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## THE LONG AND WINDING ROAD: FARMLAND PROTECTION IN OREGON 1961 – 2009

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*Dedicated to Hector Macpherson  
For his vision and commitment to the preservation of Oregon's  
farmland<sup>1</sup>*

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## I. GENERAL INTRODUCTION TO FARMLAND PROTECTION IN OREGON

For almost fifty years Oregon has protected its agricultural economy and farmland base through a combined strategy of tax incentives and development restrictions. This effort has evolved from a general voluntary approach to one that has a strong regulatory component. The program began as a means of providing tax incentives to preserve farmland, as agriculture then constituted the largest part of the state's economy. However, over the years, these tax incentives were combined with the state's comprehensive land use planning system and together have been used to prevent sprawl, extensive non-resource related rural development, and to reinforce compact urban growth as a highly effective means to protect farmland.

The tax incentive branch of this effort is fairly straightforward and its general policy has not been modified since 1961 despite changes in its details. In that year, the state legislature offered a preferential property tax assessment for land in "farm use" and "zoned exclusively for farm use" ("EFU zone").<sup>2</sup> This was an optional program and no guidance was provided as to what uses were allowed in addition to farm use in an EFU zone. The state's farm taxation policy was clarified and expanded by two 1963 state laws. One of these laws set forth the uses permitted in an EFU zone,<sup>3</sup> while another provided for farm use assessment for lands not zoned for exclusive farm use, if those lands otherwise earned a minimum income from farming.<sup>4</sup>

The land use branch of the effort, inaugurated in 1963, has a more complicated history and its details have changed with every legislative session since its creation. While the notion of EFU zoning dates back to 1961, entitlement to the farm use tax assessment since 1963 has been tied to actual agricultural activity in such a zone or a discretionary application process for actively farmed lands in other zones. Shortly after the passage of the legislation setting out Oregon's current land use system in 1973, Oregon adopted a policy of containing urban and rural residential development and placing its productive farm and forest lands outside

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<sup>1</sup> For over 40 years, as a farmer, county planning commission member, State Senator and member of the Land Conservation and Development Commission, Hector Macpherson has been the driving force for farmland protection in Oregon. Known as the "father" of Oregon land use planning, his contributions to this endeavor are explained throughout this article.

<sup>2</sup> Act of May 13, 1961, ch. 695, 1961 Or. Laws 1428.

<sup>3</sup> Act of June 24, 1963, ch. 619, § 1a, 1963 Or. Laws 1295, (S.B. 129).

<sup>4</sup> Act of June 19, 1963, ch. 577, § 5-10, 1963 Or. Laws 1141, (H.B. 1230).

Urban Growth Boundaries “UGBs”<sup>5</sup> into resource land designations. Together, these categories encourage resource use of those lands, permit enumerated non-farm uses in EFU zones in certain circumstances, and discourage urban, residential and most other uses not related to resource activities.<sup>6</sup>

There have been a number of evolving features to the preservation effort, aside from its integration with the state’s broader comprehensive land use program. The definition of “farm use,” which triggers the eligibility for the preferential property tax exemption, has been amended frequently.<sup>7</sup> Moreover, those non-farm uses permitted in EFU zones have changed with every session of the legislature since 1973.<sup>8</sup> Further, the legislature has tried to preserve large blocks of farmland while at the same time allowing owners some limited opportunities for compatible rural development. Although this effort has achieved some success on the ground, it has, nonetheless, at the state and local level, been controversial among constituencies with different philosophies and political expectations about the appropriate use of land.

This article examines the tax and land use branches of Oregon’s efforts to preserve agricultural land for farm use over time, and evaluates their effectiveness. Further, it provides some observations and recommendations regarding lessons learned and improvements needed to advance the objective of protecting agricultural land in an equitable manner.

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<sup>5</sup> Act of May 29, 1973, ch. 80, 1973 Or. Laws 127 (commonly referred to as “SB 100”); OR. ADMIN. R. 660 division 15 (2009).

<sup>6</sup> These boundaries deal with urban areas that include cities and a twenty year land supply for future urban uses. Oregon Department of Land Conservation and Development Goal 14, OR. ADMIN. R. 660-015-0000(14) (2009) and OR. ADMIN. R. 660 division 24 (2009). *See also infra* Section III. F. Containing Urban and Rural Development.

<sup>7</sup> Since its original enactment by Act of June 19, 1963, ch. 577, 1963 Or. Laws 1141, OR. REV. STAT. § 215.203 (2009) has been amended twenty-three (23) times.

<sup>8</sup> Since its original enactment in Act of June 19, 1963, ch. 577, §3, 1963 Or. Laws 1141, OR. REV. STAT. § 215.213 (2009) has been revised extensively. Since 1983, it has become the non-farm use statute dealing with “marginal lands counties.” *See* text accompanying notes 136-138, *infra*. The statute has been amended sixty-six (66) times. On the other hand, OR. REV. STAT. § 215.283 (2009) was first enacted in 1983 by Act of August 9, 1983, ch. 826, 1983 Or. Laws 1598. Since that time, the statute has also been amended fifty-two (52) times.

## II. HISTORICAL INTRODUCTION TO FARMLAND PROTECTION IN OREGON

### A. Agriculture in Oregon

Agriculture has been central to Oregon's economy from its earliest settlement unto today.<sup>9</sup> According to the Oregon Department of Agriculture, the total direct and indirect contribution to Oregon's economy by the agriculture and food processing industry in 2007 was \$25.8 billion.<sup>10</sup> The direct contribution to the state economy was \$12.6 billion.<sup>11</sup> This was 10.6 % of the total sales of all Oregon goods;<sup>12</sup> moreover the agricultural sector provides over 10.1 % of all Oregon jobs.<sup>13</sup> To protect this vital industry, Oregon has provided owners of farmland property tax reductions of over \$3.8 billion dollars.<sup>14</sup>

### B. *The Use of Tax Laws to Provide de facto Farmland Protection (1961 to 1969)*

The taxation of Oregon's farm land at its farm use value rather than at its true cash value based on *highest and best use* for non-farm use began in 1961 for "farm land which is zoned exclusively for farm use."<sup>15</sup> This original legislation was very general and did not include an express agricultural policy, identify the type of land to which it applied, list allowed uses or types of dwellings, or provide other guidance as to what qualifies as an exclusive farm use zone.<sup>16</sup> However, revisions and clarifications in

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<sup>9</sup> See generally JAMES GIBSON, *FARMING THE FRONTIER: THE AGRICULTURAL OPENING OF THE OREGON COUNTRY 1786-1846* 1-259 (University of Washington Press, Seattle and London) (1985); Ben Jacket, *The Return of King Ag*, OREGON BUSINESS, Sept. 2008, <http://www.oregonbusiness.com/articles/21-september-2008/290-the-return-of-king-ag> (last visited August 12, 2009).

<sup>10</sup> Memorandum from James Johnson, Land Use and Water Planning Coordinator, Oregon Department of Agriculture (Aug. 2009) (based on data from the U. S. Dept. of Agric., Oregon Agricultural Statistics Service, Oregon State University Extension Service; Oregon State University College of Agricultural Sciences).

<sup>11</sup> *Id.* The \$12.6 billion is comprised of: \$4.9 billion in farm/ranch products, \$2 billion from value-added processing, \$3.4 billion of purchased goods and services, and \$2.3 billion generated in wages/salaries.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> HENRY RICHMOND & TIMOTHY HOUGHEN, *OREGON'S PUBLIC INVESTMENT IN CONSERVATION, PROSPERITY AND FAIRNESS: REDUCED TAXATION OF FARM LAND AND FOREST LAND, 1974-2004* 4 (2007). The preferential assessment of farmland at farm use, rather than market value, assists in retention of farmland for farm use, especially at the periphery of the urban area.

<sup>15</sup> Act of May 13, 1961, ch. 695, 1961 Or. Laws 1428.

<sup>16</sup> *Id.* Unlike the constitutional issues that such legislation had in Maryland, the Oregon Attorney General determined that chapter 695 did not "present the clear and obvious

subsequent sessions made it evident that the justification for the preferential assessment was to help farmers stay in business, to slow the conversion of agricultural land to urban uses, to maintain the land for commercial agriculture and as a form of *compensation* for the zoning restrictions applied.<sup>17</sup>

While the 1961 law only provided farm use assessment for land within an undefined EFU zone, many farmers desired the tax benefits, without EFU zoning since most counties did not have such zones.<sup>18</sup> So, in 1963, the Legislature revised and expanded the law to establish a uniform system for the provision of farm use value assessment. Two bills were ultimately passed to do so.<sup>19</sup> First, Senate Bill 129 (“SB 129”) incorporated into the county zoning law in Oregon Revised Statutes (OR. REV. STAT.) Chapter 215, provided express authority for the establishment of “farm use zones” and required that land within such zones be used exclusively for “farm use” as defined in the Act except for a few listed non-farm uses.<sup>20</sup> Further, such farm zoning had to be consistent with the “overall plan of development of the county.”<sup>21</sup> Second, House Bill (HB) 1230 duplicated the zoning provisions of SB 129 but also included amendments to the property tax statutes in OR. REV. STAT. Chapter 308.<sup>22</sup> These amendments provided for the continued farm use assessment for land within an EFU zone used exclusively for farm use and also established a process for land owners to apply for farm assessment for lands used exclusively for farm use during the proceeding two years that were not zoned or that were not otherwise within an EFU zoning district.<sup>23</sup>

Together, this legislation established the current two-part farm tax assessment system for *zoned* and *unzoned* lands as well as the basic form

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conflict with the controlling constitutional provisions which is required before this office could advise you that chapter 695 is unconstitutional.” See 30 Op. Att’y Gen. 1598, 1604 (Or. 1960-1962).

<sup>17</sup> See *Beddoe v. Department of Revenue*, 8 Or. Tax. 186, 189-190, (Or. T.C. 1979) (and the cases cited therein); Audio tape: Senate Floor Discussion on SB 101 (Jun. 6 and 13, 1973) (Oregon State Archives 1973).

<sup>18</sup> As of October 1962, only Polk and Washington counties developed such zones to implement the 1961 legislation. *Minutes of the Tax Subcommittee of the Interim Agriculture Committee established by SJR 37*, 1961 Reg. Sess. at 22-g (Or. 1961) (Statement of Robyn Godwin, Oregon Tax Commission) (October 27, 1962) (Oregon State Archives).

<sup>19</sup> Act of June 19, 1963, ch. 577, 1963 Or. Laws 1141, (S.B. 1230); Act of June 24, 1963, ch. 619, 1963 Or. Laws 1295, (H.B. 129).

<sup>20</sup> Act of June 24, 1963, ch. 619, § 1, 1963 Or. Laws 1295, 1296, (H.B. 129).

<sup>21</sup> *Id.*

<sup>22</sup> Cf. Act of June 24, 1963, ch. 619, § 1a, 1963 Or. Laws 1295, 1296 with Act of June 19, 1963, ch. 577, §§3, 5-10, 1963 Or. Laws 1141-1144.

<sup>23</sup> Act of June 19, 1963, ch. 577, §§ 3, 5-10, 1963 Or. Laws 1141-1144.

of the Exclusive Farm Use zone.<sup>24</sup> The importance of the farm use tax assessment system should not be underestimated, for it has provided significant property tax reductions to a relatively small number of rural land owners paid for by the vast majority of urban and suburban land owners.<sup>25</sup> This assessment system constitutes a major investment by Oregonians in the agricultural industry maintaining farm land values better than similar investments in the stock market and as explained later, serves as compensation for the required zoning restrictions.<sup>26</sup>

Interest in protection of farm land surfaced again in the 1967 legislative session which enacted a tax reform proposal and tried to adopt a land use measure to protect farm land.<sup>27</sup> First, the Legislature clarified the intent of the farm assessment laws approved in 1961 and 1963. The Legislature sought to assure that farm land was assessed “exclusive of values attributable to urban influences or speculative purposes.”<sup>28</sup> This effectively established a *de facto* land use policy and evinces a concern for the effects of such influences and their potential to encourage the conversion of farmland to non-farm uses.

In the land use arena, then State Representative L.B. Day took a more direct approach with the introduction of HB 1176 to protect *prime* farmland.<sup>29</sup> Modeled after the 1965 California Williamson Act,<sup>30</sup> the bill would have allowed for the voluntary creation of agricultural preserves for the protection of “prime agricultural lands” through the use of 10-year contracts designed to grant farm use value assessment in exchange for continued farm use.<sup>31</sup> It defined “prime” agricultural land as all land that qualifies as class I or class II in the then Soil Conservation Service (“SCS”) now Natural Resource Conservation Service (“NRCS”) land use

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<sup>24</sup> This period is also discussed in O. Roberts, *The Taxation of Farmland in Oregon*, 4 Willamette L. Rev. 431, (1967) and Edward Sullivan, *The Greening of the Taxpayer*, 9 Willamette L. Rev. 1, (1973).

<sup>25</sup> RICHMOND & HOUGHEN, *supra* note 14, Executive Summary at 1.

<sup>26</sup> *Id.*

<sup>27</sup> OR. REV. STAT. § 308.239 amended by Act of July 7, 1967, ch. 633, 1967 Or. Laws 1577 (renumbered as OR. REV. STAT. § 308.345, included in OR. REV. STAT. § 308A.050 (2009) and H.B. 1176, 1967 Leg., Reg. Sess. (Or. 1967)).

<sup>28</sup> OR. REV. STAT. § 308.239 amended by Act of July 7, 1967, ch. 633, 1967 Or. Laws 1577 (renumbered as OR. REV. STAT. § 308.345, included in OR. REV. STAT. § 308A.050 (2009)).

<sup>29</sup> H.B. 1176, 1967 Leg., Reg. Sess. (Or. 1967). L.B. Day was appointed to the inaugural Land Conservation and Development Commission in October 1973 by Governor Tom McCall and served as its Chair until his resignation in June 1976.

<sup>30</sup> CAL. GOV'T. CODE §51200 *et seq.* (2008).

<sup>31</sup> See H.B. 1176, §§ 3-4, 1967 Leg., Reg. Sess. (Or. 1967); *Minutes of the Oregon House Committee on Agriculture*, Reg. Sess. at 10 (February 27, 1967) (statement of Representative L.B. Day) (Oregon State Archives).

capability classification system as well as lands returning not less than \$200 per acre from the sale of agricultural plant products in three of the previous five years.<sup>32</sup>

Representative Day said that HB 1176 was a first step at solving a “serious problem...that being the removal of prime land.”<sup>33</sup> However, he hoped that in the future the Legislature would be able to look at the need to protect “classes 3, 4, & 5, which are equally important.”<sup>34</sup> However, after approval by the House Agriculture Committee, HB 1176 failed to gain approval from the House Taxation Committee.<sup>35</sup>

As a result of the demise of HB 1176, the legislature established an Interim Committee on Agriculture.<sup>36</sup> Specifically, the Interim Committee was to study, in part, a number of agriculturally-related issues including “trends and problems in land utilization affecting prime agricultural lands, responsibility for zoning and development and use of easements with special reference to the long-range economic impact of urbanization.”<sup>37</sup>

The Interim Committee established a subcommittee on land use co-chaired by then Representative Wallace Carson from Marion County<sup>38</sup> to look at these issues and eventually developed for introduction into the 1969 Legislative Session several planning related bills, one of which, draft Legislative Council 117 (“LC 117”), would require comprehensive statewide zoning based on certain planning goals.<sup>39</sup> In developing the

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<sup>32</sup> H.B. 1176 § 1(8), 1967 Leg., Reg. Sess. (Or. 1967).

<sup>33</sup> See *Minutes of the Oregon House Committee on Agriculture*, Reg. Sess. at 10 (February 27, 1967) (statement of Representative L.B. Day) (Oregon State Archives).

<sup>34</sup> *Id.*

<sup>35</sup> See Or. S. and H. Journal 714 (1967), *Minutes of the Oregon House Committee on Agriculture*, Reg. Sess., (February 28, 1967); *Minutes of the Oregon House Taxation Committee*, Reg. Sess., (April 4, 1967) (Oregon State Archives).

<sup>36</sup> Enrolled H.J. Res. 53, 1967 Reg. Sess. (Or. 1967).

<sup>37</sup> *Id.* at section 2(b).

<sup>38</sup> Wallace Carson was a Salem attorney who was elected state representative and state senator, and then was an appointed and elected Marion County Circuit Court Judge, Oregon Supreme Court Judge from 1982 and Chief Justice of the Oregon Supreme Court from 1991 to 2005.

<sup>39</sup> See *Minutes of the Oregon Interim Committee on Agriculture and Subcommittee on Land Use*, Interim Sess. at 3 (September 25, 1967) (Oregon State Archives); *Minutes of the Oregon Interim Committee on Agriculture and Subcommittee on Land Use*, Interim Sess. at 3 (March 26, 1968) (Oregon State Archives); *Minutes of the Oregon Interim Committee on Agriculture and Subcommittee on Land Use*, Interim Sess. at 3-5 (June 25, 1968) (Oregon State Archives); *Minutes of the Oregon Interim Committee on Agriculture and Subcommittee on Land Use*, Interim Sess. at 7-8 (September 23, 1968) (Oregon State Archives); *Minutes of the Oregon Interim Committee on Agriculture and Subcommittee on Land Use*, Interim Sess. at 1-2 (October 15, 1968) (Oregon State Archives). The audio



draft bill, the Land Use Subcommittee was initially concerned that Representative Day's bill (HB 1176) only dealt with class I and II soils and wanted additional information about the capability of class III and IV soils because it was concerned that only protecting class I and II soils was not enough to ensure the long term protection of agricultural land.<sup>40</sup> The draft bill eventually became SB 10 (1969).<sup>41</sup>

*C. SB 10 – Comprehensive Planning and the Interim Goal to Protect Farmland (1969)*

Senate Bill 10 developed by the Interim Committee<sup>42</sup> required comprehensive statewide zoning by local governments along with seven “goals for comprehensive physical planning.”<sup>43</sup> If the local zoning was not accomplished in a timely manner, the Governor was required to plan and zone those lands based on the seven statutory planning goals.<sup>44</sup> One of these goals was “to conserve prime farm lands for the production of crops...”<sup>45</sup> However, no definition of “prime” was provided by that piece of legislation. SB 10 was enacted and became the first known Oregon statute to use the term “prime” with respect to farmland.<sup>46</sup> Another bill (SB 12) was proposed to prohibit the use of eminent domain for the construction of roads or power lines on agricultural land unless no feasible alternative route was available in response to concerns about the conversion of farmland from the construction of the I-5 Interstate high-

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tapes of these meetings provide additional information on the origin, intent and purpose of this bill and the first statewide planning goals.

<sup>40</sup> See *Minutes of the Oregon Interim Committee on Agriculture and Subcommittee on Land Use*, Interim Sess. at 3 (September 25, 1967) (Oregon State Archives).

<sup>41</sup> Cf. L.C. 117, Interim Sess. (Or. 1967) with S.B. 10 Reg. Sess. (Or. 1969) (Oregon State Archives).

<sup>42</sup> Assistance and background about the development of SB 10 was provided by Sy Adler, Professor at the Nohad A. Toulan School of Urban Studies and Planning, Portland State University and his unpublished manuscript “From Senate Bill 10 to Senate Bill 100.”

<sup>43</sup> Act of June 3, 1969, ch. 326, 1969, § 3, Or. Laws 581 (codified as OR. REV. STAT. § 215.515 (1969)).

<sup>44</sup> *Id.* at §§ 1-3.

<sup>45</sup> *Id.* at § 3(4). These goals were developed by a number of planners from the Willamette Section of the Oregon Institute of Planners led by Wes Kvarsten, then Director of the Mid-Willamette Council of Governments, *Minutes of the Oregon Interim Committee on Agriculture*, Reg. Sess. at 7-8 (September 23, 1968) (Oregon State Archives). Kvarsten later became the third Director of DLCD and served from 1977 to 1982.

<sup>46</sup> See Act of June 3, 1969, ch. 326, 1969, § 3(4), Or. Laws 581 (codified as OR. REV. STAT. § 215.515 (1969)).



way through the heart of the agriculturally rich Willamette Valley.<sup>47</sup> That bill was tabled.<sup>48</sup>

One of the main reasons for SB 10 was the Interim Committee's concern "that prime agricultural land was being put to other uses and taken out of production."<sup>49</sup> Governor Tom McCall also supported the planning goals in SB 10 because "the unnecessary and premature urbanization of prime farmlands can no longer be viewed as an impersonal economic upgrading to a 'higher and better use' for some city's or county's tax assessment rolls."<sup>50</sup> Specifically, the Governor stated that "we must have a system that is courageous and comprehensive to the point that, *at a minimum*, it should achieve the planning goals as set forth last year by the Legislative Interim Committee on Agriculture" that included the "preservation of the quality of:... prime farmlands and forests."<sup>51</sup> (Emphasis added).

By 1973 it was clear that SB 10 would not be effective to achieve the timely completion of comprehensive plans and zoning because local governments were not completing their new plans and implementing zoning regulations in a timely manner.<sup>52</sup> Further there were increasing concerns over the many new development threats to the agriculturally important counties of the Willamette Valley, including the Charbonneau development just south of the Willamette River in Marion County and a regional shopping center just east of Corvallis in Linn County.<sup>53</sup>

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<sup>47</sup> S.B. 12, 1969 Leg. Reg. Sess. (Or. 1969).

<sup>48</sup> Or. S. and H. Journal 464 (1969).

<sup>49</sup> *Minutes of the Oregon Senate Committee on Agriculture*, Reg. Sess. (February 24, 1969) (Oregon State Archives).

<sup>50</sup> Governor Tom McCall, Special Message to the 55th Oregon Legislative Assembly on Land-Use Planning and Zoning (February 7, 1969).

<sup>51</sup> *Id.*

<sup>52</sup> See generally LOCAL GOVERNMENT RELATIONS DIVISION OF THE OREGON EXECUTIVE DEPARTMENT, REPORT (1971) (Oregon State Archives); LOCAL GOVERNMENT RELATIONS DIVISION OF THE OREGON EXECUTIVE DEPARTMENT, REPORT (1973) (Oregon State Archives).

<sup>53</sup> See generally ROBERT LOGAN, CHARBONNEAU: AN INTERGOVERNMENTAL ENVIRONMENTAL PLANNING SCENARIO OREGON STATE ARCHIVES (1971), Lawrence Halpern and Associates, *Project Foresight* (1972) <http://ir.library.oregonstate.edu/jspui/handle/1957/52> (last visited June 11, 2009); OREGON HISTORICAL SOCIETY LIBRARY, LOCAL GOVERNMENT RELATIONS DIVISION (OR), WILLAMETTE VALLEY MALL: A CHALLENGE TO COMMUNITY PLANNING, OREGON ENVIRONMENTAL COUNCIL PAPERS (1973).

*D. 1973: Senate Bills 100 and 101*

In 1973, then Governor Tom McCall made his famous speech to the legislature decrying “sagebrush subdivisions, coastal condomania, and the ravenous rampages of suburbia in the Willamette Valley all threaten to mock Oregon’s status as the environmental model for the nation.”<sup>54</sup> The desire to preserve farmland in the Willamette Valley was one of the major motivations for the adoption of a statewide comprehensive land use planning program in Oregon.<sup>55</sup>

Much has been written on the impetus, politics, development, and evolution of Senate Bill 100 (“SB 100”) and it need not be covered again here.<sup>56</sup> Suffice it to say that it established the structure of the current land use program. SB 100 reasserted state level authority over land use policy and zoning that the state legislature initially delegated to local government (cities, 1919,<sup>57</sup> and counties, 1947).<sup>58</sup>

SB 100 established the Land Conservation and Development Commission (“LCDC”) composed of seven members appointed to staggered four-year terms by the Governor and confirmed by the Senate to supervise the Department of Land Conservation and Development (“DLCD”).<sup>59</sup> One function of the agency was to develop Statewide Plan-

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<sup>54</sup> Or. H. Journal, 57th Legislative Assembly, at J-310, (1973) (Governor Tom McCall, Legislative Message to a Joint Session of the Oregon Legislature, (January 8, 1973)) (transcript available in Oregon House Journal at 310-315). For more on Governor McCall’s strong support for land use planning see BRENT WALTH, FIRE AT EDEN’S GATE: TOM MCCALL AND THE OREGON STORY, 242-252 and 351-361 (Oregon Historical Society Press) (1994).

<sup>55</sup> See sources cited *supra* note 53.

<sup>56</sup> For good summaries of the genesis of the Oregon land use system, see Hector McPherson & Norma Paulus, *Senate Bill 100: The Oregon Land Conservation and Development Act*, 10 Willamette L. Rev. 414, 414-421 (1974); CHARLES E. LITTLE, THE NEW OREGON TRAIL: AN ACCOUNT OF THE DEVELOPMENT AND PASSAGE OF STATE LAND-USE LEGISLATION IN OREGON (Conservation Foundation) (1974); Carl Abbot & Deborah Howe, *The Politics of Land-Use Law in Oregon: SB 100, Twenty Years After*, 94 Or. Hist. Q. 4 (1993).

<sup>57</sup> Act of March 4, 1919, ch. 300, 1919 Or. Laws 539. For a more complete history of Oregon land use law, see Edward Sullivan, *From Kroner to Fasano: An Analysis of Judicial Review of Land Use Regulation in Oregon*, 3 Willamette L. Rev. 358, 358-393 (1974).

<sup>58</sup> Act of April 19, 1947, ch. 537, 1947 Or. Laws 948; Act of April 21, 1947, ch. 558, 1947 Or. Laws 1029.

<sup>59</sup> Act of May 29, 1973, ch. 80, §§ 4,5, 1973 Or. Laws 127 (commonly referred to as “SB 100”). SB 100 also established the Joint Legislative Committee on Land Use (JLCLU) to oversee the activities of LCDC which it did effectively until the legislative leadership refused to make appointments in the mid 1990s. Ultimately, the Committee was abolished. OR. REV. STAT. § 197.080 repealed by Act of June 13, 2007, ch. 354, § 1 2007 Or. Laws 972.

ning Goals that direct the preparation of comprehensive plans, zoning and implementing land use regulations.<sup>60</sup> LCDC also had the authority and was expected to designate “areas of critical state concern” and regulate “activities of statewide significance.”<sup>61</sup> Every city and county was required to prepare and adopt a comprehensive plan, zoning and implementing land use measures in compliance with the anticipated Statewide Planning Goals within one year of their adoption.<sup>62</sup> This expectation proved to be unrealistic and faced staunch objections from local governments.<sup>63</sup> Except for a few isolated contested areas and the agricultural land in Lane County, plans and regulations were all completed and “acknowledged” to be in compliance with the statewide planning goals by 1986.<sup>64</sup> To carry out this work, DLCD’s plan review and field staff reviewed local plans and regulations for compliance with the goals and then LCDC would consider “acknowledgement” of plan and ordinance compliance.<sup>65</sup> Oregon has provided well over \$25 million in direct grants to local governments to develop or update these required plans.<sup>66</sup>

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<sup>60</sup> Macpherson & Paulus, *supra* note 56, at 418-419.

<sup>61</sup> *Id.* No “activities of statewide significance” have ever been designated and 36 years after passage of SB 100, the 2009 Legislature finally designated portions of the Metolius River basin as an “area of critical state concern” by Act of July 15, 2009, ch 712, (2009) (HB 3298).

<sup>62</sup> Act of May 29, 1973, ch. 80, §§ 17, 18, 32, 1973 Or. Laws 127 (commonly referred to as “SB 100”).

<sup>63</sup> See generally *Mayea v. LCDC*, 635 P.2d 400 (Or. App. 1981), *rev. allowed* 644 P.2d 1126 (Or. 1981); *Tillamook County v. LCDC*, 642 P.2d 691 (Or. App. 1981). Between 1975 and 1986, LCDC issued enforcement orders under OR. REV. STAT. § 197.320 (2009) for eleven counties in order to gain compliance with Statewide Goal 3. Copies of these orders are available from DLCD files in Salem.

<sup>64</sup> DLCD Acknowledgement ScoreBoard, January 14, 1993 (on file with authors). During this period, farmers and citizen groups like 1000 Friends of Oregon appealed local land use decisions and zoning codes and the subsequent decisions provided important interpretations to Goal 3 and the statutory EFU zone. See the sources cited *supra* notes 97, 112, 307, and 340.

<sup>65</sup> Acknowledgment was a process where LCDC reviewed locally developed plans and implementing regulations for compliance with the statewide goals. It was important to local governments because, until acknowledged, they were required to make land use decisions under their plans and regulations, as well as the statewide planning goals. Once acknowledged, the goals were deemed incorporated in the plans and regulations and were not required to be addressed separately. (OR. REV. STAT. § 197.251 (2009) and OR. ADMIN. R. 660 division 3 (2009)).

<sup>66</sup> Grant amount provided by DLCD. The 1981 and 1983 Oregon legislatures extended the scope of SB 100 and the responsibilities of LCDC to include the review of amendments to completed plans and ordinances to ensure continued compliance with the Statewide Planning Goals. See OR. REV. STAT. § 197.610-.625 (2009) (post acknowledgment amendments); OR. REV. STAT. § 197.628-.644 (2009) (periodic review).

As introduced, SB 100 did not include the strong and direct protection of agricultural land supported by land use advocates and the environmental community at that time. It required that new comprehensive plans and “agricultural zones” only “conserve prime farm lands and provide for a blocking of agricultural lands in order to minimize conflicts between farm and non-farm uses.”<sup>67</sup> It also included the general goals from SB 10.<sup>68</sup> The Oregon Student Public Interest Research Group (“OSPIRG”) advocated designation of agricultural land as an “area of critical state concern” and this was strongly supported by land use advocates and the environmental community.<sup>69</sup> “Vineyardists and vintners” urged Governor McCall to promote “sensible land use planning now for a wine industry in Oregon” by not destroying “hillside areas of prime grape land and prevent the development of Oregon’s new and flourishing wine grape industry.”<sup>70</sup> The Wine Growers Council estimated that there may only be 10,000 acres available in the Willamette Valley for wine grapes<sup>71</sup> and did not want any farmland protection to be limited to just the farmland on the floor of the Willamette Valley.<sup>72</sup>

While these specific approaches were not adopted, the protection of farmland remained an important part of the enacted version of SB 100 which included two relevant provisions. First, it expanded its initial focus on “prime farm lands” to encompass all “agricultural land” as a priority for consideration in the adoption of the Statewide Planning Goals.<sup>73</sup> Second, it maintained the interim goals from SB 10 including unchanged the “conservation of prime farmland for the production of crops” that was to be applied prior to the adoption of the Statewide Planning Goals developed by the LCDC.<sup>74</sup> However, SB 100 did not define the term “prime.”<sup>75</sup>

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<sup>67</sup> SB 100, as introduced, § 50(2) (1973) (on file with authors).

<sup>68</sup> *Id.* at § 57(1)(d).

<sup>69</sup> DAVID AAMODT, OR. STUDENT PUB. INTEREST RESEARCH GROUP, OREGON’S PRIME AGRICULTURAL LANDS: AN AREA OF CRITICAL STATE CONCERN 16 (1973).

<sup>70</sup> Letter from Richard Ponzi and William Blosser, Winegrowers Council of Oregon to Tom McCall, Governor (Apr. 3, 1973) (on file with authors).

<sup>71</sup> As of 2008, there are over 14,556 acres now planted in the Willamette Valley and 19,300 acres statewide. NAT’L AGRIC. STATISTICS SERV., OR. FIELD OFFICE, U.S. DEPT. OF AGRIC., 2008 OREGON VINEYARD AND WINERY REPORT (2009).

<sup>72</sup> See Ponzi and Blosser, *supra* Note 70.

<sup>73</sup> OR. REV. STAT. § 197.230 adopted by Act of May 29, 1973, ch. 80, § 34, 1973 Or. Laws 127, 137.

<sup>74</sup> See generally *Petersen v. Klamath Falls*, 566 P.2d 1193 (Or. 1977); Act of May 29, 1973, ch. 80, § 48, 1973 Or. Laws 127, 141.

<sup>75</sup> OR. REV. STAT. § 197.230 (1973); OR. REV. STAT. § 215.515 (1969) (amended 1973) repealed by Act of July 26, 1977, ch. 766, 1977 Or. Laws 745.

At the same time the Legislature enacted SB 100, it also enacted SB 101, a comprehensive rewrite and update of the exclusive farm use zone provisions in OR. REV. STAT. Chapter 215.<sup>76</sup> As explained by the bill's chief sponsor, then Senator Hector Macpherson:

This bill speaks to the problem we're all concerned about – we know that Oregon's prime agricultural land is rapidly being urbanized – these limited high value agricultural soil resources should be kept in agricultural production as long as possible because of the important contribution they make to Oregon's economy and other important social considerations such as open space and ascetic enjoyment... Despite this fundamental importance, city and counties allow over 8,000 acres per year to be paved.<sup>77</sup>

Most significantly, SB 101 enacted the “Agricultural Land Use Policy” now found in OR. REV. STAT. § 215.243, expanded the list of permitted non-farm uses including the allowance of non-farm dwellings, and continued the link of land use regulation to preferential farm use assessment established in 1961.<sup>78</sup> The new policy made it clear that EFU zoning substantially limited the use of farmland and justified “incentives and privileges” (tax and otherwise) as compensation in return for such restrictions.<sup>79</sup> Senator Victor Atiyeh explained it best when he said, “I’m going to put it crudely...we were attempting...to give some ‘goodies’ for being in a farm zone.”<sup>80</sup>

The adoption of SB 100 and 101 in 1973 marked the transition from a voluntary incentive based approach to one that required zoning restrictions with reciprocal tax benefits. SB 100 established the new planning structure still in use today and SB 101 revised the basic structure of the EFU zone and its relationship to the assessment of farmland at its farm use value.<sup>81</sup> The passage of these two bills established the current land use and tax framework that enabled the establishment of a comprehen-

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<sup>76</sup> Act of August 22, 1973, ch. 503, 1973 Or. Laws 1047.

<sup>77</sup> S. Deb. S.B. 101, 1973 Leg., 57th Sess. (Or. 1973) (debate of June 6, 1973); Letter from Wes Kvarsten, Director of DLCD, to Mike Fitzgerald, Chairman of the Curry County Board of Commissioners (Dec. 29, 1977) (By 1977, DLCD estimated that “Oregon was losing about 23,000 acres/year of its agricultural land.”); As a measure of the programs success, the NRCS National Resource Inventory (“NRI”), estimated that during the 15 year period between 1982 and 1997 Oregon converted to urban and built-up uses 48,400 acres of farmland (cropland, pasture and range) or only 3226 acres per year) “Resource Lands Converted to Urban Lands,” 1997 National Resource Inventory Results (Revised December 2000).

<sup>78</sup> Act of August 22, 1973, ch. 503, § 1, 1973 Or. Laws 1047.

<sup>79</sup> *Id.*

<sup>80</sup> S. Deb. 101, 1973 Leg., 57th Sess. (Or. 1973) (debate of June 6, 1973); as quoted in RICHMOND & HOUGHEN, *supra* note 14 at 25.

<sup>81</sup> Act of May 29, 1973, ch. 80, 1973 Or. Laws 127; Act of August 22, 1973, ch. 503, 1973 Or. Laws 1047.

sive program for the protection of agricultural land that would soon emerge with the adoption of Statewide Goal 3 “Agricultural Lands” in 1975.<sup>82</sup> This would endure until the major revisions adopted in 1992-94 by LCDC and in 1993, by the Legislature with HB 3661 (Chapter 792, Or. Laws, 1993).<sup>83</sup>

*E. Fasano and the Transformation of Land Use Decision-making*

In the midst of all this legislative activity regarding land use came the transformational decision of the Oregon Supreme Court in *Fasano v. Board of County Commissioners of Washington County*,<sup>84</sup> which changed the nature of local government decisions applicable to specific parcels of land. No longer would such local land use decisions be presumed valid as legislative decisions but rather would be considered *quasi-judicial* and require a written decision (justified by adequate findings) and procedural safeguards appropriate to their characterization.<sup>85</sup> The opinion also interpreted statutory law to establish the priority of planning over land use implementation measures, such as zoning,<sup>86</sup> and also established minimum procedural standards applicable to “quasi-judicial” land use decisions, where policy was applied to land use permits for one or a few parcels.<sup>87</sup> Thus, if a decision-maker exercising discretion when determining whether a permit request for a home was “in conjunction with farm use,”<sup>88</sup> Oregon statutory law arising out of *Fasano* required an opportunity for interested persons to be heard and contest the proposed permit.<sup>89</sup>

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<sup>82</sup> OR. ADMIN. R. 660-015-0000(3) (1975) (amended 1993, 1995).

<sup>83</sup> OR. ADMIN. R. 660-015-0000(3) (1975) (amended 1993, 1995); OR. ADMIN. R. 660, Div. 33 (1993) (amended 1994).

<sup>84</sup> See generally *Fasano v. Bd. of County Comm’rs of Wash. County*, 507 P.2d 23 (Or. 1973).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 582. See also 36 Op Att’y Gen. 960 (Or. 1974) (which gave guidance to public agencies in applying *Fasano*, which interpreted OR. REV. STAT. 215.110(2), providing that zoning “carry out” a separately adopted comprehensive plan). See generally *Baker v. City of Milwaukie*, 533 P.2d 772 (Or. 1975) (in which that same court found a similar obligation applicable to cities, if there were an adopted plan. In 1973, the Oregon legislature imposed these same plan consistency obligations on both cities and counties under OR. REV. STAT. § 197.175(2) (1973).).

<sup>87</sup> *Fasano*, 507 P.2d. at 580, 587-88.

<sup>88</sup> See OR. REV. STAT. § 215.213(1)(g) (2009). See also § 215.283(1)(f) (2009).

<sup>89</sup> See OR. REV. STAT. § 197.015(10) (2009). See generally *Doughton v. Douglas County*, 728 P.2d 887, (Or. App. 1987), review denied 734 P.2d 354 (Or. 1987).



### III. OREGON'S AGRICULTURAL LANDS PROTECTION PROGRAM

Oregon's voluntary efforts to protect agricultural lands (through preferential assessment and EFU zoning) were subsequently forged into a required protection "program" by Statewide Planning Goal 3, "Agricultural Lands," which consists of statutory and administrative rule provisions with further interpretations by the Land Use Board of Appeals ("LUBA") and court opinions.<sup>90</sup> This goal was adopted in 1974 as one of the first 14 Statewide Goals as required of LCDC by SB 100.<sup>91</sup> As part of the new statewide planning program, Goal 3 required counties to adopt or revise their comprehensive plans and other land use regulations to protect farmland.<sup>92</sup> Although Goal 3 was revised significantly between 1992 and 1994, its basic form and substance remain the same.<sup>93</sup> The primary provisions of the goal were and continue to require: (1) an inventory and designation of agricultural lands as defined in the goal; (2) the use of the statutory EFU zoning provisions established by the Oregon legislature in OR. REV. STAT. Chapter 215, as interpreted and refined by LCDC rulemaking;<sup>94</sup> and (3) a standard for the use and development of any minimum lot sizes in EFU zones.<sup>95</sup> LCDC intentionally incorporated and required the use of the statutory EFU zone because of the legislatively approved list of farm and non-farm uses and its provision of other benefits, both tax and otherwise to property owners.<sup>96</sup> LCDC also re-

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<sup>90</sup> See OR. ADMIN. R. 660-015-0000(3) (1975) (amended 1993, 1995); OR. ADMIN. R. 660, Div. 33 (1993) (amended 1994). LUBA was created by the 1981 legislature as an experiment to determine whether land use decisions should be taken out of the court system and replaced by an on-the-record review by an administrative tribunal, subject to further appellate court review. The experiment was a success and LUBA was made permanent in 1981 and provides most of the case law precedent for Oregon. See Ed Sullivan, *Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program, 1979-1999*, 36 Willamette L. Rev. 441 (2000).

<sup>91</sup> See generally Jack D. Kartez, *Planning Preservation: Issues in Implementing Oregon's Agricultural Land Preservation Policy in the Willamette Valley* (June, 1976) (unpublished Master's Thesis, University of Oregon) (on file University of Oregon).

<sup>92</sup> See OR. ADMIN. R. 660-015-0000(3) (1975) (amended 1993, 1995).

<sup>93</sup> *Id.*

<sup>94</sup> See OR. ADMIN. R. 660, Div. 5 (1982) (repealed 1993); OR. ADMIN. R. 660, Div. 33 (1993).

<sup>95</sup> See OR. ADMIN. R. 660-015-0000(3) (1975) (amended 1993, 1995); OR. ADMIN. R. 660, Div. 33 (1993) (amended 1994).

<sup>96</sup> Testimony of Jim Smart, LCDC Commissioner to the Oregon Joint Legislative Committee on Land Use, Interim. Sess. (June 12, 1978). Jim Smart was a cherry farmer from Polk County and appointed to the initial Land Conservation and Development Commission by Governor McCall in October of 1973 and served until 1980. Smart was the first of many farmers who brought their special agricultural knowledge to LCDC. Other farmers who served on LCDC and who made significant contributions to the land



jected the use of alternative methods or types of zones.<sup>97</sup> Thus Goal 3 made these optional incentive-based land use and tax provisions mandatory and required their application to specifically defined "agricultural lands." As part of the broader statewide land use program, Goal 3 and other statutory provisions and goals include several distinct elements which are essential for any program intended to protect farmlands at any level of government.<sup>98</sup> Together, these elements have been recognized as "the most fully integrated and comprehensive in the country."<sup>99</sup> By reviewing these different elements, it is easier to explain how Oregon's land use program protects agricultural lands and document how it has changed over time. These elements include:

- 1) Policy statements on the economic, social and environmental value of agricultural lands;
- 2) A clear, measurable definition of the agricultural lands to be inventoried and protected;
- 3) Specific farm and non-farm dwellings and uses that can or cannot be placed on these lands;
- 4) Standards for review of land divisions and minimum lot sizes;
- 5) Containment of urban and rural development; and
- 6) Other complementary tax and regulatory policies.

#### A. Policy Statements

As explained earlier, in 1973 the Oregon legislature completed a major revision of the statutory EFU zone and related farm use property tax system with the adoption of SB 101. Included as part of these revisions was an "Agricultural Land Use Policy" (now found in OR. REV. STAT. §

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use program include Randy Smith, Shirley Ekker, Roger Hamlin, Stafford Hansell, John Brogotti, Bill Blosser, Hector Macpherson, Gary Harris and Ron Henri.

<sup>97</sup> Minutes of the Oregon Land Conservation and Development Commission (November 27, 1974 and December 20, 1974) (on file at DLCD in Salem); *See generally* 1000 Friends v. Multnomah County, 1 LCDC 309 (1980).

<sup>98</sup> RONALD EBER, *Oregon's Agricultural Land Protection Program* in PROTECTING FARMLANDS, 161-171 (Steiner & Theilacker eds., Avi Press 1984).

<sup>99</sup> U.S. GOV'T. PRINTING OFFICE, NATIONAL AGRICULTURAL LANDS STUDY (1980). The Study was released at the First Annual National Agricultural Lands Conference, Chicago, Illinois, February 8-10, 1980 where Tom McCall, Henry Richmond and one of the authors, Ronald Eber were speakers to explain the Oregon program.

215.243).<sup>100</sup> This new provision converted the farm use value property tax policy in OR. REV. STAT. § 308.345 from a de facto land use policy into an explicit statement of reasons for the protection of agricultural land and the provision of the farm use property tax assessment.<sup>101</sup>

There are four basic parts to this policy:

- 1) Agricultural land is a vital natural and economic asset for all the people of this state;<sup>102</sup>
- 2) Preservation of a maximum amount of agricultural land, in large blocks, is necessary to maintain the agricultural economy of the state;<sup>103</sup>
- 3) Expansion of urban development in rural areas is a public concern because of conflicts between farm and urban activities; and<sup>104</sup>
- 4) Incentives and privileges are justified to owners of land in exclusive farm use zones because such zoning substantially limits alternatives to the use of rural lands.<sup>105</sup>

This policy statement clearly sets forth that the state's primary interest in the preservation of agricultural lands is to maintain the agricultural economy, rather than the protection of open space or a pleasant pastoral setting for city residents to enjoy. It also declares that incentives and privileges (i.e., tax and other benefits) are justified because of the limits placed upon the use of the land.

In 1993, the Oregon legislature added two more important elements to its policy applicable to the protection of agricultural lands<sup>106</sup>:

- 1) Providing certain owners of less productive land an opportunity to build a dwelling on their land; and<sup>107</sup>
- 2) Limiting the future division of and the siting of dwellings on the state's more productive resource land.<sup>108</sup>

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<sup>100</sup> See Act of August 22, 1973, ch. 503, 1973 Or. Laws 1047. This policy was modeled after the California Williamson Act and has not been amended since its adoption in 1973. Compare OR. REV. STAT. § 215.243 (2009) with CAL. GOV'T. CODE § 51220 (1973).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Act of September 8, 1993, ch. 792, 1993 Or. Laws 2438 (H.B. 3661) (now codified at OR. REV. STAT. § 215.700 (1993)).

<sup>107</sup> *Id.*

Goal 3 has always complemented these policy statements by declaring: “Agricultural lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space *and the state’s agricultural land use policy expressed in ORS 215.243 and 215.700.*” (Emphasis added).<sup>109</sup>

### B. Defining Agricultural Lands

Oregon’s earlier efforts to protect agricultural lands using optional EFU zoning and tax incentives did not work because those efforts left to each local jurisdiction not only the decision about whether to protect such lands but also the choice of the type of lands it should protect. Goal 3 is significant in its approach because it provides a relatively clear definition of the lands to be protected. This has been one of the most controversial parts of Oregon’s program because it declares a state interest in all land used or suitable for agricultural use and not merely “prime farmlands.”<sup>110</sup>

As adopted in 1975, Goal 3 incorporated the approach first proposed by OSPIRG during the 1973 legislative session to identify and define agricultural lands using the Soil Conservation Service soil capability ratings, rather than merely “prime farm lands,” preferring protection of all suitable agricultural lands.<sup>111</sup> It defined “agricultural land” differently for two distinct regions of the state (East and West): those lands predominantly composed of Class I-IV soils in western Oregon and Class I-VI soils in eastern Oregon, as well as other lands “suitable for farm use” and other “lands necessary to permit farm practices” on adjacent or nearby lands.<sup>112</sup> These are the lands required to be inventoried and preserved.<sup>113</sup> This definition is broader and includes more land than covered by the earlier definitions of “prime farmland” proposed by Rep. Day in 1967 and OSPIRG in 1973, in part because farmers in western and east-

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<sup>108</sup> *Id.*

<sup>109</sup> See OR. ADMIN. R. 660-015-0000(3) (1975) (amended 1993, 1995); OR. ADMIN. R. 660, Div. 33 (1993) (amended 1994).

<sup>110</sup> See Hector Macpherson, *Oregon’s True Land Use Story*, MEDFORD MAIL TRIB., February 19, 1995; see also text accompanying notes 67-75.

<sup>111</sup> See AAMODT, *supra* note 69 (OSPIRG recommended protecting all Class I, II and III soils.). OR. ADMIN. R. 660-015-0000(3) (1975) (amended 1993, 1995).

<sup>112</sup> See OR. ADMIN. R. 660-015-0000(3) (1975) (amended 1993, 1995). See generally *Wetherell v. Douglas County*, 160 P.3d 614 (Or. 2007) (LUBA No. 2009-004, April 30, 2009 (remanded)); *DLCD v. Curry County*, 888 P. 2d 592 (Or. App. 1995); *DLCD v. Coos County*, 844 P.2d 907 (Or. App. 1992); *1000 Friends v. Benton County*, 575 P.2d 651 (Or. App. 1978); *Meyer v. Lord*, 586 P. 2d 367 (Or. App. 1978); *Kaye/DLCD v. Marion County*, 23 Or. LUBA 452 (1992).

<sup>113</sup> See OR. ADMIN. R. 660-015-0000(3) (1975) (amended 1993, 1995)

ern Oregon urged a broader definition for their regions of the state.<sup>114</sup> LCDC recognized that Class I and II soils could not be protected without also protecting the Class III and IV soils intermingled with them in a farm operation.<sup>115</sup>

About 15.5 million acres are zoned EFU based on the definition of “agricultural land” under Goal 3.<sup>116</sup> This is much broader than the 1.1 million to 4.3 million acres of “prime farmland soils” identified by United States NRCS (depending upon whether the soils are drained, protected from flooding, or irrigated).<sup>117</sup>

The breadth of the agricultural lands definition and its use of clear and objective standards, led to much controversy over its implementation at the local county level from citizens, planners and elected officials.<sup>118</sup> Implementation of Goal 3 in the Willamette Valley led to over 300,000 acres of land to be *down* zoned from rural development zones to an EFU zone (16% of all EFU zoned land in the Valley).<sup>119</sup> However, the broader approach chosen by LCDC was fully consistent with both the state’s agricultural land policy and the federal approach to identifying “prime” lands used by the United States Department of Agriculture (“USDA”)/National Resources Conservation Service (“NRCS”). The state policy encourages the protection of “large blocks” of agricultural land.<sup>120</sup> The federal government’s approach was not merely to inventory the “nation’s most productive” or “prime farmlands” but also provide states with the opportunity to establish farmland categories of “Statewide” and of “local” importance.<sup>121</sup> This is essentially what Goal 3 did.<sup>122</sup>

Since the SB 10 statutory goal of protecting “prime farmlands” was superseded by Goal 3, the term “prime,” or reference to “prime farm land,” was not used until the 1992 federal list of soils rated “prime” was incorporated into the LCDC definition of “high-value farmland” under

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<sup>114</sup> See RICHMOND & HOUGHEN, *supra* note 14, at 15.

<sup>115</sup> *Id.*

<sup>116</sup> DEP’T. OF LAND CONS. & DEV., GIS ZONING DATABASE.

<sup>117</sup> U.S. DEP’T. OF AGRIC., OREGON PRIME FARMLAND ACREAGE, NRCS NASIS DATABASE, PORTLAND, OREGON (MARCH 2, 2009). Seventy-seven percent (77%) or 915,387 of the 1.1 million acres of the prime soils are in the Willamette Valley.

<sup>118</sup> *Minutes and exhibits of the JLCLU work session and hearings on the Agricultural Lands Goal*, Interim Sess. (June 12, 29 and 30, 1978) (Oregon State Archives).

<sup>119</sup> Memorandum from DLCD on Resource Lands Protected After Review by LCDC (September 16, 1998) (on file with authors).

<sup>120</sup> OR. REV. STAT. § 215.243(2) (2009).

<sup>121</sup> Memorandum from SCS Land Inventory and Monitoring (LIM-3), *Background Paper: Prime, Unique and Other Farmlands* (October 16, 1975) (on file with authors).

<sup>122</sup> See Letter from Jack P. Kanalz, State Conservationist, USDA Soil Conservation Service, to James F. Ross, Director of DLCD (May 12, 1983) (on file with authors).

the Goal 3 rule (OR. ADMIN. R. 660-033-080(1) in 1992).<sup>123</sup> In 1993, the Legislature agreed with this new approach, called for better protection of the state's more productive resource land and added its own definition of "high-value farmland" into OR. REV. STAT. Chapter 215.<sup>124</sup> "Prime" soils only comprise a portion of the land defined as "high-value" farm land under OR. REV. STAT. § 215.710.<sup>125</sup>

The significance of these definitions lies in the fact that they are primarily based on objective, scientific field data, not on current trends in the agricultural economy or the individual management skills of the farmer. Although these definitions are relatively clear, they did not end the debate over whether land is good or marginal or whether an individual can make a living by undertaking agricultural production.<sup>126</sup> This has been made very clear in a recent set of LUBA and Court decisions that have opened the door for the consideration of profitability when determining whether land is suitable for farm use.<sup>127</sup> What this approach overlooks and why the state protects more than just its "prime" farmlands is that state and local agricultural economies not only depend on the best or prime farmlands but need the lower capability lands as well since many crops like orchards, wine grapes, grass seed, alfalfa, and hay grow very well on lower quality soils.<sup>128</sup>

The underlying assumption of the Oregon program to protect agricultural lands is that long term resource decisions should not be based on short-term economics.<sup>129</sup> Oregon requires an inventory of all farmlands primarily based on the land's resource capability, not a farmer's man-

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<sup>123</sup> OR. ADMIN. R. 660-033-080(1) (1993); *See also* OR. REV. STAT. § 197.230 (1973); OR. REV. STAT. § 215.515 (1969) (amended 1973) *repealed by* Act of July 26, 1977, ch. 766, 1977 Or. Laws 745.

<sup>124</sup> OR. REV. STAT. § 215.710 (1993); OR. ADMIN. R. 660 div. 33 (1994). The full story about the development of HB 3661 and the Legislative showdown over Oregon's efforts to protect farmland between House Republicans, Senate Democrats and the Governor's Office is yet to be written and is one worthy of being told.

<sup>125</sup> OR. REV. STAT. 215.710 (2009); OR. ADMIN. R. 660-033-020(8) (2009) (defining "high-value farmland" and the additional non-prime soils and lands included); OR. REV. STAT. 195.300(10) (2007) (a revised and updated definition used for the purposes of Measure 49).

<sup>126</sup> *See infra* Part III.C.

<sup>127</sup> *See generally* Wetherell v. Douglas County, 160 P.3d 614 (Or. 2007) (LUBA No. 2009-004, April 30, 2009 (remanded)). The 2009 Legislature considered obviating this decision but failed to adopt it. *See* H.B. 3222, *available at* [http://www.leg.state.or.us/bills\\_laws/](http://www.leg.state.or.us/bills_laws/) (last visited June 24, 2009).

<sup>128</sup> OR. REV. STAT. § 215.710 (1993); Act of September 8, 1993, ch. 792, Or. Laws 2438 (H.B. 3661); OR. ADMIN. R. 660 div. 33 (1994).

<sup>129</sup> OR. REV. STAT. § 215.243(2) (2009).

agement ability or the current economic possibilities for such use.<sup>130</sup> Commercial property is not rezoned for industrial use every time a business fails and it should not be that way for farms and agricultural lands.

### *C. Marginal - Secondary or Unproductive Lands*

Despite the fact that less land is zoned EFU under Goal 3 than the number of acres of farmland according to the most recent US Census of Agriculture,<sup>131</sup> some planners and those interested in more rural development suggest that the Goal 3 definition is too broad and includes *marginal* or *secondary* lands that should not be subject to the same land use restrictions applicable to the *primary* or *best* farmlands.<sup>132</sup> It is usually suggested that these *secondary lands* be designated and zoned separately from the better farm lands, be subject to local control and eligible for more rural development.<sup>133</sup> The separation of *secondary* from *primary* lands is advocated as a replacement for the current system that allows more non-farm development on lower quality lands zoned EFU on a case-by-case basis.<sup>134</sup> As this section explains, Oregon has tried several approaches for separating *marginal* or *secondary* lands from the *primary* or *best* farmlands but has ended up retaining its current approach that identifies these lower quality lands on a case-by-case basis. The authors believe the current approach was retained because of a mix of reasons both technical and political:

- 1) The technical difficulty is that Oregon's geography is diverse and complex with the *productive* and *non-productive* lands and resource soils closely intermingled in a way that makes their separation and rezoning in appropriately sized blocks extremely difficult if not impracticable;

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<sup>130</sup> OR. ADMIN. R. 660-015-0000(3) (1975) (amended 1993, 1995); OR. ADMIN. R. 660, Div. 33 (1993) (amended 1994).

<sup>131</sup> DEP'T. OF LAND CONS. & DEV., GIS ZONING DATABASE; USDA FARMS AND LAND IN FARMS FINAL ESTIMATES 2003-2007 (February 2009). According to DLCD about 15.5 million acres are zoned EFU while the USDA Agricultural Statistical Service reports that Oregon has about 16.4 million acres of farmland in 2007.

<sup>132</sup> See generally OR. TASK FORCE ON LAND USE PLAN., FINAL REPORT TO THE OREGON LEGISLATURE 8-16, (2009), available at <http://www.oregonbiglook.org/finalreport> (last visited June 9, 2009).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

- 2) Regional differences make the lands that one area or county defines as *unproductive* to be the higher or better quality lands in another area or region; and
- 3) Agreement has been elusive among resource specialists, planners and state and local officials about the definitions of such lands and about who should identify or determine the appropriate uses for them.

Nevertheless, the desire to identify *marginal* or *secondary* lands has been and continues to be the subject of extensive public discussion, advisory committees, task forces, and pilot studies by the Legislature and LCDC.<sup>135</sup> Six major attempts were made in 1983, 1985, 1987-88, 1989-1991, 1992-1993, and 2009 to allow for the identification and designation of marginal, secondary or unproductive lands.

In 1983, the Legislature adopted the Marginal Lands Act that established a trade-off: less regulation of lower quality *marginal lands* and improved protection for the best or primary resource lands.<sup>136</sup> Only Lane and Washington counties adopted this system<sup>137</sup> and the provisions allowing the designation of marginal lands by any other county were repealed with the adoption of HB 3661 in 1993.<sup>138</sup>

In 1985, the Legislature directed the Commission to “consider adoption of rules, amendments of the goals, and recommendations for legislation that will provide a practical means of identifying secondary resource land and allow specified uses of those lands.”<sup>139</sup> Just prior to this time, LCDC Chair Stafford Hansell established a Rural Lands Advisory Committee (“RLAC”) to evaluate the effectiveness of Goal 3 which then pursued the 1985 Legislative directive and completed its work in the fall of 1986.<sup>140</sup>

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<sup>135</sup> See generally *Minutes and exhibits with respect to H.B. 2229*, Reg. Sess. (1983) (Oregon State Archives).

<sup>136</sup> Act of August 9, 1983, ch. 826, 1983 Or. Laws 1598. Compare OR. REV. STAT. § 215.317 and 215.327 with OR. REV. STAT. § 215.213(1)(g) and (2)(a) & (b) (2009); See Memorandum from Ron Eber, DLCD Policy Analyst to LCDC, *A Summary of the Marginal Lands Act – SB 237 (Preliminary Draft)* (August 9, 1983) (on file with authors).

<sup>137</sup> Lane County v. LCDC, 942 P.2d 278, 281 (Or. 1997).

<sup>138</sup> OR. REV. STAT. § 215.316 (1993).

<sup>139</sup> Act of July 15, 1985, ch. 811, § 11, 1985 Or. Laws 1980, 1984.

<sup>140</sup> Testimony of Roger Hamlin, LCDC, before the Oregon Senate Energy and Natural Resources Committee (May 6, 1985) (discussing the Work of the Rural lands Task Force) (on file with authors); Memorandum from James F. Ross, DLCD Director, to LCDC, (July 29, 1986) (regarding the Rural Lands Package) (on file with authors).



In 1987, the Legislature renewed its direction to LCDC to prepare a secondary lands proposal.<sup>141</sup> Then in 1988, based on the work of the RLAC, LCDC developed and approved for statewide public hearings a draft proposal for the identification of secondary lands and the possible uses and densities to be permitted on primary and secondary resource lands.<sup>142</sup> There was strong opposition to this proposal from the Association of Oregon Counties (“AOC”) and certain individual counties because they did not want LCDC to adopt more stringent protections for *primary* resource lands.<sup>143</sup> There were also significant concerns expressed by a citizen’s group, 1000 Friends of Oregon<sup>144</sup> about the improper approval of dwellings in EFU zones and from Legislative leaders not only about the draft proposal for the identification of *secondary lands* but also about the “gradual erosion of our farm and forest land base, primarily through dwelling construction and land division.”<sup>145</sup> In response to these concerns, the Legislature, added to LCDC’s budget funds for a “secondary lands pilot project” to field test the LCDC definition of *secondary lands*.<sup>146</sup> The results of the pilot project were reported to the 1991 Legislature.<sup>147</sup> A number of bills were considered by the Legislature based on the recommendations of the Pilot Project, but none were approved.<sup>148</sup>

Ultimately, the work of the RLAC, the *pilot project*, and the 1991 proposed legislation formed the basis of LCDC’s 1992 amendments to statewide Goals 3 and 4.<sup>149</sup> These amendments to Goals 3 and 4 and their

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<sup>141</sup> Act of July 21, 1987, ch. 886, § 11, 1987 Or. Laws 1860, 1865.

<sup>142</sup> Minutes of LCDC Meeting (October 24, 1988) (on file with authors).

<sup>143</sup> Letter from Harold Haugen, Chair of the Oregon Counties Land Use Coalition (OCLUC), to Stanton Long, Chair of LCDC (May 31, 1988) (on file with authors); Letter from Bill Rogers, President of AOC, to Dennis Karnopp, Acting Chair of LCDC (February 7, 1989) (on file with authors).

<sup>144</sup> See *infra* Section III.E text and accompanying notes 211, 215, and 225 (discussing the role of 1000 Friends of Oregon).

<sup>145</sup> Testimony of Senator John Kitzhaber, M.D., Senate President, Representative Vera Katz, Speaker of the House, Senator Dick Springer, Chairman, Senate Agriculture and Natural Resources Committee, and Representative Ron Cease, Chairman, House Environment and Energy Committee, before LCDC (February 22, 1989) (discussing the Proposed Administrative Rules Establishing a System for Designating Primary and Secondary Lands) (on file with authors).

<sup>146</sup> Act of July 20, 1989, ch. 710, § 3, 1987 Or. Laws 1110.

<sup>147</sup> LCDC, Report to the 66<sup>th</sup> Legislative Assembly on Secondary Lands (April 1991) (on file with authors).

<sup>148</sup> Memorandum from Craig Greenleaf, DLCD Deputy Director, to LCDC on Comparison of Secondary Land Bills, (April 12, 1991) (on file with authors); 1991 Or. Senate and House Journal S-18 (1991).

<sup>149</sup> Compare the adopted amendments with the RLAC and Pilot Project Recommendations, and the 1991 legislation discussed *supra* note 148.

administrative rules allowed for the separate designation of “small-scale resource lands,” “high-value” and “important” farmland and forestland.<sup>150</sup> The amendments also established separate standards for the uses allowed on high value farmland from those allowed under OR. REV. STAT. Chapter 215.<sup>151</sup> New administrative rules were also adopted to define these different types of resource lands and specify the uses allowed on such lands.<sup>152</sup> The rules provided for both a clear and objective statewide definition of these lands and permitted counties to develop and obtain LCDC approval for a specific county designation.<sup>153</sup>

Due to the controversy over these amendments,<sup>154</sup> the 1993 Legislative Assembly adopted House Bill 3661 (“HB 3661”),<sup>155</sup> which directed LCDC to repeal the goal and rule provisions it had just adopted regarding the separate designation of small-scale resource lands and in its place established provisions for the case-by-case identification and use of these lands.<sup>156</sup> These included new “lot-of-record” provisions for farm and forest zones, a statutory definition of “high-value farmland,” and new standards for non-farm dwellings allowed on less productive resource lands.<sup>157</sup> The approach established under HB 3661 was intended to and achieved the type of results intended by the 1992 goal and rule amendments by directing more development to lower quality farm and forest lands outside the Willamette Valley in order to better protect the *primary or high-value farmland* especially inside the Valley.<sup>158</sup>

However, in 2005, the Oregon legislature created the Big Look Task Force (“BLTF”) to review and suggest revisions to the state’s land use program.<sup>159</sup> In its review of state land use policy, the BLTF did not give up on the quest for an alternative resource land use system and proposed the identification of unproductive or *secondary lands*.<sup>160</sup> The BLTF

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<sup>150</sup> See OR. ADMIN. R. 660-015-0000(3) (amended 1993, 1995); OR. ADMIN. R. 660, Div. 33 (1993) (amended 1994).

<sup>151</sup> See OR. ADMIN. R. 660-015-0000(3) (1975) (amended 1993, 1995); OR. ADMIN. R. 660, Div. 33 (1993) (amended 1994).

<sup>152</sup> See OR. ADMIN. R. 660-015-0000(3) (1975) (amended 1993, 1995); OR. ADMIN. R. 660, Div. 33 (1993) (amended 1994).

<sup>153</sup> See OR. ADMIN. R. 660-015-0000(3) (1975) (amended 1993, 1995); OR. ADMIN. R. 660, Div. 33 (1993) (amended 1994).

<sup>154</sup> The history of this controversy is set forth in *Lane County v. LCDC*, 942 P.2d 278 (1997).

<sup>155</sup> Act of September 8, 1993, ch. 792, 1993 Or. Laws 2438.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> See discussion *infra* note 259 and accompanying text.

<sup>159</sup> Act of August 9, 2005, ch. 703, 2005 Or. Laws 1976.

<sup>160</sup> OR. TASK FORCE ON LAND USE PLAN., *supra* note 132 at 8-16.

found that the land use program has been “relatively successful” in the protection of farmland and had “dramatically slowed” the conversion of such lands to urban or rural uses.<sup>161</sup> While recognizing that the standards for the protection of farmland do “vary” in different parts of the state, it concluded that “strategic adjustments” are needed to “increase local flexibility, thus avoiding the ‘one-size-fits-all’ approach . . . .”<sup>162</sup> Its primary recommendation was to allow two or more counties to propose regional definitions of farmland based on a number of general discretionary criteria subject to approval by LCDC and to allow more rural development on the lands no longer designated as farmland.<sup>163</sup> The only justification for this recommendation appears to be that there is public “sentiment” that the land use system does not adequately recognize regional differences within the state and that some counties have not mapped their farmlands accurately.<sup>164</sup>

The 2009 Legislature reviewed the BLTF’s recommendations, but wisely took another approach.<sup>165</sup> In its place, it established a new process, similar to the original acknowledgment review, that provides authority for a single county to do a countywide review of its resource land designations (farm – forest – rural development exceptions) against the existing definitions of agricultural and forest land in the statewide goals and evaluate any “mapping errors” of these lands.<sup>166</sup> If so, they can be redesignated after review and approval by LCDC from farm or forest zoning to other appropriate rural development categories.<sup>167</sup> These new “non-resource” designations and the level of permitted rural development is subject to a “carrying capacity” analysis to ensure that any such rural development will be in balance with other identified natural resources, infrastructure needs, and not be harmful to any farm or forest activities on adjacent or nearby lands.<sup>168</sup>

#### *D. EFU Zoning and Allowed Farm and Non-farm Uses*

Limiting or prohibiting incompatible uses within large blocks of agricultural land has always been an objective of EFU zoning. As explained earlier, the EFU zone was developed by the Oregon legislature in 1961

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> H.B. 2229, 2009 Leg., Reg. Sess. (Or. 2009) (as introduced).

<sup>164</sup> OR. TASK FORCE ON LAND USE PLAN., *supra* note 132 at 8-16.

<sup>165</sup> Enrolled H.B. 2229, §§ 5-7, Reg. Sess. (Or. 2009).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

along with the farm tax assessment program.<sup>169</sup> As revised in 1963, that zone specifically provided for farm dwellings and five basic non-farm uses.<sup>170</sup> These were educational, religious, and recreational uses, utility services and meeting places for the rural community.<sup>171</sup> This initial list demonstrated a Legislative intent that the allowed uses were intended to be those needed or that would directly serve the rural agricultural/EFU area. After the 2007 Legislative Session, there were over 50 uses allowed in an EFU zone.<sup>172</sup> Many are directly supportive of agriculture, e.g. farm stands, wineries, and processing facilities while others are dependent on a locally present resource (water bottling), need adequate acreage (golf courses) or are just passing through (roads and utilities).<sup>173</sup> One of the more controversial uses, mining, was allowed in 1973 and has been the subject of intense debate between farm and mining interests ever since.<sup>174</sup>

Authorized non-farm uses are subject to local land use approval.<sup>175</sup> Between 1961 and 1973, no distinction was made between the type of review or the standards applicable to the approval of the allowed uses.<sup>176</sup> But in 1973, the uses allowed were divided into two categories.<sup>177</sup> The

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<sup>169</sup> See *supra* Part II.B.

<sup>170</sup> See Act of June 19, 1963, ch. 577, 1963 Or. Laws 1141, (H.B. 1230); Act of June 24, 1963, ch. 619, 1963 Or. Laws 1295, (S.B. 129).

<sup>171</sup> OR. REV. STAT. § 215.213 (1963).

<sup>172</sup> During the 2007 session, Governor Kulongoski “cautioned” Legislators against adding more allowed uses to the EFU on an ad hoc basis. In 2007, bills to add hospices, motor vehicle race tracks, fireworks storage facilities and agritourism resorts were before the Legislature. Letter from Ted Kulongoski, Governor to Peter Courtney, Senate President, Jeff Merkley, Speaker of the House, Brad Avakian, Senator, Jackie Dingfelder, Representative, and Arnie Roblan, Representative (April 26, 2007) (on file with authors).

<sup>173</sup> A comprehensive analysis of all the different uses allowed in an EFU zone is beyond the scope of this article but a chronological list of all the allowed uses is included as Appendix 1 to this article.

<sup>174</sup> In addition to the numerous LUBA cases dealing with the relationship between aggregate mining and exclusive farm use zoning, a catalogue of the appellate court cases demonstrates the controversy that often erupts in evaluating mining in EFU zones. See generally *Smith v. Clackamas County*, 836 P.2d 716 (Or. 1992); *Eugene Sand & Gravel v. Lane County*, 74 P.3d 1085 (Or. App. 2003); *Beaver State Sand & Gravel, Inc. v. Douglas County*, 65 P.3d 1123 (Or. App. 2003); *Port of St. Helens v. LCDRC*, 996 P.2d 1014 (Or. App. 2000); *Mission Bottom Ass’n. v. Marion County*, 930 P.2d 897 (Or. App. 1996); *Zippel v. Josephine County*, 876 P.2d 854 (Or. App. 1994); *O’Mara v. Douglas County*, 854 P.2d 470 (Or. App. 1993), *rev.* 862 P.2d 499 (Or. 1993); *McKay Creek Valley Ass’n. v. Washington County*, 857 P.2d 167 (Or. App. 1993); *Clark v. Jackson County*, 797 P.2d 1061 (Or. App. 1992), *aff’d*, 836 P.2d 710 (Or. 1992).

<sup>175</sup> See generally *Doughton v. Douglas County*, 728 P.2d 887 (Or. App. 1987) *rev. den.* 734 P.2d 354 (Or. 1987).

<sup>176</sup> OR. REV. STAT. § 215.213 (1963-1971).

<sup>177</sup> OR. REV. STAT. § 215.213(1) and (2) (1973).

first category was the “permitted” uses that a county was required to authorize in its EFU zone without applying any additional review standards, other than those provided by statute.<sup>178</sup> The second category included the larger and more intensive non-farm uses allowed through a discretionary process.<sup>179</sup> Except for non-farm dwellings, local review and approval standards were left to the discretion of the local county planning authorities.<sup>180</sup> The authors are aware that many counties applied the approval criteria for non-farm dwellings in the former OR. REV. STAT. § 215.213(3)(a) to (e) (1973) to the review of these discretionary non-farm uses.

In 1981, the Joint Legislative Committee on Land Use (“JLCLU”) established an EFU Task Force to recommend changes to the EFU statutes that would “improve the quality of county exclusive farm use (EFU) zone decisionmaking.”<sup>181</sup> In November of 1982, the Task Force submitted its report and recommendations to the JLCLU.<sup>182</sup> They considered the recommendations of the EFU Task Force on amendments to the EFU statute in ORS chapter 215. Some of these became part of the 1983 Marginal Lands legislation.<sup>183</sup>

In 1989, a more specific approval standard, initially developed in 1983 by the EFU Task Force and only applicable to non-farm dwellings in Marginal Land Counties, was applied to the non-farm uses allowed through a discretionary review.<sup>184</sup> This new standard required a demonstration that the proposed use will not force a significant change in or significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.<sup>185</sup>

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<sup>178</sup> OR. REV. STAT. § 215.213(1); *See generally* *Brentmar v. Jackson County*, 900 P.2d 1030 (Or. 1995).

<sup>179</sup> OR. REV. STAT. § 215.213(2) (1973).

<sup>180</sup> *See generally* *Brentmar v. Jackson County*, 900 P.2d 1030 (Or. 1995); *Zorn v. Marion County*, 19 Or. LUBA 54 (1990); *Kola Teepee, Inc. v. Marion County*, 17 Or. LUBA 910, 915, *aff’d* 99 Or.App. 481 (1989).

<sup>181</sup> Memorandum from EFU Task Force to JLCLU, *Recommendations on Amendments to EFU Statute* (ORS 215.203, *et. seq.*) (November 30, 1982). Serving on the Task Force were: Scott Aschom (Farm Bureau), Scott Parker (Clackamas County Counsel for AOC), Planning Directors Bob Martin (Jefferson County) and Doug McClain (Clackamas County), Richard Benner (1000 Friends of Oregon) and Ronald Eber (DLCD).

<sup>182</sup> *Id.*

<sup>183</sup> *Compare* Task Force Recommendations with Act of August 9, 1983, ch. 826, 1983 Or. Laws 1598.

<sup>184</sup> *Compare* the Task Force Recommendations with OR. REV. STAT. § 215.213(3) (1983), Act of July 27, 1989, ch. 861, 1989 Or. Laws 1576 and codified at OR. REV. STAT. § 215.296 (1989).

<sup>185</sup> OR. REV. STAT. § 215.296 (1989).

Beginning in 1992, LCDC adopted other approval standards that favored locating such discretionary uses on less productive or non-high-value farmlands, or not within three miles of a UGB.<sup>186</sup> Over time, counties also began to apply the standards in OR. REV. STAT. § 215.296 to the first category of *permitted* uses<sup>187</sup> and not only to the second category or *conditional discretionary* uses.<sup>188</sup> This made the EFU zone more restrictive than the state statute and these local EFU zones were initially upheld as lawful.<sup>189</sup> Later, this practice was challenged in a Jackson County case and was determined inconsistent with the enabling legislation.<sup>190</sup> Because counties could not adopt more restrictive review standards, the authority of LCDC to adopt rules requiring such standards was challenged.<sup>191</sup> However, LCDC's authority was upheld by the Oregon Supreme Court in *Lane County v. LCDC* where the Court concluded that a county's authority to allow non-farm uses on farmland under ORS chapter 215 was "subordinate to the statewide land use planning goals, including goal 3."<sup>192</sup>

Allowing some non-farm uses and dwellings is a safety valve to recognize that within farm zones there are areas that can accommodate rural uses supportive of the local farm community, or a dwelling on a small lot, without affecting an area's overall viability for farm production. Small lots with such non-farm uses and dwellings do not qualify for farm use tax assessment.<sup>193</sup> The non-farm development must be sited so as to minimize its impact on agriculture and thus protect the primary farming use within the zone. Despite these standards, there is concern about the cumulative long-term impact and appropriateness of allowing an increasing number of these uses, especially dwellings, in an active farming area.<sup>194</sup>

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<sup>186</sup> OR. ADMIN. R. 660-033-0120 and 0130 (1993).

<sup>187</sup> OR. REV. STAT. § 215.213(1) and 215.283(1) (2009).

<sup>188</sup> OR. REV. STAT. § 215.213(2) and 215.283(2) (2009).

<sup>189</sup> See generally *Zorn v. Marion County*, 19 Or. LUBA 54 (1990); *Kola Tepee, Inc. v. Marion County*, 17 Or. LUBA 910, 915, aff'd 99 Or.App. 481 (1989).

<sup>190</sup> See generally *Brentmar v. Jackson County*, 900 P.2d 1030 (Or. 1995).

<sup>191</sup> See generally *Lane County v. LCDC*, 942 P.2d 278 (Or. 1997).

<sup>192</sup> *Id.* at 286.

<sup>193</sup> OR. REV. STAT. § 308A.062 (2009); OR. REV. STAT. § 215.203 (2009); OR. REV. STAT. § 215.236 (2009).

<sup>194</sup> See generally 2001-2007 LCDC Farm Reports to the Legislature under OR. REV. STAT. § 197.065 (2009) available at [http://www.lcd.state.or.us/LCD/urbanrural.shtml#Farm\\_and\\_Forest\\_Reports](http://www.lcd.state.or.us/LCD/urbanrural.shtml#Farm_and_Forest_Reports) (last visited August 13, 2009). The first study to try to assess the impact of these uses is: C. VEKA, IMPACT OF DWELLINGS ON LAND USE IN FARM AND FOREST ZONES: THE CASE OF HOOD RIVER COUNTY, OREGON 1994-2005 1 (2008).

In an unprecedented move, the 2009 Legislature for the first time since 1973, took some very modest, if not inadequate, steps to update the statutory EFU zone in OR. REV. STAT. Chapter 215 with HB 3099. Besides eliminating two minor non-farm uses, the bill limited the approval of “public and private schools” consistent with recent Court interpretations and limited such schools to be “primarily for residents of the rural area in which the school is located.”<sup>195</sup> Further, the bill added the existing LCDC rule provisions that only permit golf courses on non-high-value farmland.<sup>196</sup>

### *E. Dwellings – Farm and Non-Farm*

The most controversial type of use subject to approval in an EFU zone is a residential dwelling. Oregon was settled on the promise of free land and the opportunity to establish an independent small farmstead.<sup>197</sup> Settlers came across the plains in pursuit of Jefferson’s dream to establish a nation state of small landowners in the Eden of the Willamette Valley.<sup>198</sup> At that time, those who settled on the state’s productive farmland were clearly farmer homesteaders.<sup>199</sup> With the advent of the automobile and cheap energy after World War II, many began to look for a small piece of land to live on and commute to town for work.<sup>200</sup> People who live in the country but are not part of the farm community may not appreciate or understand that farmland is not the tranquil open space landscape it appears to be but one that is actually an intensely managed working landscape. Distinguishing between residences to be occupied by a bona fide farmer as opposed to a rural resident has been the single most difficult technical and political challenge to public policy makers in Oregon for

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<sup>195</sup> Enrolled H.B. 3099 §§ 1-2, (2009). It eliminated the “breeding, kenneling and training of greyhounds for racing” (OR. REV. STAT. § 215.213(1)(L) & § 215.283(1)(j) (2007) and a preexisting “aerial fireworks display business” (OR. REV. STAT. 215.213(2)(w) & 215.283(2)(y) (2007) ). For schools *see* OR. REV. STAT. § 215.213(2)(x) & § 215.283(2)(z) (2009) and *Warburton v. Harney County*, 39 Or. LUBA 389, *aff’d*, 25 P.3d 978 (Or. App. 2001), *rev. denied*, 34 P.3d 1177 (Or. 2001).

<sup>196</sup> Enrolled H.B. 3099, §§ 1-2, (2009). *Compare* OR. REV. STAT. § 215.213/215.283(2)(f) (2009) *with* OR. ADMIN. R. 660-033-0120 (Table 1).

<sup>197</sup> *See generally* Donation Land Claim Act, Act of 1850, ch. 46, 9 Stat. 496 (1850). *See also* JERRY A. O’CALLAGHAN, MEMORANDUM OF THE CHAIRMAN SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, UNITED STATES SENATE, COMMITTEE PRINT, DISPOSITION OF THE PUBLIC DOMAIN IN OREGON, (1960) for a comprehensive history of non-Indian settlement in Oregon.

<sup>198</sup> *See* GIBSON, *supra* note 9.

<sup>199</sup> *Id.*

<sup>200</sup> *See generally* WILLIAM G. ROBBINS, LANDSCAPES OF CONFLICT: THE OREGON STORY, 1940-2000, 281 – 313 (University of Washington Press) (2004).



almost 50 years. Further, given our common history of settlement and notions of property rights, prohibiting someone from living on their own land is the proverbial third rail of land use politics.

Since 1963 the basic statutory standard for a farm dwelling has remained unchanged but its interpretation and implementation has varied widely throughout Oregon.<sup>201</sup> The statutory standard for a farm related dwelling requires that it be “customarily provided in conjunction with farm use,”<sup>202</sup> – i.e., farm dwellings are for farmers. Initially this provision was part of the definition of farm use in OR. REV. STAT. § 215.203 to show that such dwellings were permitted in an EFU zone.<sup>203</sup> No provision for any dwelling unrelated to farming (a non-farm dwelling) was authorized until 1973.<sup>204</sup> Throughout the 1960s, many counties permitted farm dwellings without any particular land use review as long as there was even a general connection between the occupants and any farming on the parcel.<sup>205</sup>

After the statutes for EFU zones were revised in 1973 to allow non-farm dwellings,<sup>206</sup> it became necessary to provide standards in order to distinguish clearly between farm and non-farm dwellings and to scrutinize more closely whether the proposed dwelling were actually to be used “in conjunction with farm use” on the subject parcel. The first attempt at this was when LCDC determined that Goal 3 required that a farm dwelling could be approved only if the existing parcel was deter-

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<sup>201</sup> See OR. REV. STAT. § 213.203(2)(1963); OR. REV. STAT. § 215.213(1)(e)(1973) re-numbered to OR. REV. STAT. § 215.213(1)(g) (1983) and added to OR. REV. STAT. § 215.283(1)(f) (1983).

<sup>202</sup> See OR. REV. STAT. § 213.203(2)(1963); OR. REV. STAT. § 215.213(1)(e)(1973) re-numbered to OR. REV. STAT. § 215.213(1)(g) (1983) and added to OR. REV. STAT. § 215.283(1)(f) (1983).

<sup>203</sup> OR. REV. STAT. § 215.203(2) (1963).

<sup>204</sup> Between September 13, 1967 and August 22, 1969, “the construction and use of dwellings” language was removed from the definition of farm use. The Legislature did not add farm dwellings to the non-farm use list in 215.213. In 1969, the Legislature approved an amendment to correct an error to again allow “the dwellings and other buildings customarily provided in conjunction with farm use” in an EFU zone once again. Act of June 12, 1967, ch. 386, 1967 Or. Laws 788; Act of June 3, 1969, ch. 258, 1969 Or. Laws 452 (H.B. 1279); OR. REV. STAT. § 215.213(6) (1969).

<sup>205</sup> Act of June 24, 1963, ch. 619, 1963 Or. Laws 1295; Act of August 22, 1973, ch. 503, 1973 Or. Laws 1047; See generally *Doughton v. Douglas County*, 728 P.2d 887 (Or. App. 1987), rev. den. 734 P.2d 354 (Or. 1987).

<sup>206</sup> Act of August 22, 1973, ch. 503, § 8, 1973 Or. Laws 1047, 1051 (S.B. 101).

mined to be “appropriate for the continuation of the existing commercial agricultural enterprise within the area.”<sup>207</sup>

During the 1970s, many counties required, with its LCDC acknowledgment, an applicant to prepare a farm management plan in order to demonstrate that the size of the parcel was appropriate for commercial farm use, and the connection between the occupants and the existing or proposed farm operation.<sup>208</sup> However, some counties required no review or determination of whether the proposed dwelling was “in conjunction with farm use”<sup>209</sup> while the use of farm plans led to many approvals based on a promise to farm that increased the number of dwellings in EFU zones with no connection to commercial agriculture.<sup>210</sup>

Because of concerns about these approvals from farmers and a citizen’s group, 1000 Friends of Oregon (“1000 Friends”)<sup>211</sup>, the Legislature required counties to report and provide copies of certain land use decisions made in the state’s EFU zones to the JLCLU in 1981.<sup>212</sup> At first, the JLCLU had these decisions reviewed by the Office of Legislative

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<sup>207</sup> See Memorandum from Hal Brauner, DLCD Director, to DLCD: *Common Questions about Goal 3*, Question # 9, (Aug. 30, 1977 as amended July 12, 1979); OR. ADMIN. R. 660-05-025(1) (1982 Edition, repealed Aug. 7, 1993).

<sup>208</sup> Under OR. REV. STAT. § 197.251 (2009), LCDC had “acknowledged” a number of county regulations dealing with farm dwellings as being consistent with the goals. Following acknowledgment and in the absence of a governing administrative rule, the acknowledged plan and regulations, rather than the Goals, became the standard for review of farm dwellings. Farm management plans under such acknowledged regulations, which did not assure protection of farmlands, were nonetheless affirmed. *Byrd v. Stringer*, 666 P.2d 1332 (Or. 1992). In 1986, LCDC adopted a rule to interpret OR. REV. STAT. § 215.283(1)(f) (1983) in OR. ADMIN. R. 660-05-030(4) (1986) in a manner to assure that a dwelling was used only with the “current employment” of land. However, LUBA’s application of that rule was successfully challenged as being overly restrictive in *Forster v. Polk County*, 839 P.2d 241 (Or. App. 1992).

<sup>209</sup> See generally *Doughton v. Douglas County*, 728 P.2d 887 (Or. App. 1987), *rev. denied*, 734 P.2d 354 (Or. 1987).

<sup>210</sup> See *infra* note 230.

<sup>211</sup> Richard Benner, Staff Attorney for 1000 Friends of Oregon, *Administration of Exclusive Farm Lands in Twelve Oregon Counties: A Study of County Application of State Standards to Protect Oregon Farmland*, (March 1981) (on file with authors). 1000 Friends of Oregon was founded in 1975 by Governor Tom McCall and Henry Richmond and was organized to monitor the work of LCDC and to ensure the full and complete implementation of S.B. 100 through appeals of local land use decisions, those of the LCDC and preparing reports, testimony and legislation. For the current activities of 1000 Friends visit their website at <http://www.friends.org/> (last visited June 9, 2009). Richard Benner eventually became the sixth Director of DLCD and served in that capacity from November 1991 until July of 2001.

<sup>212</sup> Act of August 24, 1981, ch. 748, § 21, 1981 Or. Laws 976, 986.

Counsel and DLCD.<sup>213</sup> Legislative Counsel and DLCD noted numerous problems with the findings and decisions being made and the DLCD recommended that the review standards for farm and non-farm dwellings could be improved by being made more precise.<sup>214</sup> 1000 Friends submitted another report that concluded that “counties are not applying state farmland protection standards as the Legislature and LCDC intend” and that was described as showing “a pattern of lawlessness” in the land use decisions reviewed.<sup>215</sup> In response to these criticisms, the 1983 Legislature made submittal of these “Farm” reports an ongoing requirement and they provide an excellent source of data about what has been approved in the EFU zones throughout Oregon since that time.<sup>216</sup>

In light of concerns about the continuing approval of dwellings in farm zones, the general nature of the applicable approval standards and continuous litigation, an attempt to revise the review standards for dwellings was made in 1983 as part of the “Marginal Lands Act.”<sup>217</sup> This act proposed to permit counties to designate some less productive land as “marginal” and ease development limitations in return for applying a stricter farm zone to the remaining lands zoned EFU.<sup>218</sup> However, when the Legislature decided to make the application of this Act optional, two EFU zones were created in OR. REV. STAT. chapter 215.<sup>219</sup> A revised OR. REV. STAT. § 215.213 became applicable to only those counties that decided to designate “marginal lands” while OR. REV. STAT. § 215.283 was created to apply to the non-marginal land counties.<sup>220</sup> Since only two

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<sup>213</sup> Memorandum from Arnie Braafladt, Legislative Counsel to Ted Hallock, Senator and Chair of the JLCLU (Mar. 22, 1982); Memorandum from James F. Ross, Director of DLCD to Ted Hallock, Senator and Chair of the JLCLU (Mar. 25, 1982).

<sup>214</sup> Memorandum from Arnie Braafladt, Legislative Counsel to Ted Hallock, Senator and Chair of the JLCLU (Mar. 22, 1982); Memorandum from James F. Ross, Director of DLCD to Ted Hallock, Senator and Chair of the JLCLU (Mar. 25, 1982).

<sup>215</sup> Report to JLCLU, prepared by Richard Benner, Staff Attorney for 1000 Friends of Oregon, *Farmland in Jeopardy: County Administration of Exclusive Farm Use Zoning* (Mar. 1982) (on file with authors); John Hayes, “*Lawless*” *Land-Use Decisions Criticized*, OREGONIAN, Feb. 26, 1982 (on file with authors).

<sup>216</sup> Act of August 9, 1983, ch. 826, § 13, 1983 Or. Laws 1598. Farm and Forest Reports from 1993 can be found at Oregon Department of Land Conservation and Development [http://www.lcd.state.or.us/LCD/urbanrural.shtml#Farm\\_and\\_Forest\\_Reports](http://www.lcd.state.or.us/LCD/urbanrural.shtml#Farm_and_Forest_Reports) (last visited June 10, 2009) and earlier reports are also available upon request from DLCD.

<sup>217</sup> Act of August 9, 1983, ch. 826, 1983 Or. Laws 1598; see *supra* notes 136-138.

<sup>218</sup> See *supra* note 136.

<sup>219</sup> *Id.*

<sup>220</sup> OR. REV. STAT. § 197.247 (1983); *Lane County v. LCDC*, 942 P.2d 278, 281 (Or. 1997). Only Lane and Washington counties chose to designate “marginal lands” and use the EFU provisions in OR. REV. STAT. § 215.213 (2009) regarding non-farm uses. The remaining 34 counties continue to use the provisions in OR. REV. STAT. § 215.283 (2009) for that purpose.

counties chose to adopt the provisions of the “Marginal Lands Act,” important revisions to the EFU provisions applicable to the approval of farm and non-farm dwellings were not applied on a statewide basis.<sup>221</sup>

The new farm dwelling standards in the Marginal Lands Act attempted to establish some more precise clear and objective standards that required that a new farm dwelling “be on a lot or parcel managed as part of a farm operation and not smaller” than the acknowledged minimum lot size or be at least 20 acres and have earned or be “capable” of meeting a modest income standard.<sup>222</sup>

In 1984, the Oregon Court of Appeals determined that the statutory language in OR. REV. STAT. § 215.213(1)(g) “in conjunction with farm use” meant that the parcel had to be “currently employed for farm use” before the dwelling could be approved.<sup>223</sup> The Court interpreted the enabling legislation that defines “farm use” to be land “currently employed” for farm use under OR. REV. STAT. § 215.203.<sup>224</sup> This was intended to ensure that some level of farming was occurring on the property before the dwelling was constructed, not merely proposed or promised.

In 1986, fueled by the ongoing concerns being expressed by 1000 Friends of Oregon about the continuing high number of farm dwelling approvals,<sup>225</sup> LCDC added to its Goal 3 rule the Oregon Supreme Court’s interpretation of “farm use” from *Capsey v. Department of Revenue*.<sup>226</sup> In *Capsey*, the Supreme Court cited a Tax Court case which held that “farm use” was not:

[T]he professional man’s fine residence in a filbert orchard, the city worker’s five suburban acres and a cow, the retired person’s 20 acres of marginal land on which a travel trailer constitutes the personal residence, *unless the day-to-day activities on the subject land are principally and patently directed to*

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<sup>221</sup> Marion County attempted to designate itself as a *marginal lands county* just before the legislation authorizing such designations expired, but was unsuccessful. *See generally* 1000 Friends v. Marion County, 27 Or. LUBA 303 (1994).

<sup>222</sup> OR. REV. STAT. § 215.213(1)(g) and § 215.213(2)(a) and (b) (1983). New standards for the approval of non farm dwellings are explained in section III F. of this paper. *See infra* notes 267-294 and accompanying text.

<sup>223</sup> *See generally* Matteo v. Polk County, 11 Or. LUBA 259, *aff’d without opinion*, 687 P.2d 820 (Or. App. 1984); Newcomer v. Clackamas County, 758 P.2d 369, *modified*, 64 P.2d 927 (Or. App. 1988).

<sup>224</sup> *See* cases cited *supra* note 223.

<sup>225</sup> Report by Richard P. Benner, Staff Attorney for 1000 Friends of Oregon to LCDC, Stafford Hansell, Chairman, Oregon’s Farm Lands Protection Program: Is It Working? (January 25, 1985) (on file with authors).

<sup>226</sup> OR. ADMIN. R. 660-05-030(4) (1986) (repealed August 7, 1993); 294 Or. 455, 657 P.2d 680 (1983).

*achieving a profit in money through the farm use of the land.*<sup>227</sup> (Emphasis added).

LCDC required that a new farm dwelling could not be approved on a parcel unless it complied with the Supreme Court decision in *Capsey*.<sup>228</sup>

However, LCDC's 1987 annual report to the Legislature regarding land use actions in EFU zones continued to note that the approval of many farm dwellings did not include the required findings or the determinations required by applicable case law or Goal 3.<sup>229</sup> LCDC expressed concern about "the continued high number of approvals of farm and non-farm dwellings, especially at a time when farming as a profession and a way of life is in economic trouble."<sup>230</sup> LCDC went on to find that "even where the required findings are being made, it is well established that the review standards for such decisions are not clear and objective and involve much discretion by the local decision-maker."<sup>231</sup> It also determined that "even in the marginal land counties it is not apparent whether the special EFU provisions are working any better."<sup>232</sup> Finally it concluded that "...the current pattern of approvals represents either a conscious or unconscious attempt to solve a locally perceived 'lot-of-record' problem regardless of state law or local acknowledged plans and land use regulations."<sup>233</sup>

At the same time concerns were being expressed about LCDC's *secondary* lands proposals,<sup>234</sup> DLCD made a special report to the JLCLU in 1988, that reiterated these findings and concluded:

Fifteen years since the Oregon Supreme Court's landmark *Fasano* decision,<sup>235</sup> counties are still failing to make findings, address all required stan-

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<sup>227</sup> *Capsey v. Department of Revenue*, 657 P.2d 680, 681 (Or. 1983). The quotation is taken from *Beddoe v. Dept. of Rev.*, 8 Or.Tax 186, 190-191 (Or. T.C. 1979).

<sup>228</sup> OR. ADMIN. R. 660-05-030(4) (1986) (repealed August 7, 1993).

<sup>229</sup> Letter from Stafford Hansell, Chairman, LCDC to Bill Bradbury, Senator and Chair of JLCLU (January 29, 1987) (on file with authors) (submitting the Commission's report on County EFU decisions).

<sup>230</sup> Letter from Stafford Hansell, Chairman, LCDC to Bill Bradbury, Senator and Chair of JLCLU (January 29, 1987) (on file with authors) (submitting the Commission's report on County EFU decisions); United States Department of Commerce, 1987 Census of Agriculture for Oregon, 7 (1987) (Table 1). For comparison, between 1982 and 1987 the USDA Census of Agriculture reported that the number of farms in Oregon declined by about 2000 while the number of 'commercial' farms remained constant as compared to the approval of at least 700 new 'farm' dwellings for this same time period.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> See *supra* notes 143-145.

<sup>235</sup> *Fasano v. Board of County Commissioners of Washington County*, 507 P.2d 23 (Or. 1973); see *supra* Part II.E for discussion.

dards, include evidence in the record to support their findings or adequately explain the basis of their decisions as required by law. These problems have been pointed out to the Legislature, the Committee and the Commission since the reporting began in 1982....<sup>236</sup>

DLCD concluded that “counties appear to operate on the unwritten assumption that every parcel of land is somehow entitled to a dwelling permit regardless of the applicable standards.”<sup>237</sup>

Then in 1990 as part of the funding for the *secondary lands pilot project*, the Legislature also directed DLCD to conduct an independent analysis of Oregon’s productive farm and forestlands to determine what actions or conditions may diminish the quality and quantity of these farm and forestlands.<sup>238</sup> The resulting *Farm and Forest Land Research Project* included three tasks completed in the spring of 1991.<sup>239</sup> The study concluded that “Oregon’s current system of land use planning is failing to provide adequate protection for farm and forest lands.”<sup>240</sup> The study showed that the large majority of the tracts on which new farm dwellings had been approved were not contributing very much to commercial agriculture.<sup>241</sup> Seventy-five percent of the dwellings approved were part of “farms” that grossed less than \$10,000 and about 37 percent earned noth-

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<sup>236</sup> Memorandum from James F. Ross, Director of DLCD to JLCLU, Siting of Dwellings on Resource Lands, 3 (February 8, 1988) (on file with authors).

<sup>237</sup> *Id.* at 5.

<sup>238</sup> See Act of July 20, 1989, ch. 710, § 3, 1987 Or. Laws 1110.

<sup>239</sup> These reports were: C. RUSSELL BEATON, PH.D. AND THOMAS H. HIBBARD, PH.D., FARM AND FOREST LAND RESEARCH PROJECT- TASK ONE: STATUS OF THE LAND RESOURCE BASE – LITERATURE AND REVIEW ANALYSIS, (WILLAMETTE UNIVERSITY, March 1991), PACIFIC MERIDIAN RESOURCE, TASK TWO: ANALYSIS OF THE RELATIONSHIP OF RESOURCE DWELLING AND PARTITION APPROVALS BETWEEN 1985-87 AND RESOURCE MANAGEMENT IN 1990 (May 1991) (on file with authors), and WILSON E. SCHMISSEUR, OREGON STATE UNIVERSITY AGRICULTURAL & RESOURCE ECONOMICS DEPARTMENT, DAVID CLEAVES, OREGON STATE UNIVERSITY FOREST RESOURCES DEPARTMENT AND HELEN BERG, OREGON STATE UNIVERSITY SURVEY RESEARCH CENTER, TASK THREE: SURVEY OF FARM AND FOREST OPERATORS ON CONFLICTS AND COMPLAINTS (April 1991) (on file with authors). All prepared for DLCD.

<sup>240</sup> See Letter from Craig Greenleaf, Acting Director of DLCD to the Honorable John Kitzhaber, President of the Senate and the Honorable Larry Campbell, Speaker of the House, submitting the Farm and Forest Research Project (June 7, 1991) (on file with the authors).

<sup>241</sup> DEP’T OF LAND CONSERVATION AND DEV., ANALYSIS AND RECOMMENDATIONS OF THE RESULTS AND CONCLUSIONS OF THE FARM & FOREST RESEARCH PROJECT (May 31, 1991) (on file with authors). United States Department of Commerce, 1992 Census of Agriculture for Oregon, 8 (1992) (Table 1). Compared with the 1300 new farm dwellings approved between 1987 and 1992 the USDA Census of Agriculture reported an increase of only about 400 “commercial” farms.



ing.<sup>242</sup> Parcels that earn less than \$10,000 are not commercial operations and contribute very little (less than two percent) to Oregon's agricultural economy.<sup>243</sup>

Based on this report, LCDC, in 1992, developed a standard that would be clear and objective and that could be easily and efficiently applied. At that time, it adopted a \$40,000 gross income test for parcels of high-value farmland<sup>244</sup> in addition to the existing rule standards based on the then-recent decisions in *Matteo v. Polk County*<sup>245</sup> and *Capsey v. Department of Revenue*.<sup>246</sup> After the passage of HB 3661, LCDC again applied the longstanding statutory standard through an administrative rule.<sup>247</sup>

Currently, the rule's gross income standards vary depending on whether the tract or farm operation on which the dwelling will be sited is "high value farmland," as defined by OR. REV. STAT. § 215.710 and OR. ADMIN. R. 660-033-0020(8).<sup>248</sup> High-value farmland is Oregon's very best farmland and comprises four to five million acres of the 15.5 million acres of land zoned EFU.<sup>249</sup> On high-value farmland, there is only one way to get a primary farm dwelling. The standard requires that the applicant demonstrate that the farm operation on which the dwelling will be located produced gross sales of at least \$80,000 in each of the past two years or in three of the past five years.<sup>250</sup>

On non-high-value farmland in Oregon (11 to 12 million acres),<sup>251</sup> there are three primary farm dwelling standards.<sup>252</sup> The first is a gross-income standard of \$40,000 or the median amount of gross income earned by commercial farms using the 1992 Census of Agriculture.<sup>253</sup> The census figures are usually higher than the \$40,000 figure, but in some counties that figure is less.<sup>254</sup> The second standard allows a dwelling on a parcel that contains at least 160 acres (320 acres if designated

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> OR. ADMIN. R. 660-033-0130(1) (1993).

<sup>245</sup> See generally *Matteo v. Polk County*, 11 Or. LUBA 259, *aff'd without opinion*, 687 P.2d 820 (Or. App. 1984); *Newcomer v. Clackamas County*, 758 P.2d 369, *modified*, 64 P.2d 927 (Or. App. 1988).

<sup>246</sup> *Capsey v. Department of Revenue*, 657 P.2d 680, (Or. 1983).

<sup>247</sup> OR. ADMIN. R. 660-033-0135 (1994).

<sup>248</sup> OR. ADMIN. R. 660-033-0135 (2009).

<sup>249</sup> DEP'T. OF LAND CONS. & DEV., GIS ZONING DATABASE.

<sup>250</sup> OR. ADMIN. R. 660-033-0135(7) (2009).

<sup>251</sup> See *supra* note 49.

<sup>252</sup> OR. ADMIN. R. 660-033-0135(1),(2) and (5) (2009).

<sup>253</sup> OR. ADMIN. R. 660-033-0135(5) (2009).

<sup>254</sup> These counties are Benton, Clackamas, Clatsop, Columbia, Crook, Curry, Deschutes, Douglas, Jackson, Josephine, Lane, Lincoln, Multnomah, and Union.



rangeland).<sup>255</sup> In this case, the parcel must only be found to be currently in farm use production.<sup>256</sup> The third standard is now optional and involves determining if the “potential gross sales” of the parcel is greater than that for surrounding farm parcels.<sup>257</sup> These clear and objective standards are much easier for citizens to understand and for local governments to administer than the original 1963 statutory standard that the dwelling is “customarily provided in conjunction with farm use.”

Since its adoption in 1994, these income requirements have been and remain very controversial but highly effective.<sup>258</sup> Before-and-after comparisons of approved development and the regional distribution of these approvals show significant improvements.<sup>259</sup> As noted earlier, farm dwelling approvals before 1992 stood in stark contrast to the declining number of farms in Oregon.<sup>260</sup> After 1992, the number of approvals per year went down and became more consistent with the data about the number of farms in the Census of Agriculture.<sup>261</sup> Also, over half the new farm dwellings are on non-high-value farmland outside the Willamette Valley or in conjunction with existing farm operations that generate the required gross farm income.<sup>262</sup>

There have been numerous Legislative attempts to overrule the income requirement as well as litigation challenging LCDC’s authority to adopt it.<sup>263</sup> The gross farm income standard rule was found to be a permissible interpretation of the statutory farm dwelling criteria<sup>264</sup> and LCDC’s rule was upheld by the Oregon Supreme Court.<sup>265</sup> The significance of this decision in upholding LCDC’s broad rulemaking authority cannot be overstated because the Court emphatically held “that LCDC did not ex-

<sup>255</sup> OR. ADMIN. R. 660-033-0135(1) (2009).

<sup>256</sup> *Id.*

<sup>257</sup> OR. ADMIN. R. 660-033-0135(2) (2009).

<sup>258</sup> For a complete explanation of these income standards *see* LCDC, REPORT ON EVALUATION OF INCOME CRITERIA FOR FARM DWELLINGS: CHAPTER 693, Or. Laws 1999 (S.B. 454) (December 29, 2000) submitted by LCDC to Senate President Brady Adams, Senate President-Elect Gene Derfler, Speaker of the House Lynn Snodgrass and Speaker of the House-Elect Mark Simmons.

<sup>259</sup> DEP’T OF LAND CONSERVATION AND DEV., *supra* notes 216, 230, and 241.

<sup>260</sup> Letter from Stafford Hansell, Chairman, LCDC to Bill Bradbury, Senator and Chair of JLCLU (January 29, 1987) (on file with authors) submitting the Commission’s report on County EFU decisions.

<sup>261</sup> DEP’T OF LAND CONSERVATION AND DEV., *supra* notes 216, 230, and 241.

<sup>262</sup> *Id.*

<sup>263</sup> *Nichols v. Clackamas County*, 932 P.2d 1185, 1188 (Or. App. 1997) *rev. denied*, 952 P.2d 60 (Or. 1997); *Lane County v. LCDC*, 942 P.2d 278 (Or. 1997).

<sup>264</sup> *Nichols v. Clackamas County*, 932 P.2d 1185, 1190 (Or. App. 1997) *rev. denied*, 952 P.2d 60 (Or. 1997).

<sup>265</sup> *Lane County v. LCDC*, 942 P.2d 278 (Or. 1997).

ceed the scope of its authority in any respect argued by the county when it promulgated regulations imposing additional restrictions on land classified as high value farmland, even if those regulations have the effect of prohibiting uses otherwise permissible under the applicable statute.”<sup>266</sup> As a result, legislative attempts to overturn the rule have been defeated.

#### *F. Non-farm Dwellings*<sup>267</sup>

In 1973, Senate Bill 101 specifically authorized “single family residential dwellings not provided in conjunction with farm use,” commonly called *non-farm dwellings*.<sup>268</sup> The principal sponsor of SB 101, Senator Hector MacPherson, stated that the purpose of this provision was not “to open the exclusive farm use zone up to subdivisions” but rather to provide “a little escape valve here whereby we can allow a small amount of single family residential dwelling within an exclusive farm use zone.”<sup>269</sup>

The initial review standards for non-farm dwellings required a determination that the dwelling:

- 1) Is “compatible with farm uses” and “consistent with the intent and purposes” in OR. REV. STAT. § 215.243;<sup>270</sup>
- 2) Will not “interfere seriously with accepted farming practices on adjacent lands devoted to farm use;”<sup>271</sup>
- 3) “Does not materially alter the stability of the overall land use pattern in the area;”<sup>272</sup>
- 4) “Is situated on generally unsuitable land for the production of farm crops and livestock,” based on certain considerations; and<sup>273</sup>
- 5) Complies with any other conditions the county determines are needed.<sup>274</sup>

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<sup>266</sup> *Id.* at 285.

<sup>267</sup> This section will focus on the approval standards for non-farm dwellings while an analysis of land divisions for such dwellings will be covered in the next section.

<sup>268</sup> OR. REV. STAT. § 215.213(3) (1973).

<sup>269</sup> Audio Tape 10, side 1: Testimony of Hector MacPherson, Senator to Oregon Senate Revenue Committee 57th Session (February 7, 1973) (on file with Oregon State Archives).

<sup>270</sup> OR. REV. STAT. § 215.213(3) (1973).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

These standards remained relatively unchanged until the passage of HB 3661 in 1993.<sup>275</sup> Until then, the standards had been the subject of numerous court interpretations.<sup>276</sup>

Some attempt to revise these standards was made in 1983 as part of the “Marginal Lands Act.”<sup>277</sup> However, when the Oregon Legislature decided to make the application of this legislation optional, the new non-farm dwelling standards proposed at 215.213(3) were not applied to most counties and thus remained very general and subject to local interpretation and litigation with Court interpretations left to be applied by counties case-by-case, if at all.<sup>278</sup>

One of the most far reaching interpretations came in 1992. *Smith v. Clackamas County*, 313 Or. 519 (1992),<sup>279</sup> was a catalyst that led the Legislature to once again revisit the EFU zoning statutes and the provisions for non-farm dwellings.<sup>280</sup> This decision held that, when determining whether land is “generally unsuitable for the production of farm crops and livestock,” the entire parcel or tract must be evaluated rather than just a portion thereof.<sup>281</sup> Up until this decision, it was the common practice to identify only a portion of the parcel or tract as “generally unsuitable.”<sup>282</sup>

HB 3661 (1993) reversed this interpretation and returned the law to the previous practice by explicitly allowing the dwelling to be situated on a

<sup>275</sup> Compare OR. REV. STAT. § 215.213(3) (1973) and § 215.283(3) (1991) with § 215.284 (1993). In 1981, counties were required to disqualify the entire parcel on which the non-farm dwelling was to be situated from any farm or forest special assessments and all back taxes paid prior to the final approval of the dwelling under OR. REV. STAT. § 215.236. See Letter from Ted Barbera, Assistant Attorney General, Oregon Department of Justice to Gary Wright, Oregon Department of Revenue (August 11, 1994) (on file with authors) (re: “*Interpretation of ORS 215.236*”, DOJ file 150-303-4TX117-94). This statute also applies to the partition of an existing farm dwelling and its reclassification to a non farm dwelling. See Letter from the Department of Justice to Tony Van Vliet, Representative (December 24, 1987) (on file with authors) (Opinion OP-6144).

<sup>276</sup> Important examples include *Smith v. Clackamas County*, 836 P.2d 716 (Or. 1992); *Hearne v. Baker County*, 741 P.2d 921 (Or. App. 1987); *Cherry Lane v. Jackson County*, 733 P.2d 488 (Or. App. 1987); *Rutherford v. Armstrong*, 572 P.2d 1331 (Or. App. 1977); *Sweeten v. Clackamas County*, 17 Or LUBA 1234 (1989).

<sup>277</sup> Act of August 9, 1983, ch. 826, 1983 Or. Laws 1598; see *supra* notes 181-183 and accompanying text.

<sup>278</sup> Act of August 9, 1983, ch. 826, 1983 Or. Laws 1598 (codified at OR. REV. STAT. § 215.283(3)(1983)).

<sup>279</sup> See generally *Smith v. Clackamas County*, 836 P.2d 716 (Or. 1992).

<sup>280</sup> Act of September 8, 1993, ch. 792, § 14, 1993 Or. Laws 2438, 2444 (codified at OR. REV. STAT. § 215.284(2) and (3) (1993)).

<sup>281</sup> *Smith v. Clackamas County*, 836 P.2d 716 (Or. 1992).

<sup>282</sup> *Id.*

“portion” of the parcel that is “generally unsuitable.”<sup>283</sup> HB 3661 also incorporated many of the EFU revisions adopted in 1983 as part of the Marginal Lands Act and established different regionally based standards for non-farm dwellings inside and outside the Willamette Valley.<sup>284</sup> Specifically, in the Willamette Valley, the bill defined a parcel as “generally unsuitable” if it contained predominantly Class IV to VIII soils and also prohibited the creation of any new parcels for such dwellings.<sup>285</sup> Outside the Willamette Valley, the approval standards first adopted in 1973 with respect to “compatibility” and “interference” were amended to use those adopted in 1983 into OR. REV. STAT. § 215.296.<sup>286</sup> Otherwise, outside the Willamette Valley, the standards for non-farm dwellings remained essentially the same as those first adopted in 1973.<sup>287</sup>

As with the effect of LCDC’s rule changes in 1994 on the approval of farm dwellings, the effect of the changes made by HB 3661 to non-farm dwelling approval criteria were very effective. Although the annual number of approved non-farm dwellings only declined slightly, the location of the approvals shifted dramatically.<sup>288</sup> Before 1992, the approvals were evenly distributed across the state even though the quality of farmland varied widely.<sup>289</sup> After 1992, the annual approvals dropped from 35 percent in the Willamette Valley to only seven percent.<sup>290</sup> Thus, the preponderance of non-farm dwellings are now being approved on lower quality lands in eastern or southwestern Oregon.<sup>291</sup> The vast majority of farm dwellings and partitions are for large parcels (greater than 80 acres) while non-farm type dwellings and partitions are for small parcels (less than 10 acres).<sup>292</sup>

Subsequent LCDC rule changes<sup>293</sup> incorporated the statutory changes and were consistent with these statutory directions and the Oregon Court of Appeals observation that non-farm dwellings are exceptional and, by nature, should be difficult to obtain.<sup>294</sup>

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<sup>283</sup> OR. REV. STAT. § 215.284(2) and (3) (1993).

<sup>284</sup> OR. REV. STAT. § 215.284 (1993).

<sup>285</sup> OR. REV. STAT. § 215.284(1) (1993) and OR. REV. STAT. § 215.263(4) (1993).

<sup>286</sup> OR. REV. STAT. § 215.284(2) and (3) (1993).

<sup>287</sup> Compare OR. REV. STAT. § 215.213(3) (1973) with 215.284(2) and (3) (1993).

<sup>288</sup> See reports cited *supra* note 216.

<sup>289</sup> See reports cited *supra* note 216.

<sup>290</sup> See reports cited *supra* note 216.

<sup>291</sup> See reports cited *supra* note 216.

<sup>292</sup> See reports cited *supra* note 216.

<sup>293</sup> OR. ADMIN. R. 660-033-0130(4) (2009).

<sup>294</sup> See *Cherry Lane v. Jackson County*, 733 P.2d 488, 490 n. 3 (Or. App. 1987) Where the court observed:

*G. Land Divisions and Minimum Lot Sizes*

One of the most difficult problems in protecting agricultural land is how to control the continual *entropic* division of farmland into smaller and smaller parcels that become less useable for farming and more attractive for residential use. What standards should be applied to land divisions and on what basis should a minimum lot size be established?

Before 1973, there was no statewide policy or standard regarding the division of land in an EFU zone.<sup>295</sup> Subdivision and partitioning laws were not comprehensive.<sup>296</sup> In 1973, the Legislature adopted the Agricultural Land Use Policy with the passage of SB 101, which placed an emphasis on protecting agricultural land “in large blocks” but did not make a distinction between land divisions for farm or non-farm purposes.<sup>297</sup> It only required that a county review and approve all divisions that resulted in parcels less than 10 acres, but left optional the review of new parcels 10 acres or larger.<sup>298</sup> To approve new parcels containing less than 10 acres, or larger, a county was required to determine that the land divisions were consistent with the Oregon Agricultural Land Use Policy.<sup>299</sup>

In 1975, Goal 3 established an additional land division standard applicable to all land divisions in an EFU zone – not only to those smaller than 10 acres under OR. REV. STAT. § 215.263.<sup>300</sup> It required that all

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“An EFU zone is designed to preserve the limited amount of agricultural land to the maximum extent possible. It constitutes a substantial limitation on other uses of rural land. See ORS 215.243. . . In order to achieve this purpose, the legislature has imposed substantial restrictions on the construction of non-farm dwellings in EFU zones. See ORS 215.213(3); ORS 215.283(3). The clear intent is that non-farm dwellings be the exception and that approval for them be difficult to obtain.”

<sup>295</sup> OR. REV. STAT. § 215.263 (1973) (sets the standards for land divisions in EFU zones and was not adopted until 1973 by Act of Aug. 22, 1973, ch. 503, 1973 Or. Laws 1047 (S.B. 101)).

<sup>296</sup> See generally Steven Hawes, *Replating the Subdivision Laws*, 10 WILLAMETTE L. REV. 394 (1974).

<sup>297</sup> Act of Aug. 22, 1973, ch. 503, § 1, 1973 Or. Laws 1047. (this provision is now found in OR. REV. STAT. § 215.243(2) (2009)).

<sup>298</sup> OR. REV. STAT. § 215.263 (1973). (this statute only permits the partition and not the subdivision of land). See 1000 Friends of Oregon v. Marion County, 27 Or. LUBA 303 (1994). In Oregon, a subdivision creates four or more lots in a calendar year and a partition creates 1 to 3 parcels of land in a calendar year. (OR. REV. STAT. Ch. 92 (2009)).

<sup>299</sup> OR. REV. STAT. § 215.263 (1973). See 1000 Friends of Oregon v. Marion County, 27 Or. LUBA 303 (1994).

<sup>300</sup> Memorandum from Hal Brauner, DLCD Director to DLCD: *Common Questions about Goal 3 Questions 7-11*, (Aug. 30, 1977 as amended July 12, 1979) (on file with authors). This policy paper was later incorporated into OR. ADMIN. R. 660 divisions 5 (1982) and 33 (1993).

divisions of land or minimum lot sizes be “appropriate for the continuation of the existing commercial agricultural enterprise” in the area.<sup>301</sup> A statewide minimum was not used because farm acreage needs varied from large dry land wheat ranches to small intensive farm operations.<sup>302</sup> The Goal 3 land division standard applied to the creation of new parcels to prevent agricultural land from being divided into small units of land that would not contribute to the local commercial agricultural enterprise.<sup>303</sup>

The importance of this land division standard was that it required a distinction between farm and non-farm development and thus the application of different and more appropriate standards to each. Agricultural land was preserved to protect Oregon’s largest industry, commercial agriculture – rather than to allow hobby farms and rural home sites.

In 1981, OR. REV. STAT. § 215.263 was amended to require that all land divisions be reviewed for consistency with the Oregon Agricultural Land Use Policy in OR. REV. STAT. § 215.243<sup>304</sup> and in 1982, LCDC adopted an administrative rule to further implement the Goal 3 land division standard.<sup>305</sup> OR. REV. STAT. § 215.263 was amended again in 1983 to distinguish between and set separate standards for farm divisions by incorporating the Goal 3 land division standard just discussed, establishing a standard for the other permitted non-farm uses except dwellings and not allowing divisions for a non-farm dwelling until the dwelling was first approved.<sup>306</sup>

However, litigation increased over county implementation of the general and discretionary Goal 3 standard for land divisions.<sup>307</sup> At the same time 1000 Friends was expressing concerns about too many farm and non-farm dwellings being approved they also were concerned about the approval of smaller and smaller “farm” parcels being approved.<sup>308</sup>

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<sup>301</sup> See OR. ADMIN. R. 660-015-0000(3) (1975) (amended 1993, 1995) (now in OR. REV. STAT. § 215.263(2)(a) (2009)).

<sup>302</sup> See *supra* note 300 Question 7 and accompanying text.

<sup>303</sup> *Id.*

<sup>304</sup> Act of Aug. 24, 1981, ch. 748, § 48, 1981 Or. Laws 976, 997.

<sup>305</sup> OR. ADMIN. R. 660-05-015 and 020 (1982) (effective July 21, 1982, amended June 7, 1986, and repealed Aug. 7, 1993).

<sup>306</sup> See OR. REV. STAT. §§ 215.263(2), (3) and (4) (1983).

<sup>307</sup> See generally *Meeker v. Clatsop County*, 601 P.2d 804 (Or. 1979); *Goracke v. Benton County*, 703 P.2d 1000 (Or. App. 1985) *rev. denied*, 710 P.2d 147 (Or. 1985); *Goracke v. Benton County*, 683 P.2d 106, (Or. App. 1984); *Goracke v. Benton County*, 12 Or. LUBA 128 (1984); *Goracke v. Benton County*, 13 Or. LUBA 146 (1985); *Goracke v. Benton County*, 8 Or. LUBA 128, (1982); *Kenagy v. Benton County*, 6 Or. LUBA 93 (1982); *Thede v. Polk County*, 3 Or. LUBA 336 (1981).

<sup>308</sup> See reports cited *supra* notes 211, 215, and 225.

After a review of the land use statutes and rules by LCDC in 1990-1991 found that smaller parcels and higher density “increased conflicts between commercial farm operations and nearby non-farm residents,”<sup>309</sup> the legislature, in 1993, established a statewide minimum lot size for farm related partitions of 80 acres and for rangeland of 160 acres in HB 3661.<sup>310</sup> Smaller parcel sizes may be approved by LCDC if the county can demonstrate that the smaller size promotes “commercial scale” farm operations.<sup>311</sup>

No additional changes to the standards for the creation of parcels for non-farm dwellings were made until 2001. These new standards for the creation of new parcels for non-farm dwellings were adopted by the 2001 Legislature through amendments to OR. REV. STAT. § 215.263<sup>312</sup> in response to appellate court decisions in *Dorvinen v. Crook County*, 957 P.2d 180 (1998),<sup>313</sup> and *Friends of Douglas County v. Douglas County*.<sup>314</sup>

In *Dorvinen*, LUBA determined (and the Court of Appeals affirmed) that any existing parcel smaller than the statutory minimum lot size could not be further divided for a non-farm dwelling.<sup>315</sup> One non-farm dwelling could be allowed on an existing eligible parcel larger than the established minimum lot size but new nonconforming parcels less than the minimum could not be created.<sup>316</sup> In the Douglas County decision, LUBA held that both parcels (the non-farm parcel and parent) had to be larger than the minimum lot size.<sup>317</sup> Although there are many arguments for and against this land use policy, the statute was not clear and this interpretation by LUBA was in conflict with the accepted practice used

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<sup>309</sup> DEP’T OF LAND CONSERVATION AND DEV., *supra* note 241 at 8.

<sup>310</sup> Act of September 8, 1993, ch. 792, § 7, 1993 Or. Laws 2438, 2442 (current version at OR. REV. STAT. § 215.780 (2009)).

<sup>311</sup> OR. REV. STAT. § 215.780(2) (2009). Such “go-below” minimums have been approved in Deschutes, Douglas, Lane, Polk, Umatilla, Wasco and Yamhill counties. For cases involving these provisions, *see generally* DLCD v. Douglas County, 28 Or. LUBA 242 (1994); Thompson v. LCDC, 204 P.3d 808 (Or. App. 2009); 1000 Friends v. LCDC (Deschutes County), 934 P.2d 601 (Or. App. 1997) *rev. denied*, 952 P.2d 62 (Or. 1998); 1000 Friends v. LCDC, 912 P.2d 919 (Or. App. 1996), *rev. denied*, 916 P.2d 312 (Or. 1996); OIA and 1000 Friends v. LCDC, 854 P.2d 1010 (Or. App. 1993), *rev. denied*, 867 P.2d 1384 (Or. 1993); Juvenat v. Douglas County, LUBA No. 2008-197 (2008); Friends of Umatilla County v. Umatilla County, LUBA No. 2008-96 (2008); Thompson v. Umatilla County, 54 Or LUBA 531 (2007); Friends of Umatilla County v. Umatilla County, 55 Or LUBA 330 (2007).

<sup>312</sup> Act of January 2, 2001, ch. 704, § 3, 2001 Or. Laws 1822.

<sup>313</sup> *Dorvinen v. Crook County*, 957 P.2d 180 (Or. App. 1998).

<sup>314</sup> *Friends of Douglas County v. Douglas County*, 39 Or. LUBA 156, 172 (2000).

<sup>315</sup> *See generally* *Dorvinen v. Crook County*, 957 P.2d 180 (Or. App. 1998).

<sup>316</sup> *Id.*

<sup>317</sup> *Friends of Douglas County v. Douglas County*, 39 Or. LUBA 156, 172 (2000).



by counties and thus resulted in Legislative changes to return the law to the accepted practice in place before these two decisions.

In 2001, HB 3326 codified part of the *Dorvinen* decision, allowing up to two new parcels for non-farm dwellings smaller than the minimum as long as the remaining parent parcel is larger than the applicable minimum parcel size.<sup>318</sup> A parcel smaller than the minimum also may be divided for non-farm dwellings if both new parcels meet clear and objective standards establishing that both new parcels are not suitable for farm or forest use.<sup>319</sup> The trade-off for allowing these partitions is a new restriction that any parcel created after July 1, 2001 is not eligible to be further partitioned for a non-farm dwelling.<sup>320</sup> Together with the existing provisions applicable to the approval of non-farm dwellings discussed in the previous section, HB 3326 returned the provisions related to non-farm parcels to what was intended by SB 101 in 1973.

#### *H. Containing Urban and Rural Development*

Oregon has adopted strong land use policies to contain urban and rural development that support its efforts to protect agricultural land. If development is to be effectively limited on agricultural land, it must be accommodated and encouraged elsewhere. Oregon's planning program puts a great emphasis on meeting future housing and development needs in urban areas, lands already committed to rural development or on non-resource lands.

Statewide Goal 14, "Urbanization," prohibits urban uses outside an UGB.<sup>321</sup> Every city is required to establish an UGB that includes enough land to satisfy the community's housing, commercial, industrial and other urban land needs for 20 years.<sup>322</sup> Goal 14 encourages efficient use of urban land in order to minimize sprawl and promote livable communities.<sup>323</sup> State law sets a priority scheme for expansions of UGBs; more productive farm and forest lands are the lowest priority for inclusion and cities are therefore discouraged from bringing these lands inside the UGB until other options are exhausted.<sup>324</sup> The state's housing goal, Goal

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<sup>318</sup> See Act of January 2, 2001, ch. 704, 2001 Or. Laws 1822 (current version at OR. REV. STAT. § 215.263(4)(a) and (5)(a) (2009)).

<sup>319</sup> OR. REV. STAT. § 215.263 (4)(b) and (5)(b) (2001).

<sup>320</sup> OR. REV. STAT. § 215.263 (4) and (5) (2001).

<sup>321</sup> See generally *1000 Friends of Oregon v. LCDCC (Curry County)*, 724 P.2d 268 (Or. 1986); *1000 Friends v. LCDCC*, 642 P.2d 1158 (Or. 1982) (urban growth boundary does not automatically include all land within city).

<sup>322</sup> See *supra* note 6 and accompanying text.

<sup>323</sup> See *supra* note 6 and accompanying text.

<sup>324</sup> OR. REV. STAT. § 197.298 (2009).

10, requires communities to meet all their housing needs, particularly those for affordable and multifamily housing types, by adopting clear and objective approval standards for needed housing and by planning and zoning adequate buildable land for such development.<sup>325</sup>

Statewide Goal 11, “Public Facilities and Services,” and Goal 12, “Transportation,” are underappreciated contributors to urban containment and farmland protection.<sup>326</sup> These goals, and their implementing rules, require cities with populations exceeding 2500 to plan efficient extension of water and sewer systems and street networks, directing growth to appropriate urban areas.<sup>327</sup> Perhaps more important, urban facilities such as sewer service and city streets are prohibited outside UGBs, reducing the growth-inducing influence of expensive public works projects on resource lands.

These land use policies have also been effective. UGBs have protected farmland. Since 1987, only 33 percent of the land added to UGBs was zoned EFU (14, 840 acres), or less than one percent of all the land zoned EFU (15.5 million acres).<sup>328</sup> The total acreage of all lands added to UGBs statewide over a 15 year period amounts to about a two-percent increase in the total land area within UGBs (782,000 acres).<sup>329</sup> Fewer options to expansion onto farmland will be available to cities in the future, however, these statistics will likely change over time.

Between 1992 and 1997, 71 percent of all agricultural lands converted to urban and built-up lands occurred within UGBs and rural development zones as planned for in acknowledged comprehensive plans.<sup>330</sup> Only 29 percent of the conversion occurred within farm zones as a result of the non-farm uses allowed in EFU zones.<sup>331</sup>

Rural development (industrial, commercial, and residential outside a UGB), has also been restricted to existing unincorporated communities and centers, non-resource lands or land where development is recognized

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<sup>325</sup> OR. ADMIN. R. 660, Div. 07 and 08 (2009); OR. REV. STAT. § 197.307 (2009).

<sup>326</sup> These goals are respectively found at OR. ADMIN. R. 660-015-0000 (11) and (12) (2009).

<sup>327</sup> *Id.*; OR. ADMIN. R. 660, Div. 011 and 012 (2009).

<sup>328</sup> OR. LAND CONSERVATION AND DEV. COMM’N., APPROVED 2007 FARM REPORT Table N (2007); DEP’T. OF LAND CONS. & DEV., GIS ZONING DATABASE.

<sup>329</sup> OR. LAND CONSERVATION AND DEV. COMM’N., APPROVED 2007 FARM REPORT Table N (2007); DEP’T. OF LAND CONS. & DEV., GIS ZONING DATABASE. Such an approach is consistent with state policy, which directs that farm and forest land be the last alternative to additions to urban growth boundaries. OR. REV. STAT. § 197.298 (2009).

<sup>330</sup> “Resource Lands Converted to Urban Lands,” 1997 National Resource Inventory Results (Revised December 2000). Special analysis and comparison of DEP’T. OF LAND CONS. & DEV., GIS ZONING DATABASE with NRI data for Oregon.

<sup>331</sup> See *supra* note 330 and accompanying text.

through an *exception* to the goals, i.e. land already developed or committed to such use or for which there are special reasons for the location of the use in a rural area.<sup>332</sup> Currently, there are approximately 782,000 acres inside all of Oregon's UGBs while statewide approximately 890,000 acres are now designated for rural residential, commercial or industrial uses (more than all the land inside UGBs).<sup>333</sup> About 200,000 acres are so designated in the highly productive Willamette Valley.<sup>334</sup>

An exception is a limited process available to designate land for rural development outside UGBs.<sup>335</sup> To do this, the exception must set forth the reasons why Goals 3 and 4 should not apply and the proposed use should be allowed, including the amount of land needed and why the use requires a location on resource land.<sup>336</sup> Alternatively, the LCDC Unincorporated Communities Rule allows for limited development within areas already committed to urban or quasi-urban uses.<sup>337</sup>

For rural residential development, the reasons used to justify a new area for such use cannot be based on market demand for housing, assumed continuation of past urban and rural population distributions, or housing types and cost characteristics.<sup>338</sup> A county must show why, based on the economic analysis in the plan, there are reasons for the type and density of housing planned that requires a particular location on resource lands.<sup>339</sup> A jurisdiction could support an exception for rural residential development, for instance, by demonstrating that the rural location of the proposed residential development is necessary to satisfy the need for housing generated by existing or planned rural industrial, commercial, or other economic activity in the area.<sup>340</sup>

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<sup>332</sup> OR. REV. STAT. § 197.732 (2009), OR. ADMIN. R. 660 division 4 (2009); *see generally* Memorandum from Pat Amedeo, Natural Resource Advisor to Victor Atiyeh, Governor, to John Kitzhaber, Senator and Chairman, and Members of the Senate Committee on Environment and Energy (May 27, 1983) (on file with authors) (regarding proposed revisions to the exceptions process and cited as authority in *1000 Friends v. LCDC*, 688 P.2d 103, 104-106 (Or. App. 1984)).

<sup>333</sup> DEP'T. OF LAND CONS. & DEV., GIS ZONING DATABASE.

<sup>334</sup> *Id.*

<sup>335</sup> *See* sources cited *supra* note 332.

<sup>336</sup> OR. ADMIN. R. 660-04-020 and 022 (2009). *See also* *VinCEP v. Yamhill County*, 171 P.3d 368, 374, (Or. App. 2007).

<sup>337</sup> OR. ADMIN. R. 660, Div. 22 (2009).

<sup>338</sup> OR. ADMIN. R. 660-04-022(2) (2009).

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* This approach was first articulated by the Oregon Court of Appeals, which stated, "[a] market demand for rural residential development, however, does not constitute a 'need' for it . . . Goal 3 was enacted to preserve agricultural land from encroachment by urban and suburban sprawl by subordinating the free play of the marketplace to broader public policy objectives. Land is not excepted from the agricultural goal merely

### *I. Other Complementary Tax and Regulatory Policies*

Oregon also has some other laws to encourage farming that complement its land use program, some of which are common to other states and a few of which are unique to Oregon. The first is a legal prohibition on any state agency or local government from adopting a rule or ordinance that would restrict or regulate “accepted farming practices” outside an UGB on lands zoned EFU or marginal lands.<sup>341</sup> This restriction does not limit the lawful exercise of any governing body’s power to protect the health, safety, and welfare of its citizens.<sup>342</sup> These are farm areas, not residential zones. Oregon also requires that all dwelling approvals record a deed restriction prohibiting the landowner from pursuing a court action to restrict accepted farm or forest practices.<sup>343</sup>

Oregon has also adopted some limitation on a farmer’s nuisance liability for generally accepted farming practices. The 1981 Oregon Legislature passed a “right to farm” law (revised in 1993) to provide some limitation on a farmer’s nuisance liability for regular farming practices.<sup>344</sup> This law precludes local governments and special districts from adopting or administering any laws that make a farm practice a nuisance or that provides for the abatement of a farm practice.<sup>345</sup> This protection is not limited, however, only to those lands zoned EFU.<sup>346</sup>

Finally as explained in Section II, Oregon has long provided certain tax benefits to property owners who farm. Land zoned EFU and farmed is appraised at its farm use value for property tax purposes.<sup>347</sup> As already noted, between 1974 and 2004, owners of farmland received property tax reductions of over \$3.8 billion dollars.<sup>348</sup> In addition, these lands are also exempt from certain special district and rural service assessments (i.e., sanitary and water, etc.).<sup>349</sup>

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because somebody wants to buy it for a house.” *Still v. Marion County*, 600 P.2d 433, 437 (Or. App. 1980).

<sup>341</sup> OR. REV. STAT. § 215.253 (2009); Act of August 22, 1973, ch. 503, § 8, 1973 Or. Laws 1047, 1051. Thus zoning regulations in EFU zones cannot restrict accepted farming activities by limiting when tractors can operate or to limit noise or dust.

<sup>342</sup> OR. REV. STAT. § 215.253 (2009); Act of August 22, 1973, ch. 503, § 8, 1973 Or. Laws 1047, 1051.

<sup>343</sup> OR. REV. STAT. § 215.293 (2009); Act of August 9, 1983, ch. 826, § 11, 1983 Or. Laws 1598, 1603.

<sup>344</sup> See OR. REV. STAT. §§ 30.390 - 30.947 (2009).

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> See *supra* note 2.

<sup>348</sup> RICHMOND, ET AL., *supra* note 14.

<sup>349</sup> See OR. REV. STAT. § 308A.128 (2009).

This is a significant difference between Oregon's agricultural land protection program and those of other states. Although most states have voluntary farm use tax assessment programs,<sup>350</sup> Oregon realized in the early 1970s, as did others across the nation, that tax incentives alone would not protect farmland and was one of the few states to directly link comprehensive planning and zoning with its farm-use tax assessment program.<sup>351</sup>

This link between zoning and special tax treatment is essential. It provides a balance between the public and private interests in the use of agricultural lands. The preferential tax treatment is extended in order to aid the farmer and help keep the agricultural land in production. The zoning restrictions on the non-farm use of agricultural land assure the taxpaying public that the program's objective is being met: protection of agricultural lands.<sup>352</sup>

However, these provisions have not been sufficient in and of themselves to assist agriculture. Zoning land for farm use no more creates a farm than zoning land for industry creates a factory. The objective of Goal 3 and these other provisions has been to protect commercial agriculture. Oregon's planning program primarily involves statewide policymaking implemented by local regulations. As already explained, some tax policies have been coordinated with the land use system, but Oregon has not fully availed itself of other planning techniques that can complement its regulatory land use system. They include the purchase or transfer of development rights (PDRs/TDRs), conservation easements, land

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<sup>350</sup> COUNCIL ON ENVIRONMENTAL QUALITY, UNTAXING OPEN SPACE: AN EVALUATION OF THE EFFECTIVENESS OF DIFFERENTIAL ASSESSMENT OF FARMS AND OPEN SPACE, TABLE 1: PROVISIONS OF STATE DIFFERENTIAL ASSESSMENT LAWS, EXECUTIVE SUMMARY, USGPO (April 1976) (on file with authors) Compare those states that grant preferential or deferred taxation with those that require zoning in order to qualify. (the authors note that the table is not accurate with respect to Oregon's zoning requirement in order to qualify for farm use tax assessment).

<sup>351</sup> *Id.* (preface) The Report concluded:

[D]ifferential assessment laws in general work well to reduce the tax burden on farmers. Acting alone, however, they are not very effective in preserving current uses. It is only when such laws are combined with other effective land-use mechanisms in rural areas that they contribute to successful long-term preservation of open lands.

<sup>352</sup> See OR. REV. STAT. § 215.243 and § 308A.050 (2009). See *supra* notes 78-80 and accompanying text. The basic relationship between Oregon's land use and preferential assessment programs is explained in a letter (Opinion Request OP-6390) from the Department of Justice to Susan Brody, Director of DLCD and Richard Munn, Director of the Oregon Department of Revenue (October 11, 1990).

trusts and deed covenants among others.<sup>353</sup> The 2009 Legislature approved new legislation authorizing cities and counties to establish a transferable development credit system within or between governmental units and established an Oregon Transfer of Development Rights Pilot Program (limited to forest lands) to be administered by DLCD working with the Oregon Departments of Forestry and Agriculture and local governments.<sup>354</sup> In light of the significant tax reductions provided to land owners, these techniques should be limited to those lands most severely restricted and although they cannot do the job alone, used strategically, they can be helpful.

*J. Resurgence – Regression – Redemption: Ballot Measures 7, 37, and 49*<sup>355</sup>

Generated by the controversy over the actions of the Legislature and LCDC between 1992 and 1994, certain landowners organized with others to reclaim their perceived *lost* property rights as a result of the increased regulation and limitation on the use of their rural land.<sup>356</sup> To these advocates, the trade-off embodied in OR. REV. STAT. § 215.243 (preferential assessment as compensation for the EFU land use limitations) no longer was good enough.<sup>357</sup> They organized to elect candidates to state and local office sympathetic to their philosophy, pass legislation and ballot initiatives to limit existing land use restrictions and filed lawsuits to support property owners frustrated by local land use regulations or to block LCDC administrative rules.<sup>358</sup> These efforts have had an impact on Oregon's lengthy effort to protect its economically important farmland. Although their attempts to pass major changes to state law or to require

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<sup>353</sup> See generally Rick Pruetz & Noah Standridge, *What Makes Transfer of Development Rights Work?*, 75 J. Am. Pl. Assn. 78 (2009); RICK PRUETZ, AICP, *BEYOND TAKINGS AND GIVINGS: SAVING NATURAL AREAS, FARMLAND AND HISTORIC LANDMARKS WITH TRANSFER OF DEVELOPMENT RIGHTS AND DENSITY TRANSFER CHARGES* (Arjie Press, Marina Del Rey, California) (2003).

<sup>354</sup> Enrolled S.B. 763, ch 504 (2009); Enrolled H.B. 2228, ch 636 § 6 (2009).

<sup>355</sup> A detailed account of this period and these measures is not possible in this article but has been covered elsewhere. See e.g., Edward Sullivan, *Year Zero: The Aftermath of Measure 37*, 38 Urb. Law. 131 (2006); David Hunnicutt, *Oregon Land-Use Regulation and Ballot Measure 37: Newton's Third Law at Work*, 36 ENVTL. L. 25 (2006); Keith Hirokawa, *Property Pieces in Compensation Statutes: Law's Eulogy for Oregon's Measure 37*, 38 ENVTL. L. 1111 (2008); Michael Blumm, Michael & Erik Grafe, *Enacting Libertarian Property: Oregon's Measure 37 and its Implications*, 85 DENV. U. L. REV. 279 (2007).

<sup>356</sup> See sources cited *supra* note 355.

<sup>357</sup> See sources cited *supra* note 355.

<sup>358</sup> See Oregonians in Action, <http://www.oia.org> (last visited June 9, 2009).

amendments to LCDC rules, especially those with respect to the income test applicable to the approval of farm dwellings, either failed or were vetoed, their greatest success was through the passage of two significant ballot initiatives: Measures 7 and 37.<sup>359</sup>

### K. Measure 7 - Resurgence

Ballot Measure 7 was on its face a very simple and seductive proposition. Its measure summary read:

Amends Constitution. Oregon Constitution prohibits taking private property for public use without just compensation. Oregon Supreme Court has not required compensation when property value merely reduced. Measure requires state, local governments pay landowner amount of reduction in market value if law, regulation reduces property value. Compensation required if owner must act to protect certain natural resource, cultural values or low income housing. Exemption for historically recognized nuisance laws or if owner sells alcohol, pornography, operates casino. Applies if regulation adopted after owner acquires property.<sup>360</sup>

Simply stated, it was an amendment to the Oregon Constitution to require “compensation” for virtually any type of government regulation.<sup>361</sup> Fueled by the public’s confusion over *just compensation* and *property rights*,<sup>362</sup> Ballot Measure 7, had it been constitutional, would have been the most profound change in the relationship of landowners and regulators since the founding of the country. Although it did not survive,<sup>363</sup> it was a powerful indicator of public sentiment and confusion about Oregon’s longstanding land use program and laid the groundwork for what followed.

### L. Measure 37 - Regression

Ballot Measure 37 was a narrower and more focused statutory change specifically directed at the land use system. Its measure summary read:

Currently, Oregon Constitution requires government(s) to pay owner “just compensation” when condemning private property or taking it by other action, including laws precluding all substantial beneficial or economically vi-

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<sup>359</sup> Hunnicutt, *supra* note 355.

<sup>360</sup> Measure 7, <http://www.oregonvotes.org/nov72000/guide/mea/m7/m7.htm> (last visited June 9, 2009).

<sup>361</sup> See generally 49 Op. Or. Att’y. Gen. 284 (2001).

<sup>362</sup> See generally Fred Bosselman, David Callies & John Banta, *The Taking Issue*, 323-324 (Council on Environmental Quality, USGPO)(1973).

<sup>363</sup> The Oregon Supreme Court found that the Measure sought amendments to multiple sections of the Oregon Constitution in violation of Or. Cons., Art. XVII, § 1. *McCall v. Kitzhaber*, 118 P.3d 256 (Or. 2005).



able use. Measure enacts statute requiring that when state, city, county, metropolitan service district enacts or enforces land use regulation that restricts use of private real property or interest thereon, government must pay owner reduction in fair market value of affected property interest, or forgo enforcement. Governments may repeal, change, or not apply restrictions in lieu of payment; if compensation not timely paid, owner not subject to restrictions. Applies to restrictions enacted after "family member" (defined) acquired property. Creates civil right of action including attorney fees. Provides no new revenue source for payments. Certain exceptions. Other provisions.<sup>364</sup>

The measure required the payment of just compensation or the waiver of any land use regulation that reduces the value of the property relative to its value based on the uses permitted when the owner acquired it.<sup>365</sup> This measure created a new Oregon land rush.<sup>366</sup> About 6,900 claims were filed asserting a loss of over \$19 billion in reduced property values.<sup>367</sup> The claims covered over 750,000 acres generating over 300 lawsuits.<sup>368</sup> In the Willamette Valley, the heart of Oregon's agricultural bounty, 51 percent of the acreage subject to Measure 37 claims were located in farm zones (nine percent of all EFU-zoned land), 42 percent in forest zones (five percent of all forest-zoned land) and five percent in rural zones (five percent of all rural-zoned land).<sup>369</sup> Since Measure 37 did not provide funding for any required compensation,<sup>370</sup> all the approved claims received a "waiver" of the existing land use regulations in lieu of it.<sup>371</sup> Thus, the specter of sprawling development across the Willamette Valley instigated a counter wave of public outrage and the 2007

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<sup>364</sup> Ballot Measure 37 (2004) codified at OR. REV. STAT. § 197.352 (2004) passed with nearly 61% of the vote. See Or. Sec'y of State, Elections Division, Elections History, "Initiative, Referendum Historical Results," <http://bluebook.state.or.us/state/elections/elections22a.htm> (last visited on August 17, 2009).

<sup>365</sup> Ballot Measure 37 (2004) codified at OR. REV. STAT. § 197.352 (2004).

<sup>366</sup> OR. DEP'T. OF LAND CONSERVATION AND DEV., PRIVATE PROPERTY IN MEASURE 37 CLAIMS BY LAND USE ZONE, (May 7, 2007). Claims were made and granted even in the absence of an effect on property values and even though agricultural property values continued to increase at a rate better than that of unregulated agricultural lands in other states. JOHN D. ECHEVERRIA, GEORGETOWN ENVIRONMENTAL LAW AND POLICY INSTITUTE, PROPERTY VALUES AND OREGON MEASURE 37, EXPOSING THE FALSE PREMISE OF REGULATION'S HARM TO LANDOWNERS (2007).

<sup>367</sup> OR. DEP'T. OF LAND CONSERVATION AND DEV., SUMMARIES OF MEASURE 37 CLAIMS, [http://www.oregon.gov/LCD/MEASURE49/summaries\\_of\\_m37\\_claims.shtml](http://www.oregon.gov/LCD/MEASURE49/summaries_of_m37_claims.shtml) (last visited on August 17, 2009).

<sup>368</sup> OR. DEP'T. OF LAND CONSERVATION AND DEV., PRIVATE PROPERTY IN MEASURE 37 CLAIMS BY LAND USE ZONE, (May 7, 2007).

<sup>369</sup> *Id.*

<sup>370</sup> Ballot Measure 37 (2004) (codified at OR. REV. STAT. § 197.352 (2004)).

<sup>371</sup> OR. DEP'T. OF LAND CONSERVATION AND DEV., MEASURE 37 CLAIM REPORTS, <http://www.oregon.gov/LCD/m37finalstaffreports.shtml> (last visited August 17, 2009).

Legislature referred to the voters an alternative measure, HB 3540 (2007) later known as Ballot Measure 49.<sup>372</sup>

### *M. Ballot Measure 49 – Redemption*

Ballot Measure 49 was a product of compromise in the 2007 Legislative session and was a significant attempt to scale back the widespread development proposals generated by the Measure 37 claims. Measure 49 revised Measure 37 generally to limit valid claims to no more than three home sites assuming the owners were entitled to at least that many at the time the property was acquired.<sup>373</sup> Further, it prohibited subdivisions, billboards and commercial and industrial developments.<sup>374</sup> It was seen as a “fairer” version of Measure 37, allowing some development that pre-Measure 37 permitted but prohibiting the more excessive post-Measure 37 claims especially on “high-value” farmland. Measure 49 passed with 62 percent of the vote, a margin larger than the 61 percent cast for Measure 37.<sup>375</sup> About 4600 claims have been filed under Measure 49 compared to the 6900 claims filed under Measure 37.<sup>376</sup> Measure 49 did not necessarily establish good land use policy but it clearly scaled back the negative impacts associated with the development enabled by passage of Measure 37.<sup>377</sup>

## IV. CONCLUSIONS – RECOMMENDATIONS – FINAL THOUGHTS

Overall, Oregon has a comprehensive and effective program to protect agricultural lands, whether standing alone or in comparison to the efforts of other states.<sup>378</sup> The Oregon program includes both regulations and tax

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<sup>372</sup> Act of June 15, 2007, ch. 424, 2007 Or. Laws 1138 (now codified at OR. REV. STAT. § 195.300-195.336 (2007)).

<sup>373</sup> *Id.* at 1142.

<sup>374</sup> *Id.* at 1147.

<sup>375</sup> Or. Sec’y of State, Elections Division, Elections History, “Initiative, Referendum Historical Results,” <http://bluebook.state.or.us/state/elections/elections22b.htm> (last visited on August 17, 2009).

<sup>376</sup> *Id.*

<sup>377</sup> Based on the claims approved as of May 1, 2009, about 9000 dwellings will be approved under Measure 49 as opposed to the over 30,000 expected under Measure 37. See Carmel Bender-Charland & Judith Moore, *Measure 49 Implementation Update*, OR. PLANNERS’ J., May/June 2009 at 3, 5.

<sup>378</sup> INST. FOR NATURAL RES., OR. STATE UNIV., THE OREGON LAND USE PROGRAM: AN ASSESSMENT OF SELECTED GOALS, 139, (2008), available at <http://www.oregonbiglook.org/documents> (last visited June 9, 2009) (report prepared for Oregon DLCD); OR. DEPT. OF FORESTRY, OFFICE, U.S. DEPT. OF AGRIC., FOREST FARMS AND PEOPLE LAND USE CHANGE ON NON-FEDERAL LAND IN OREGON 1974-2005, 1-76, 4 (2009) (on file with authors).

incentives and is part of a broader planning program designed to contain sprawl and provide for needed housing and the efficient provision of public services and facilities as well as preserve farmland. That program is not perfect. Legally, it is sound and on the ground it is effective. Politically, it is constantly being challenged. As this article demonstrates, the land use program has been continuously updated to address changing conditions, situations, and public sentiment. Beginning over 40 years ago with a tax assessment policy,<sup>379</sup> Oregon has attempted to protect its agricultural industry and the resource lands on which it depends. But Oregon soon learned, as did other states across the country, that tax policy alone would not provide effective long-term protection to farmland. Even with a comprehensive land use planning program, protection has been difficult.

The land use program began with general and very flexible standards left to the discretion of local officials. Local officials are elected or appointed to represent local interests and rarely see it in their political interest to support public policies established by the state. In the face of frequent and strong local opposition, effective implementation was, and remains, difficult. Because it was not in the interests of many local officials to implement the state's broader interests as expressed in the State-wide Goals, especially Goal 3,<sup>380</sup> the preparation and adoption of local plans to comply with the state's goal to preserve agricultural land was slow and in many cases there was outright defiance by local officials to not apply or implement this policy faithfully. Thus, the use of general standards applied locally did not work.

As a result of the choice of local officials to resist adopting the required farmland protection provisions, and in response to longstanding concerns from citizens, the farm community, the Legislature, and the Courts to cure this defect in the state's planning structure, the Legislature and LCDC finally moved to correct these problems. The 1992 amendments to Goal 3 by LCDC,<sup>381</sup> 1993 Legislative amendments to OR. REV. STAT. chapter 215 by HB 3661,<sup>382</sup> as well as the 1994 LCDC implementing rules<sup>383</sup> were directed at addressing the problems pointed out in the 1990 Legislative Study,<sup>384</sup> especially the need for more clear and objective state standards,<sup>385</sup> and have proven to be successful.<sup>386</sup>

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<sup>379</sup> Act of May 13, 1961, ch. 695, 1961 Or. Laws 1428.

<sup>380</sup> OR. ADMIN. R. 660-015-0000(3) (1975) (amended 1993, 1995).

<sup>381</sup> OR. ADMIN. R. 660-015-0000(3) (1993) (amended 1995).

<sup>382</sup> See generally Act of September 8, 1993, ch. 792, 1993 Or. Laws 2438.

<sup>383</sup> OR. ADMIN. R. 660, Div. 33 (1993) (amended 1994).

<sup>384</sup> See DEP'T OF LAND CONSERVATION AND DEV., *supra* note 241.

<sup>385</sup> *Id.*

The annual LCDC farm reports to the Legislature<sup>387</sup> show that the policy changes made in 1993 by the Legislature (H.B. 3661)<sup>388</sup> and in 1994 by the Commission (OR. ADMIN. R. Division 33 – Goal 3 Implementing Rules)<sup>389</sup> are achieving the statutory policy in OR. REV. STAT. § 215.700<sup>390</sup> to:

- Better protect the state's more productive resource lands;<sup>391</sup> and
- Provide opportunities for dwellings on less productive resource lands.<sup>392</sup>

The farmland protection program has evolved and changed from the mandated use of general, discretionary standards to the use of clear and objective standards in order to ensure more effective implementation. Recent evidence and studies appear to demonstrate that this adaptation is working.<sup>393</sup>

Because of the success of the farmland protection program, the passage of Ballot Measures 37<sup>394</sup> and 49<sup>395</sup> have been a setback. At this point, no one can say for sure what the actual impact on farmland will be from either Measures 37 or 49. Claims are still being processed and local land use approvals and permits acquired.<sup>396</sup> All that can be said is that these Measures will lead to more development than Oregon's 40 year effort to protect agricultural lands would have allowed. The full impact of this development, actual and political remains to be seen. No one expects the current program to remain unchanged and if history tells us anything, change is the rule not the exception when it comes to Oregon land use. And any such changes certainly will be the source of further debate and discussion.

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<sup>386</sup> See generally 2001-2007 LCDC Farm Reports, *supra* note 194; VEKA, *supra* note 194 at 70.

<sup>387</sup> See note 216.

<sup>388</sup> Act of Sept. 8, 1993, ch. 792, 1993 Or. Laws 2438.

<sup>389</sup> OR. ADMIN. R. 660-015-0000(3) (1975) (amended 1993, 1995); OR. ADMIN. R. 660, Div. 33 (1993) (amended 1994).

<sup>390</sup> Act of Sept. 8, 1993, ch. 792, 1993 Or. Laws 2438 (H.B. 3661) (now codified at OR. REV. STAT. § 215.700 (1993)).

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> See VEKA, *supra* note 194 at 70; OR. DEPT. OF FORESTRY, OFFICE, U.S. DEPT. OF AGRIC., FOREST FARMS AND PEOPLE LAND USE CHANGE ON NON-FEDERAL LAND IN OREGON 1974-2005, 1-76, 4 (2009) (on file with authors).

<sup>394</sup> See Ballot Measure 37 (2004) (codified at OR. REV. STAT. § 197.352 (2004)).

<sup>395</sup> Act of June 15, 2007, ch. 424, 2007 Or. Laws 1138 (now codified at OR. REV. STAT. § 195.300-195.336 (2007)).

<sup>396</sup> See generally Bender-Charland et al., *supra* note 377.

Despite the best of intentions, the many amendments already made to address changing conditions, situations, and public sentiment have led inextricably to a much more complex land use program<sup>397</sup> that can and should be revised to simplify it, as well as address persistent issues and better achieve its objectives. The following are a few modest suggestions for further improvements.

#### *A. Recommendations*

##### 1. Clarify the Definition of Agricultural Lands to be Protected by EFU Zoning

From the beginning, Oregon has struggled to identify the lands that should be protected by EFU zoning in order to maintain its agricultural economy. It started by providing a property tax break to anyone who was farming at some minimal level.<sup>398</sup> Beginning in 1967, attempts were made to define and identify these lands based on their inherent capability to be farmed.<sup>399</sup> Since the adoption of Goal 3 in 1974,<sup>400</sup> the extent of the current regulations has been questioned and the charge made that the definition includes large blocks of *marginal, secondary, or unproductive lands* mis-zoned EFU.<sup>401</sup> Numerous studies and pilot programs have tried to identify and designate these lands only to conclude that large blocks are not readily identifiable.<sup>402</sup> The Big Look Task Force (“BLTF”), based on nothing more than the perception of its members, recommended that counties be allowed to make-up whole new regional definitions of “agricultural land.”<sup>403</sup> This was indeed disappointing and fortunately, the Oregon Legislature thought better of the recommendation, although the new process it established<sup>404</sup> does not go far enough and only addresses part of this definitional issue.

In planning as in politics, perception all too often becomes reality without any real analysis of the issue. The BLTF proceeded to address

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<sup>397</sup> GOVERNOR'S TASK FORCE ON LAND USE IN OR., REPORT TO GOVERNOR VIC ATIYEH, STREAMLINING STATE REVIEW OF LOCAL LAND USE DECISIONS 10 (1982) (on file with authors); OR. TASK FORCE ON LAND USE PLAN., REDUCING COMPLEXITY *supra* note 132 at 17-18.

<sup>398</sup> See Act of May 13, 1961, ch. 695, 1961 Or. Laws 1428.

<sup>399</sup> H.B. 1176, 1967 Leg., Reg. Sess. (Or. 1967); *Minutes of the Oregon House Committee on Agriculture*, Reg. Sess. at 10 (February 27, 1967) (statement of Representative L.B. Day) (Oregon State Archives).

<sup>400</sup> OR. ADMIN. R. 660-015-0000(3) (1975) (amended 1993, 1995).

<sup>401</sup> See *supra* Part III.C.

<sup>402</sup> See *supra* Part III.C.

<sup>403</sup> OR. TASK FORCE ON LAND USE PLAN, *supra* note 132 at 8-16.

<sup>404</sup> Enrolled H.B. 2229, Reg. Sess. (Or. 2009).

the issue of *mis-zoned* lands without any data or analysis and accepted the perception that some *unproductive* lands are included in the existing definition of “agricultural land.”<sup>405</sup> The 2009 Legislature merely codified a process for the identification of “non-resource” lands that currently exists and that has already permitted the designation of over 86,000 acres of such lands.<sup>406</sup> The canard that more such *unproductive* lands are still out there has long plagued and continues to hinder Oregon’s efforts to protect its agricultural industry and lands. The authors are dubious that reasonably-sized blocks of *marginal or unproductive* lands (160 acres or more) can be identified given the great diversity and intermingled nature of Oregon’s productive and less productive soils. Proposals for reform like that from the BLTF that reopen the basic definition of “agricultural land” and provide for the development of new regional definitions and for more development on the remaining *unproductive lands* are misplaced.

Before Oregon abandons its current approach of enabling some limited development (non-farm dwellings) on *less productive* lands on a case-by-case basis, it should examine the issue of whether there are any reasonably sized blocks of *unproductive lands* mis-zoned or included in the definition. No doubt some such lands exist, but the existing definition of “agricultural land” and especially its core part that relies on soil capability, is clear and objective and has worked well to identify the land now commercially used or needed by Oregon’s agricultural industry. To date, no one has shown that these soils are not capable or needed for agriculture. It is the discretionary outer edge of this definition, e.g., the “other lands suitable for farm use” that has proved more difficult to apply and has led to questionably *less productive* or *non-productive* lands being designated. Further, this less clear part of the definition is subject to dubious and manipulative studies that suggest that land long used for agriculture are no longer *profitable* as farmed and should be rezoned for rural residential use.<sup>407</sup>

Specifically, LCDC together with the Oregon Department of Agriculture, should develop a clear and objective productivity standard for identifying any reasonably sized blocks (160 acres) of lands that are not predominantly composed of I-IV/I-VI soils suitable for crop, pasture and range use for different regions of the state to replace or refine the vague “other lands suitable for farm use” part of the “agricultural lands” definition. The lands identified should be compared with the current lands

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<sup>405</sup> OR. TASK FORCE ON LAND USE PLAN., *supra* note 132 at 8-16.

<sup>406</sup> OR. LAND CONSERVATION AND DEV. COMM’N., *supra* note 328 at 8-9.

<sup>407</sup> See *supra* note 127 and accompanying text.

zoned EFU and any lands not identified should be removed. This work should be closely coordinated with the USDA-NRCS and other agricultural experts.

Such a study will provide for a thorough field testing of these definitions and a comparison with the existing lands covered by Goal 3, the lands now in commercial resource use or needed in the future for such use. Just like the vineyardists pointed out the need to protect what were viewed as less productive hillsides for a prospective wine industry, so too do we now have to recognize that today's "marginal or abandoned lands" may be needed for the production of biomass for the coming biofuels industry.<sup>408</sup> Only after this kind of analysis, review, and public comment, can LCDC or the Legislature determine what, if any, goal or rule amendments are needed to enable counties to amend their existing plans consistent with these inventories.

After more than 30 years, it is time to bring some closure to this endless debate about *unproductive* lands. A careful field tested inventory and public review of the agricultural lands important to the economy of the state now and in the future can help to resolve this longstanding issue much like the 1990 Farm/Forest study helped to address the issue of how farm dwellings should be approved. This study should be coupled with the impact analysis of all the allowed uses and dwellings recommended later.

Further, because some EFU lands are intermingled with those lands that are unproductive, committed, fragmented or are in an area that lacks the needed agricultural infrastructure, existing rural exception areas should be reviewed for any appropriate additions. These would include any lands surrounded or enclosed by the existing rural exception areas to round out the boundaries of these areas but should not allow the introduction of rural development into any active commercial farm areas. After this revision is completed, no more such exceptions should be permitted. Arguably, the new process established by HB 2229 permits this kind of analysis.<sup>409</sup>

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<sup>408</sup> Oregon Department of Agriculture Story of the Week: Oregon's Agricultural Diversity (March 4, 2009). The story points out that "there is a new oilseed crop arriving on the scene in Oregon. Camelina has shown promise as a source for biofuel production. As a crop that needs very few inputs such as water or fertilizer, camelina can be grown on marginal farm land unlike many other crops." See also Beth Casper, *Salem Biodiesel Plant Gears Up for a Revival*, SALEM STATESMAN J., May 22, 2009; Paul Fattig, *Oil Flows in Sams Valley: Canola Oil that is. The crop thrives here and is a good source of biodiesel*, MEDFORD MAIL TRIB., June 9, 2009.

<sup>409</sup> See Enrolled H.B. 2229 § 5(4)(e), Reg. Sess. (Or. 2009).



## 2. Determine the Appropriate Uses of Agricultural Land and Lands Identified for Rural Development

### i. Reform the EFU Enabling Legislation

The EFU zone is now exclusive in name only. The list of permissible non-farm uses has grown steadily from 6 in 1963 to over 50 today.<sup>410</sup> No careful comprehensive review of this list or analysis of the actual impact on the ground has been done and it is sorely needed.<sup>411</sup> The database for such a review is available and new computer GIS software makes this type of review readily feasible.<sup>412</sup> Such a review should include the impact of all the dwellings (farm and non-farm) that have been approved from 1963 to the present.

However, even without this analysis, a quick review of the over 50 allowed non-farm uses on lands zoned EFU makes it clear that the current number should be reduced. The allowed uses should be limited to those that directly support farm use, are needed by the local rural farm community including dwellings or to those that need to pass through farmland. These broad goals for such uses should be established by the Legislature and the task of specifying the detailed list of the allowed uses delegated to LCDC to be spelled out by administrative rule.<sup>413</sup> *High-value farmlands* should continue to receive extra protection and the definition adopted in 1993 should be updated consistent with the revised definition in Measure 49.

Further, Oregon should consider a *farmland reserve or conservancy* to provide state oversight of not only *high-value farmlands* but also those lands under extreme development pressure.<sup>414</sup> Oregon's new system for the transfer of development credits<sup>415</sup> should be used to transfer any development opportunities from these lands to more appropriate sites and a state hearings officer should be appointed to administer the land use decisions in the reserve and review petitions for non-farm use based on special or unique site specific situations.

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<sup>410</sup> See *supra* notes 7-8 and accompanying text.

<sup>411</sup> The 2009 Legislature did not provide such a review.

<sup>412</sup> VEKA, *supra* note 194 at 1.

<sup>413</sup> A similar process was suggested by one of the authors in 1973. See Letter from Edward Sullivan, Washington County Counsel, to Hector Macpherson, Senator (May 10, 1973) (Oregon State Archives) (submitted to the 1973 Senate Revenue Committee regarding SB 101).

<sup>414</sup> The intent would be to provide better protection of the state's threatened farmland where it is determined that existing provisions are not adequate.

<sup>415</sup> See *supra* note 354 and accompanying text.

ii. Continue to Limit Farm and Non-Farm Dwellings in EFU Zones

As already discussed, dwellings are the most controversial and difficult type of use to deal with at the zoning counter and regardless of how agricultural land is protected or the EFU zone reformed, they will remain so.

However, before any changes are made to the farm or non-farm dwelling standards, more studies like the review and report done for Hood River County<sup>416</sup> should be replicated in other areas of the state to determine whether or not the individual and cumulative impact of all the dwellings (farm and non-farm) approved over the years has not harmed the commercial agricultural industry in specific areas.<sup>417</sup> Such a study should be combined with that done for the 50 plus non-farm uses allowed by statute in the EFU zone under OR. REV. STAT. § 215 already recommended.

iii. Retain Restrictions on Farm Related Dwellings

The current income and large lot dwelling standards applicable to *high-value and non-high-value farmland* should be retained. They have proved their worth in ensuring that dwellings are only permitted for farm operations that have achieved a minimal level of farm production or are large enough to do so. At least two adjustments should be considered. First, an investment test should be developed to enable a temporary dwelling to be sited before the farm operation has earned the needed farm income. This should only apply to those farms growing certain perennial crops like orchards or vineyards that take several years after planting to produce and earn the required income. Such temporary dwellings will allow these types of farms to get started with on site management prior to the earning of any income. When the income is eventually earned, then the temporary dwelling maybe replaced with a permanent one.

Second, the large lot test where a farm dwelling is permitted on any parcel larger than 160 acres of non-high-value farmland should be re-evaluated especially in Central and Eastern Oregon.<sup>418</sup> This standard's assumption is that anyone with that much acreage in these regions would put the land to commercial farm use. However, this assumption should be more closely examined. In many cases, large ranches and tracts are

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<sup>416</sup> VEKA, *supra* note 194.

<sup>417</sup> *Id.* at 70. This report demonstrated that the approval of non farm dwellings in Hood River County had not harmed commercial farm operations.

<sup>418</sup> See OR. ADMIN. R. 660-033-0135(1) (2009).

being divided up to provide large home sites or *ranchettes* for those who can afford the 160 acres even though they have no intention of using the land for commercial farm or forest purposes.

iv. Reconsider Permitting Non-Farm Dwellings

Non-farm dwellings have always been controversial and problematic. However, in large areas of *high-value farmland* there should be less justification for non-farm dwellings and their allowance should be seriously reconsidered or further restricted. However, given the complex intermingling of soil capabilities, it is unlikely that the removal of any *unproductive or non-resource* land will eliminate completely the need for a safety-valve. At a minimum, the current discretionary standards used for the evaluation of non-farm dwellings outside the Willamette Valley in western and eastern Oregon should be replaced with clear and objective standards like those applicable to the creation of new non-farm parcels for such dwellings as provided for under OR. REV. STAT. § 215.263(4)(b) and (5)(b). The existing standards for the Willamette Valley should be retained. If locally administered discretionary standards are retained, then a state hearings officer should be appointed to review applications for non-farm dwellings.

v. Rural Development on Unproductive, Non-Resource or Exception Lands

Counties should continue to administer the use of any identified *unproductive, non-resource* or exception lands subject to certain conditions. Allowed uses should be limited to those needed in rural areas and should not permit urban uses or provide urban levels of public or private services. Rural commercial and industrial uses should be limited to designated unincorporated communities.

In order to determine the appropriate level of rural development for these lands, there must be a study of the costs of such development, as well as a judgment as to whether such development is sustainable, including an evaluation of its carbon footprint. Only after such study should a level of residential use be permitted on existing and future parcels. The permitted development should use lot sizes in the two to ten acre range to avoid permitting an urban level of development in rural areas, to enable response to local geographic variables and to ensure efficient use of what is likely to be a limited supply of such lands. Additional lots should not be permitted if clustering is used. Landscape and site design should also be required. Significant natural resources should be protected and the level of development permitted should be within the

carrying capacity of the respective areas identified. The 2009 Legislature has taken a big step in the right direction with respect to this issue.<sup>419</sup>

### 3. Reduce Complexity

As pointed out by previous land use task forces, the Oregon land use program has become very complex and confusing and needs simplification.<sup>420</sup> The 2009 Legislature did adopt provisions to implement the BLTF recommendation for LCDC to establish a work group to conduct a policy-neutral review and audit of the land use statutes in order to simplify and recodify the many conflicting provisions.<sup>421</sup>

### 4. Introduce Complementary Methods to Enhance the Protection of Agricultural Land

It has also been evident over the years that Oregon has not availed itself of other complementary non-regulatory land use techniques to support the existing program. These would include more coordinated use of its tax policies and the use of programs for the transfer or purchase of development rights, land trusts, conservancies, easements and deed restrictions. Such programs should be given serious study and where appropriate worked into Oregon's land use system, not as a replacement, but rather to complement the successes already achieved. Enrolled bills S.B. 763 and H.B. 2228 are excellent steps in this direction.<sup>422</sup>

Additionally, Oregon must reconcile its land use and tax policies. Once any *unproductive or non-resource lands* are removed from the EFU zone, farm assessment should not be available to any lands not zoned EFU unless the land in another zone has produced a commercial level of farm production as opposed to the low threshold income test now allowed.<sup>423</sup> Oregon policy since 1973 has been that since limitations are imposed by EFU zoning, certain benefits are called for.<sup>424</sup> If land is not subject to the limitations of EFU zoning or producing at a commercial level, then compensatory tax benefits should no longer be provided.

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<sup>419</sup> Enrolled H.B. 2229 § 6, Reg. Sess. (Or. 2009).

<sup>420</sup> See *supra* note 397 and accompanying text.

<sup>421</sup> Enrolled H.B. 2229, § 17, Reg. Sess. (Or. 2009).

<sup>422</sup> See *supra* note 354 and accompanying text.

<sup>423</sup> See OR. REV. STAT. § 308A.071 (2007).

<sup>424</sup> OR. REV. STAT. § 215.243(4) (2007).

## 5. Recognize the Value of Urban Agriculture and Encourage Farm Use in the City

As explained in this article, Oregon has approached the protection of farmland as a rural, non-urban land use issue, something to plan for outside the city – to be protected from urban sprawl. But there is a new movement that is emphasizing the values of acquiring food that is fresh and in season close to or from the city.<sup>425</sup> Such sources of food require good farmland close to or in the city and will require less energy to produce and transport to market.<sup>426</sup> Planning to provide space for urban farms, community gardens, and farmers markets is not a new idea and has been discussed in Oregon.<sup>427</sup> Despite the historic emphasis of the existing land use system and Goal 14,<sup>428</sup> it does not necessarily prohibit such land uses.<sup>429</sup> Rather, it is our traditional ideas and notions about the appropriate and compatible land uses in our cities and neighborhoods that has led to this urban – rural planning divide.<sup>430</sup> Michael Pollan suggests and the authors agree that “tax and zoning incentives” should be provided to have farmland incorporated into urban development plans just as they are now used to provide for “open space and parks.”<sup>431</sup> The new garden at the White House demonstrates the possibilities of such home gardens and that urban farms and community gardens can once again make a significant contribution to our local food supply and provide open space and recreation as much as traditional parks, ball fields and golf courses.<sup>432</sup> It is hoped that the closer people are to their food supply, the more they will appreciate the need to protect farmland.<sup>433</sup> Oregon’s planning system can and must be expanded to consider urban farms, community gardens, and farmers markets.

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<sup>425</sup> See generally Michael Pollan, *Farmer in Chief*, N.Y. TIMES, Oct. 12, 2008, available at [http://www.nytimes.com/2008/10/12/magazine/12policy-t.html?\\_r=1&scp=1&sq=Farmer%20in%20Chief&st=cse](http://www.nytimes.com/2008/10/12/magazine/12policy-t.html?_r=1&scp=1&sq=Farmer%20in%20Chief&st=cse); see generally 8 PLAN. & ENVTL. L. 1-27 (2009).

<sup>426</sup> *Id.*

<sup>427</sup> Roger Blobaum, *Farming on the Urban Fringe* in PROTECTING FARMLAND 55-61, (Frederick R. Steiner & John Theilacker eds., Avi Press) (1984); KEVIN BALMER, ET AL., PORTLAND STATE UNIV., THE DIGGABLE CITY: MAKING URBAN AGRICULTURE A PLANNING PRIORITY (2005).

<sup>428</sup> See *supra* note 6 and accompanying text.

<sup>429</sup> See *supra* note 6 and accompanying text.

<sup>430</sup> Pollan, *supra* note 425.

<sup>431</sup> *Id.*

<sup>432</sup> *Id.* During World War II over 20 million “victory gardens” supplied 40% of the produce consumed in America.

<sup>433</sup> *Id.*

*B. Final Thoughts*

No matter how much the Oregon farmland protection program is updated or adjusted, it will remain controversial because land use planning is not a science but is driven by popular desires and perceptions about growth and development and the value of land in general. The Oregon program has tried to protect agricultural lands using the traditional land use planning process which the authors believe has a built in bias against protecting resource lands in general and agricultural lands in particular. Land use planning started by trying to better organize and promote the development of our cities and does not have a history of recognizing or evaluating the resource values and constraints evident in the land.<sup>434</sup> Planners have traditionally planned for development (i.e., housing, industry and shopping centers) and leftover lands were, and maybe still are, colored green on the maps and labeled *Agriculture Open Space*, but this is generally intended as a holding designation that will eventually accommodate the growth and development that will inevitably come if it is allowed.

Further, the protection of agricultural land and the containment of sprawl challenges America's love affair with land. The history of this country is founded on the ideal that the small landowner is precious and that country living is somehow better or healthier than city life. We idealize the family farm while we watch as the farm community is systematically replaced by urban and rural development that has no economic or cultural ties to the land. We continue to idealize country living rather than make a serious effort to create livable communities that will allow the preservation of the farmland that sustains us. We are unwilling to say no to those who want to allow a home site on every parcel in the countryside.<sup>435</sup>

But the emphasis on the protection of farmland of national, state and local importance must remain focused on maintaining the agricultural industry; both large and small farms. It cannot and should not be a surrogate policy to oppose rural residential development or provide open space for urban dwellers. Just because land is not productive for farm or forest use does not mean it is appropriate for rural development. Other

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<sup>434</sup> See generally JOHN W. REPS, *THE MAKING OF URBAN AMERICA: A HISTORY OF CITY PLANNING IN THE UNITED STATES*, (Princeton University Press) (1992); IAN L. MCHARG, *DESIGN WITH NATURE*, (American Museum of Natural History, The Natural History Press, Garden City, New York) (1969).

<sup>435</sup> For more on this see SAM LOWRY, *THE BIG LOOK'S RURAL RESIDENTIAL DILEMMA* (2009), available at <http://www.oregonbiglook.org/mediacenter> (last visited June 9, 2009).

considerations must be taken into account including, but not limited to, the protection of wetlands, natural areas, consideration about climate change and the ability for the level of rural development to be economically and environmentally self-sustaining.

Agricultural land is not unused, undeveloped open space. It is a working landscape that has been developed and is being used for farming. It is the irreplaceable foundation for crops and livestock and is a primary resource in its own right. Plans for the protection of agricultural land must achieve the same status and be on an equal footing with plans for industrial parks, commercial centers and single-family residential neighborhoods and be an integral part of our efforts to establish livable communities and sustainable environments. The protection of farmland and the source of our food supply cannot remain solely a rural planning issue just for lands beyond the urban area. It also needs to be integrated into the fabric of our urban areas with the promotion of urban farms, community gardens and farmers markets. Public education and understanding of all these rural and urban issues is absolutely essential if any program for the protection of agricultural lands is to succeed.<sup>436</sup> The authors believe the Governor, LCDC and the Legislature can and should take the lead role in securing the future of agricultural lands in Oregon, rather than leaving these decisions to the voters through an initiative process fraught with slogans rather than reflection and reason.

How Oregonians face these issues will affect whether they succeed in protecting agricultural lands. Protecting agricultural land is a policy choice between an individual's use of resource lands for personal gratification versus the greater, long-range preservation of productive lands for the common good. The choice Oregonians make will decide whether this portion of the state's land use program succeeds.

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<sup>436</sup> The stabilizing effects of land use regulations generally on property values is documented in WILLIAM K. JAEGER & ANDREW J. PLANTINGA, OR. STATE UNIV., *HOW HAVE LAND-USE REGULATIONS AFFECTED PROPERTY VALUES IN OREGON* (2007).



## APPENDIX 1

*SUMMARY OF USES  
ALLOWED IN EFU ZONES*

## INTRODUCTION

State law first refers to Exclusive Farm Use (EFU) zoning in 1961 as part of legislation dealing with farm use assessment for farmland. The statutory EFU zone was established in 1963 and provided for farm dwellings and five (5) basic non-farm uses within this zone. These were educational, religious, recreational, utility services and meeting places for the local community. As of the 2001 Legislative Session, over 50 non-farm uses are now allowed.

Besides a farm use, the following non-farm uses are allowed based on a review for compliance with certain prescribed standards.

The initial non-farm uses provided for in 1963

- Public and private schools
- Churches
- Public or non-profit group parks, playgrounds or community centers
- Golf courses
- Utility facilities
- Farm dwellings

## 1965 – 1971

Except for the deletion of farm dwellings between 1967 and 1969, there were no changes to the permitted non-farm uses.

## 1973

- Commercial activities in conjunction with farm use
- Mining activities
- Private parks, playgrounds, hunting and fishing preserves and campgrounds
- Commercial power generating facilities
- Non-farm dwellings

1975

- Personal use airports

1977

- Home occupations
- Temporary facility for the primary processing of a forest product
- Boarding of horses

1979

- Sanitary landfills approved by the Environmental Quality Commission or Department

1981

- Farm help dwellings for relatives
- Limited “lot-of-record” opportunity until July 1, 1985

1983

- Expands types of home occupations allowed
- Utility facilities may include transmission towers under 200 feet
- Transmission towers over 200 feet

1985

- Residential care homes in existing dwellings
- Raising greyhounds in Multnomah County
- Dog kennels
- Raising aquatic species
- Other buildings essential to the operation of a school

1987

- Expansion and modification of existing roads

- Replacement dwelling for building on National Historic Register
- Destinations resorts qualified under the statewide goals

1989

- Wineries
- Room and board arrangements in existing dwellings
- Creation of wetlands
- Seasonal farm worker housing

1991

- Cemeteries in conjunction with a church
- Living history museums in Marginal Land counties (Lane and Washington)

1993

- Farm stands
- Replacement dwellings
- Expansion of existing railroad landings
- Lot-of-record dwellings

1995

- Armed forces reserve centers within one-half mile of community college
- Riding lessons, training clinics and schooling shows in conjunction with horse stables
- Utility facilities in existing road right-of-ways
- On-site filming and accessory activities
- Parking no more than seven log trucks

1997

- Propagating insects
- Sites for the takeoff and landing of model aircraft

- Conversion of existing building for temporary hardship dwelling
- Operations for the extraction and bottling of water
- Facilities for the processing of farm crops less than 10,000 sq. feet
- Expansion of existing county fairgrounds
- Guest ranches in Eastern Oregon

1999

- Recreational vehicle as temporary hardship residence
- Expansion or replacement of existing non-profit animal shelter until January 1, 2002
- Defines utility facilities to include wetland waste treatment systems
- Fire service facilities for rural fire protection
- Irrigation canals, delivery lines and accessory operational facilities
- Utility facility service lines
- Living history museums for non-Marginal Land counties
- Yurts in private campgrounds

2001

- Repeals separate listing for seasonal farm worker housing and directs LCDC to amend its accessory farm help dwelling rules to provide for all (seasonal and year round) farm worker housing
- Land based application of reclaimed water and biosolids but not treatment works. This provision consolidates some activities that had been treated as either 'farm uses' or 'utility facilities' into a new listing.
- Amends the definitions and review standards for farm-stands, parks and community centers, relatives eligible for farm help dwellings; non-farm dwellings and partitions and guest ranches in eastern Oregon.

2003

- Grandfathers existing aerial fireworks display business in Clackamas County

2005

- Landscaping businesses in conjunction with farm use
- Grandfathers existing county law enforcement facility in Marion County
- Clarifies the types of aquaculture operations that are a farm use or a conditional non-farm use
- Allows an owner to defer the actual replacement of a dwelling after demolition into the future
- Allows services to veterans in existing rural community centers.

2007

- Clarified that existing provisions including biofuels processing.

2009

- Eliminated kenneling greyhounds and fireworks stands
- Applied the ORS 215.296 review standards to public and private schools and limited them to be “primarily for residents of the rural area in which the school is located”
- Added existing LCDC rule restriction that golf courses be located only on non-high-value farmland