on Land Use Planning presents Oregon REALTORS® with an unprecedented opportunity: the opportunity to help shape the system for the next 30 years. This Task Force, which already contains one REALTOR®, will be seeking the Association's input as it makes its recommendations to the Legislature. Ideas that the Association could put forward include: reforming the appeals process, restoring lost rights to build a house on resource land, and ensuring that the Measure 37 process is a workable one for landowners.