



LAND USE: PROGRESS AND CHALLENGES

The League of Women Voters of Oregon (**LWVOR**) first studied land use over forty years ago; its 1959 report examined the state's role in managing urban growth. In 1973, based on that study and other League work, the League supported Senate Bill 100, which created the statewide land use planning program. This 2002 report looks at the history of Oregon's land use program, documents its accomplishments, and recognizes the challenges it continues to face.

History and Values of Statewide Planning

Oregonians' concerns about the environment during the late 1960s and early 1970s prompted statewide land use planning proposals. Governor Tom McCall (1967-75) addressed rapid development, growing population and ecological changes in the state. In the late 1960s, courts began to rule that land use decisions and zoning must address environmental and social factors; economics should not be the sole consideration.

The 1969 Legislature enacted SB 10 directing counties to enact comprehensive plans and zoning ordinances in accordance with set standards and gave the Governor enforcement power. However, the law failed to establish mechanisms or criteria for evaluating or coordinating local plans.

In response to this need, the 1973 Legislature enacted SB 100, which established statewide land use planning and created the Land Conservation and Development Commission (**LCDC**). The new commission was mandated to develop statewide land use planning goals, coordinate local land use planning activities, and assure active citizen participation throughout the planning process. The Legislature identified the initial ten goals; citizen workshops added the next four. The Willamette River Greenway Goal was added in 1975. Four coastal goals were added in 1976.

SB 100 was supported by the Governor and many state leaders, Teamsters (Willamette Valley cannery workers), and the Oregon State Home Builders Association. In addition, many farmers saw a need to protect and preserve

farmland from urbanization, particularly in the Willamette Valley.

Organized opposition came from rural landowners, primarily from ranching areas of southeast Oregon and lumber areas of southwest Oregon who were concerned about a perceived loss of land value. Kenneth Brown of the Farmers' Political Action Committee testified against SB 100 calling it a "police state bureaucracy."

Oregon's Statewide Planning Goals

- Goal 1: Citizen Involvement
- Goal 2: Land Use Planning
- Goal 3: Agricultural Land
- Goal 4: Forest Lands
- Goal 5: Open Space, Scenic and Historic Areas, and Natural Resources
- Goal 6: Air, Water, and Land Resources Quality
- Goal 7: Areas Subject to Natural Hazards and Disasters
- Goal 8: Recreational Needs
- Goal 9: Economic Development
- Goal 10: Housing
- Goal 11: Public Facilities and Services
- Goal 12: Transportation
- Goal 13: Energy Conservation
- Goal 14: Urbanization
- Goal 15: Willamette River Greenway
- Goal 16: Estuarine Resources
- Goal 17: Coastal Shorelands
- Goal 18: Beaches and Dunes
- Goal 19: Ocean Resources

While the final bill was much weaker than originally written, commissioners appointed to the LCDC were strong leaders, balanced in areas of expertise and geographic diversity. The commission took its charge of citizen involvement seriously and scheduled over 75 open hearings and workshops statewide to establish the planning goals. Department of Land Conservation and Development (**DLCD**) Director Arnold Cogan stated, "We've had regular, good old citizens, unaffiliated, non-bureaucrat citizens, at the meetings. . . Citizen involvement actually can happen in a positive way, and actu-

ally can produce a consensus, even though not all people may agree on certain points.” He noted that all persons attending were given an opportunity to state their views. During the year-long process, 10,000 people participated directly in the drafting process. A state Citizen Involvement Advisory Committee (**CIAC**) was established as a continuing program under *Goal 1: Citizen Involvement*.

In 1977 a process was established to provide administrative and judicial review for approval of comprehensive plans. Of Oregon’s 277 cities and counties, 206 met the compliance date for comprehensive plan development by 1980.

LCDC had the authority to review land use decisions for goal compliance. When conflicts arose, many chose to appeal to the LCDC instead of to the courts. A more efficient action for the appellants, it also gave the LCDC an opportunity to interpret and clarify the goals. However, hearing appeals took time away from other activities, so the 1979 Legislature created the Land Use Board of Appeals (**LUBA**). This three-person board, appointed by the Governor, now is the initial appellate body for all land use cases.

Statewide land use planning was challenged through the initiative process in 1976, 1978 and 1982. All failed. These challenges focused on repealing state control of land use planning. Although resistance remains, opponents talk in terms of reform instead of repeal.

The Legislature has continued to alter the planning process. In 1977 it passed a law to compensate owners of land down-zoned to less intensive use by providing a reduced assessed valuation for tax purposes for five years if the zone change was not at the owner’s request. The 1981 Legislature required periodic review and update of comprehensive plans and citizen involvement programs. However, in 1999 the Legislature exempted some jurisdictions.

In 1983 counties were allowed more options for hobby farm and small wood lot development in areas with poorer soils or existing small owner-

ships. Separate legislative actions redirected emphasis toward economic development in 1983 and away from control over forest practices in 1987. In 1993 counties were granted authority to allow permits for dwellings on forestland.

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The zoning of secondary lands (those tracts that have less productive soils) remains an issue of continued debate. In 1985, 1989, and 1999 the Legislature took various actions to study soil productivity and secondary lands. In 1995 a bill was passed allowing more development on lower quality lands outside the Willamette Valley while limiting development on the best farmland inside the valley.

Oregon court cases have interpreted both the process and the substance of land use planning in Oregon. In general, public policy is articulated in a comprehensive plan and carried out in zoning and other implementing regulations. In *Fasano v Board of County Commissioners of Washington County* (1973) the Oregon Supreme Court stated that plans were controlling instruments. It also established the judicial nature of certain zoning decisions and applied procedural requirements accordingly. In *Baker v City of Milwaukie* (1975) the Oregon Supreme Court likened the comprehensive plan to a constitution for land use decision making. The Oregon Court of Appeals in *Duddles v City Council of West Linn* (1975) granted standing (the legal right to appeal) to those within sight and sound of the proposed use; and *Jefferson Landfill Association v Marion County* (1984) stated that citizens have standing even if they have no economic interest. This is now under review in *Utsey* as discussed later in this update.

Issues of substance were decided when LCDC in *Seaman et al v City of Durham* (1978) stated that a metropolitan area city must bear its fair share of the regional housing need (including multi-family) for all income levels. Courts ruled that in developing local plans, resource land goals dominate housing goals outside urban growth boundaries (*Peterson v City of Klamath Falls*).

Accomplishments of the Oregon Planning Program

Although Oregon's land use program has been admired and studied around the nation, opinions differ about its effectiveness. Land Use goals are difficult to measure. Some goals suffer for lack of study, as most data collection has focused on the Portland metropolitan area rather than on rural lands or smaller cities around the state. While it is clearly difficult to make accurate interstate comparisons due to the host of other contributing factors (i.e.: economy, tax structures, cultures), the program appears to be succeeding in many of its core goals.

Conservation of Land: Incorporated cities in Oregon, from metropolitan Portland to Greenhorn, population 3, have an urban growth boundary (**UGB**). These UGBs were adopted in the late 1970s and early 1980s to protect farm and forest land and ensure efficient urban development.

In 1960 the density of the Portland metro area was 3,412 people per square mile and the density of the Atlanta metro area was 3,122 people per square mile. By 2000, Atlanta's metro density had dropped to about 1,500 people per square mile while Portland's had risen to about 4,000. If the Atlanta metro area had grown as efficiently as the Portland metro area grew, 93,000 acres of land in Georgia-- farmland, pine forests and rural homesites -- would have remained rural.

Protection of Farm and Forest Lands Outside UGBs: Oregon has zoned 16 million acres of farmland and 8.9 million acres of private forestland. By contrast, all of the land set aside for urbanization, rural residential development and commerce in Oregon totals 1.6 million acres. In farm and forest zones, minimum lot sizes to restrict development generally range from 80 to 160 acres.

In the 25 years before Oregon passed its comprehensive land use laws, the Willamette Valley's population grew by 570,000 and lost one-third (900,000 acres) of its farmland. In the following 25 years (1974-1999), the valley's population grew by 670,000 but lost only 105,000 acres of farmland, according to Willamette Valley Alternative Futures Study.

Urban Reinvestment and Revitalization in the Portland Metro Region: The share of regional employment in the central city area of the Portland metro area has held nearly steady at about 20% of the regional total (compared to 10 to 15% for many metro areas of similar size), even as the entire region has experienced rapid growth. Between the mid-1970s and the mid-1990s, downtown employment increased from 56,000 to 109,500. The downtown is also lively, vital and busy on weekends and weekday evenings.

In 1996 about 29% of all residential development inside the Portland metro UGB came from infill and redevelopment, as contrasted with about 4% in the Cleveland metro area. In the mid-1990s, the most rapid appreciation of home prices in the region occurred in poor, inner-city neighborhoods. For example, the average sale price of a home in North Portland was \$44,500 in March 1992; in March 1997 the average sale price was \$102,000, a 150% increase. By contrast, in the Lake Oswego/West Linn area the average sales price increase for that period was 31%, \$169,900 to \$221,900. The biggest challenge in many poor neighborhoods now is not urban decay but gentrification.

Reduction of Barriers to Housing Affordability: Due largely to Goal 10 and other affordable housing laws, between 1977 and 1982 the amount of land zoned for all residential uses increased by 10%, while land available for multi-family residential development almost quadrupled, from 7.6% to 27% of net buildable acreage. These multi-family units have proven popular. With changing demographics and changing needs, demand for assisted living facilities and low-maintenance units without yards has increased. In the Portland metro area, the average lot size for vacant residential land in 1978 was 12,800 square feet. It was reduced to an average of 8,280 square feet by 1982, lowering the cost of the land for a home by \$7,000 to \$10,000 in 1982 dollars. With the mixture of decreased lot size and increased housing unit diversity, the maximum number of units that could be built in the metro area increased from 129,000 to over 301,000.

Oregon requires local governments to allow manufactured housing in all residential zones. Cities and counties must zone adequate

amounts of land for multi-family housing. City charters, plans, or zoning regulations cannot be used to block government-subsidized housing.

Today these gains are eroding as accelerating growth during a period of modest wage increases has made housing less and less affordable. According to the National Association of Home Builders, the average sale price of a home in the Portland metro area in the third quarter of 2001 was \$173,000. This was greater than the price in the metro areas of Salt Lake City (\$156,000), Tacoma (\$164,000) and Reno (\$167,000), but less than metro Sacramento (\$204,000), Los Angeles (\$231,000), Seattle (\$230,000), and San Francisco (\$520,000).

While some attribute rising housing costs to the lack of developable land, several academic studies, including a recent Brookings Institution study, have found that housing demand primarily drives price increases, not a lack of land.

Increased Transportation Choices: Between 1990 and 1995, transit use (measured in trips/person/year) increased 4.4% in the Portland metro area. During the same period, transit use decreased by an average of 9.1% in the 20 cities most similar to Portland in size. From 1990 to 1996, transit ridership in the Portland metro area grew 20% more than growth in vehicle miles traveled, 41% more than growth in transit service and nearly 150% faster than the growth in population.

In 1998 light rail service was extended into Washington County. At the time of opening, 6,000 new houses and apartments were permitted or under construction in transit-oriented developments near the line. As many as one-third of the people living in these new suburban communities are projected to get to work by walking, riding their bikes, or taking public transit.

Due to state policies there are now more bicycle lanes and sidewalks. In Portland, the number of people crossing bridges on bicycles has doubled in the past ten years.

Economy: The Real Estate Research Corporation interviewed hundreds of real estate professionals for their 1998 edition of Emerging

Trends in Real Estate. It wrote, "The most stable investment markets -- the ones that have staying power and hold value -- also have growth controls, either government enacted or enforced by natural geographic boundaries." It also found, "A classic growth-constrained market, Portland, Oregon, ranks at the top of the second-tier group for both investment and development prospects -- an unusual one-two punch. It also claims the lowest risk for overbuilding. Who says 'growth boundaries' are dirty words?"

Challenges to Statewide Planning

Growth: One of the greatest challenges to Oregon's land use planning comes as a result of ever-increasing population growth. For the nine years preceding 1999, the state Office of Economic Analysis found that Oregon's population grew an average of 1.81% per year while the national average was 1.05%.

Between 1987 and 1998 the state population grew a total of 22%. The greatest proportion of population increase was in the Willamette Valley cities. During that time these same cities increased their UGBs by 0.06%. There has been a loss of farmland within UGBs, but that land was planned to provide for a growing urban population over the 20-year period for which the boundaries were designed.

When the UGBs were established, some cities predicted that their 20-year population growth would be greater than was realized. For example, in 1982 Albany projected a population of 61,060 by 2000, but actual 2000 population was 39,400. In 1984 Roseburg projected 44,320 by 2000, but realized only 25,931. The mis-

taken projections resulted in UGBs that were too large to be filled and urbanized in 20 years; indeed, there is still room for growth inside most of Oregon's UGBs.

The un-urbanized expanse of land within UGBs may have given rise to the illusion that there is no need to conserve land. Large building lots, large parking lots and sprawl within UGBs resulted. As land was developed, pressure to expand the boundaries occurred. Many cities saw

"We still have far to go before we truly integrate the natural and the built environments in the region."

that efficient land use must focus attention on infill and increased density if sprawl was to be avoided.

Sprawl is costly. As homes are built away from urban centers, the demand for services requires extension of sewers, telephone and electric lines, roads, mass transit, and police and fire protection. One study cites a 27% cost reduction per dwelling when built adjacent to an existing development and near central facilities. As Richard Benner, Senior Assistant Counsel of Metro said, "If you wonder why the Metro region began to spread into Washington County farmland 15 years ago, follow the extension of the sewer line some 25 years ago to the Rock Creek Community College on Highway 26 -- at the time far away from any center . . ." When the college was built, there was no UGB. At the time the UGB was created, the line extended to include the college campus. Had the college not been built there, the boundary may have been different, and the sewer line may not have stretched so far beyond the urban core.

Three threats to the achievement of farmland protection include expansion of UGBs to include farmland, rezoning farmland for rural development uses, and allowing non-farm uses in farm zones. Farmland preserved in large units is of utmost necessity for workable farms.

Riparian corridors, wetlands, wildlife habitat, trails, cultural, scenic and historic areas as well as open space have had less protection than farm and forest lands. As population increases, these resources (both within and outside UGBs) are at risk from mounting development pressures. As Mike Houck of the Audubon Society says, "We still have far to go before we truly integrate the natural and the built environments in the region."

Takings: Balancing Private Property Rights and Public Benefits: The U.S. Constitution and Oregon's Constitution guarantee that private property cannot be taken from the owner for public use without "just compensation." The U.S. Constitution also specifies that any such action cannot occur "without due process of law." Over time, "just compensation" has generally meant that government has the right of eminent domain or condemnation under certain circumstances and that levels of compensation should be either amicably settled or a fair price be de-

termined by the courts. The right of eminent domain governing the seizure of private property has been essential to the development of such public benefits as highways, dams, transmission systems and parks. Both Constitutions attempt to balance the rights of the individual with the clear needs of the general public.

However, the extent to which government can regulate private property to protect public health and the investments of neighbors and the public has been questioned. In a 1922 Supreme Court decision Justice Oliver Wendell Holmes established the doctrine of "regulatory takings," which says a government may regulate but that a governmental regulation that "goes too far" in restricting private property use is a taking and requires compensation.

Since then, the U.S. Supreme Court has been asked to decide when a regulation "goes too far." The constitutionality of zoning ordinances has been established, ruling that zoning could not be challenged as a constitutional "taking." Requiring a permit is not a taking. A regulatory act can only be challenged as a "regulatory taking" if the land is physically invaded or if all economically beneficial or productive use of property were denied.

Based on the concept that the rights of individuals must be balanced with the public needs of the people, the U.S. Supreme Court also established rules governing the imposition of conditions on land use approvals. The Court concluded that, whatever the regulation, it must be related to some legitimate regulatory objective (i.e. public purpose). Also, a "rough proportionality" must exist between a condition of approval and the impact of the proposed use. A recent change now allows a property owner to challenge a regulation if the property had been purchased before the regulation was enacted.

State legislators have been faced with proposals designed to give private property owners more weight in the balancing of private property rights and public need. In Oregon most proposed legislation dealing with regulatory taking or compensation for taking has been focused on Oregon's unique statewide land use planning program. In 1995 the first significant "takings" bill was passed, but vetoed by the Governor. The bill would have either prohibited regulatory protection or required compen-

sation for the protection of “scenic areas, natural areas, open space, wildlife areas, wetlands, wilderness or public outdoor recreation areas.” These areas mirror the areas to be protected under Statewide Planning Goal 5.

In 2000, Oregon voters passed Ballot Measure 7 amending Oregon’s constitutional provision against the “taking of private property.” Measure 7 defines a taking as any reduction of property value as a result of a governmental regulation and requires compensation for any reduction of property value, keyed to the “fair market value” of the loss. Measure 7 requires compensation for the protection of “wildlife habitat, natural areas, wetlands, ecosystems, scenery, open space, historical, archaeological or culture resources” -- again similar to resources protected under Goal 5.

Measure 7 is broadly written and may require compensation for regulations extending well beyond Oregon’s planning program, such as building codes and health and safety codes.

The compensation required by Measure 7 exceeds U.S. Constitutional provisions which require compensation only for a total loss of any economic use of property. Both the U.S. and Oregon Constitutions allow regulation to achieve a public benefit without requiring compensation, even if the regulation results in significant loss of property value. Quoting Justice Holmes, Chief Justice Rehnquist wrote in *Dolan v City of Tigard* (1994): “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”

The constitutionality of Measure 7 was first challenged in Circuit Court in Marion County. That decision, now on appeal before the Oregon Supreme Court, declared Measure 7 unconstitutional. The Supreme Court will only be considering procedural issues regarding the constitutionality of the Ballot Measure. These issues do not deal with the merits of takings, amount of compensation, the breadth of coverage, or other implementing decisions.

If Oregon’s Supreme Court declares Measure 7

constitutional, local governments and state agencies will immediately have to implement it. The Legislature will need to develop procedures for compensation claims. On the other hand, if Measure 7 is declared unconstitutional, voters are likely to face various ballot measures for or against Measure 7 concepts.

Erosion of Citizen Involvement: Goal 1 and related statutes require citizen involvement in all phases of the land use planning process. Goal 1 protects the rights of individual citizens as well as citizen interest groups to be involved. All phases of the planning process include:

- Development of state land use policy, including statutes, statewide planning goals, and administrative rules;
- Development of local comprehensive plans consistent with state policy;
- Periodic review and update of local comprehensive plans to reflect changes in community values and state planning policy;
- Implementation of local comprehensive plans through local zoning and development ordinances, and review of development applications under those ordinances;
- Enforcement of local plans and ordinances; and
- Appellate review of local land use decisions to LUBA and the courts.

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To facilitate meaningful citizen involvement, Goal 1 requires each local jurisdiction to have a Committee for Citizen Involvement (**CCI**). The CCI develops, implements, and evaluates the local citizen involvement plan. With approval by DLCD, the local planning commission can serve as the CCI; however, an independent committee whose sole purpose is advocating citizen involvement in local land use planning is preferred.

The statewide planning program relies on local plan implementation and on citizen involvement to ensure local comprehensive plans and ordinances achieve statewide planning goals. Statutes give citizens a broad right of standing (i.e., the legal right to appeal local land use decisions to LUBA), if a citizen first participated at

the local level and raised issues with sufficient detail to be addressed by local decision makers. Participation, rather than a showing of being personally and adversely affected or aggrieved by a decision, has been the test to confer standing to appeal local land use decisions.

Overall, citizen involvement in land use policy making at the state and local levels is working well, limited only by citizens' time and willingness to be involved. However, when it comes to applying policy and ordinances to specific properties and development applications (called "quasi-judicial decisions"), there has been erosion of citizens' ability to participate. Much of the erosion has come in an effort to provide more efficiency and certainty in local land use decision making.

In 1973 laws required local officials to hold at least one public hearing for any application for a land use permit. Since then, local land use decision making has been streamlined by the Legislature to require fewer public hearings and even prohibit hearings on "expedited land divisions," which cover certain higher density urban land divisions. "Limited land use decisions," which include land divisions, design review, and aggregate (sand and gravel) resource site permits in exclusive farm use zones, have limited procedural requirements but are exempt from notice, hearings, and other required procedures.

Costs to citizens to participate in local land use decisions have increased. A variety of costs, from copies of staff reports to fees for local appeal hearings, have shifted to citizens due to local budget constraints.

In 2001 the Court of Appeals limited standing to appeal a local land use decision to the courts to a person who has suffered "practical effects" of the decision (*Utsey v Coos County*). This court decision significantly limits the ability of a public interest group to gain standing to appeal a local land use decision beyond LUBA to the Court of Appeals, even if it met all the statutory requirements to participate and sufficiently raise issues before the local decision makers. The court stated a person or group must have more than an abstract interest in the decision appealed, such as a concern that land use laws are appropriately applied. Because of *Utsey's*

widespread impacts, LWVOR, DLCD, and the Attorney General's Office are seeking review of the decision to the Oregon Supreme Court.

Success and acceptance of the land use program rely on citizen involvement in all phases of the planning program. However, citizen involvement in quasi-judicial land use decisions is not as universally accepted or protected as is citizen involvement in legislative land use policy making.

Enforcement of Local Plans and Implementation of Ordinances: Citizens' role in land use enforcement is important because enforcement is complaint driven; it relies on citizen monitoring. Funding for enforcement is almost non-existent at all levels of government, due to budget constraints or lack of political will. Enforcement costs in terms of time and money are therefore shifted to citizens. If citizens believe statewide goals have been violated, their recourse is LCDC or LUBA.

A citizen who believes a land use decision was not made according to the law, must carefully follow the procedural requirements of the jurisdiction or risk being excluded from the process. The process is far from intuitively obvious; it is based on a litigation model with numerous technical requirements. Barriers to participation include the complexity of zoning and development laws and procedural requirements, the expense in time and money, and the stress inherent in advocating for a position against potentially well-funded adversaries.

Procedural rules for participation vary according to the type of land use decision being made. Certain minimum requirements for participation are established by state law. Localities may provide greater opportunity to participate, but not less than the minimum. Therefore, procedures differ among localities.

Meeting procedural requirements is crucial. While citizens may not win an appeal based solely on a procedural error, citizens will be excluded from the process by making a procedural error, such as missing a deadline.

Conclusion

In October 1973 the LWVOR State Land Use committee asked county commissioners and/or staff planners throughout the state to identify

the overriding concerns of their community governments regarding land use planning. Their concerns at that time, in rank order, were urban containment, preserving agricultural and forest lands, sewer and water supply, planning, subdivisions, population pressures, environmental concerns, zoning and rezoning, individual vs. public rights, money, and public understanding.

Since then, many citizens have worked very hard to write statewide land use goals, develop implementing legislation and administrative procedures to deal with these concerns.

The framework has been established and significant progress has been made in addressing these concerns. LWVOR believes citizens must remain involved to meet future challenges.

Website for LCDC/DLCD is www.lcd.state.or.us

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