



Oregon

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January 31, 2013

TO: Oregon Legislative Assembly

FROM: Jim Rue, Director
Department of Land Conservation and Development

SUBJECT: Report to Legislature on the
Oregon Transfer of Development Rights Pilot Program

Overview

SB 763 and HB 2228, enacted in 2009, provide authorization and standards for the transfer of development rights (TDRs), a voluntary market-based land use planning tool. Senate Bill 763 provides general enabling authority for TDR programs. House Bill 2228 (Chapter 636, Oregon Laws 2009) established the Oregon Transfer of Development Rights Pilot Program in the Department of Land Conservation and Development, and required the department to implement the program “Working with the State Forestry Department, the State Department of Agriculture and local governments.” The program allows for the approval of up to three pilot projects to test use of TDRs to conserve forest land. Section 10 of the bill requires the Department of Land Conservation and Development (DLCD) to provide a report to the Legislature, on or before February 1, 2013:

- (1) Evaluating the Oregon Transfer of Development Rights Pilot Program established in sections 6 to 8 of this 2009 Act; and
- (2) Recommending whether the pilot program should be continued, modified, expanded or terminated.

The purpose of the pilot program is to test TDRs as a potential method to discourage residential development on forest land and encourage the continued management of commercial forest lands for timber production and other forest uses – thus slowing the conversion of forest lands for non-forest purposes. To achieve this outcome, the TDR pilot program provides incentives for land owners to transfer development rights from forest land to land within urban growth boundaries or some types of unincorporated communities.

Department Actions to Promote the Pilot Program

Following the passage of HB 2228, the Land Conservation and Development Commission (LCDC) adopted rules at OAR chapter 660, division 28, to implement the program. These rules included an initial pilot program application deadline of June 1, 2010, and notice of the pilot

program opportunity to all Oregon local governments, commercial forest landowners and land trusts.

In addition, DLCD staff took the following actions to promote interest in the pilot program:

- Created a TDR webpage with a description of transfer of development rights, a description of the TDR Pilot Program and its benefits, links to HB 2228 and related materials and an application form;
- Presented the TDR Pilot Program to a large group of commercial forest land representatives, the Association of Oregon County Planning Directors and the Oregon Bar;
- Presented information about the TDR Pilot Program in sessions at the Oregon American Planning Association (APA) conference in May 2010 and again at the Oregon Planning Institute conference in September 2010;
- Wrote articles on the TDR Pilot Program for the Oregon APA magazine (March-April 2010 issue), the Coalition of Oregon Land Trusts magazine (April 2010 issue) and the League of Oregon Cities monthly newsletter (July 2010 issue);
- Initiated contact with and responded to inquiries from several cities, counties, land trusts and commercial forest land representatives who expressed potential interest in participating in a pilot project;
- Researched several potential TDR pilot projects by examining applicable zoning and public infrastructure availability, and created maps of numerous potential sending and receiving areas in several counties; and
- Met with representatives of several commercial forest landowners to discuss the potential for a pilot project at specific locations.

Mid-term Program Modifications

Although there was significant initial interest in the pilot program among commercial forest landowners, there was little interest from cities and counties that would need to adjust local land use plans in order for local landowners to receive transferred development rights. DLCD staff concluded that the lack of interest was, in part, connected to a slow real estate and development economy generally and, in part, due to a sharp corresponding reduction in land use planning staff and funding in many city and county planning offices. Planning departments have been reluctant to take on special new programs while struggling to maintain local planning and development functions.

When no successful projects materialized in the first biennium of the program, and taking into account feedback from local planners, DLCD proposed that additional incentives could increase city, county and commercial forest landowner interest in the TDR pilot program. The department worked with county and forest industry representatives to recommend additional incentives for the pilot program. Those recommendations were proposed as House Bill 2132, enacted in 2011, which included the following new incentives:

- Authorization for receiving areas in more types of unincorporated communities;

- Allowance for a wider variety of receiving area zones (e.g. residential, commercial and industrial);
- Authorization for lower densities for transferred rights in receiving areas;
- Increased ratios allowed for transferred development rights;
- Deletion of the requirement for public access to conserved forest lands;
- and
- Authorization for revenue sharing when rights are transferred to a different jurisdiction.

There was broad support for these additional incentives among local governments and commercial forest land representatives. This legislation was enacted, and in January 2012, LCDC amended administrative rules to incorporate the new incentives and to leave the application period open-ended. DLCD staff provided notice of the changes in the program to commercial forest landowners, local governments and land trusts, along with a description of the new incentives and an invitation to participate in the program.

Conclusions

Despite these changes and additional incentives, to date the department has received no proposals for pilot projects under this program. The department received several inquiries, and worked with landowners and local governments in exploring ideas for pilot projects and continues to receive inquiries. However, to date there has been no viable project proposed.

A possible and indeed likely reason for the lack of successful projects is the continuation of the real estate and land development downturn that began in 2008. This program was initially formulated prior to that downturn, and at that time it was reasonably assumed that there would be a market for transferred development rights, especially due to the trending increase in real estate and development values. As it turned out, there is currently not sufficient interest in transferring development rights from forest land properties to urban areas or rural communities. It is reasonable to assume that development rights on forest land properties continue to be perceived as more valuable than a forest land development right transferred to receiving areas identified in the legislation under the conditions for such transfer included in the legislation.

TDR programs will not be successful unless there is a market for the transferred rights. Potential landowners in the urban areas and communities eligible to receive dwelling rights under this program may not believe there is sufficient value in acquiring such rights. In part, this may be due to the fact that there is a surplus of dwelling rights currently within many urban areas and communities. There are few or no state imposed restrictions to dwelling density in urban areas and communities, and the restrictions that exist under current local land use plans were typically imposed by local governments due to service or other limits to development intensity in an area, or due to local preferences. As such, it may not be reasonable to expect that local governments will “upzone” property to provide for a place to transfer a dwelling or other development right from forest land.

However, communities interested in encouraging the use of TDR could make future upzones contingent upon the use of TDR, particularly when there are plans for public utility or road upgrades that would allow increased development densities. That is to say, the program would be

more likely to attract potential developers if the option to upzone is only available or preferentially available to developers who utilize transferred development rights. This option would have to involve a willing local government, probably one that is interested in conserving nearby forest land. Needless to say, this option would be controversial.

We note that the use of transferred residential development rights into urban areas is not the only option under the updated TDR Pilot Program. The new incentives enacted in 2011 identify opportunities for residential as well as other types of development that could ONLY, or at least more readily, be obtained through the TDR Pilot Program. These opportunities include:

- The ability to transfer more development rights off of forest land than may be utilized on-site under forest zoning;
- The allowance for residential development at a higher density than is allowed in the underlying zone;
- The allowance for commercial development with a higher floor area ratio than is allowed in the underlying zone;
- The allowance for commercial or industrial development with greater lot coverage than is allowed in the underlying zone;
- The allowance for uses that are not currently permitted in the underlying zone;
- The allowance for uses, densities or other provisions that are not currently allowed in unincorporated communities;
- The ability to waive certain requirements or streamline the review process for development proposals involving development rights transfer; and
- The ability to add existing exceptions areas to UGBs for development rights transfer without going through the UGB amendment process.

Another likely reason why there have been no applicants for a pilot project to date is that the program and its potential benefits are still largely unknown to many cities and potential developers. There is a significant learning curve for communities in becoming familiar with and knowledgeable about TDR as a land use planning option, not only in Oregon but across the nation. Some commercial forest land representatives have stated that, while they are interested in Oregon's TDR pilot program, they don't know how to go about locating a city or prospective receiving area landowner to work with, and do not know how to promote city or county interest in a pilot project. The department currently lacks the staff and funding to provide this "middle man" role. However, experience with TDR in other states has shown that once one or two communities are successful in using TDR, other communities will follow. Further, Oregon's land trust community is growing more interested in the potential use of TDR to advance the protection of working farms and forests.

A couple of counties have expressed an interest in using TDR to provide the voluntary option to Measure 49 landowners to transfer their Measure 49 development rights into UGBs or unincorporated communities. Unfortunately, HB 2228 does not allow this and M49 properties are not eligible for participation under this program. While Measure 49 itself authorizes the use of TDR to transfer such rights, there is not enough detail in statute currently to give potential participants the confidence to use this provision and enable such transfer to occur.

Recommendations

The department continues to believe that viable applications for one or more pilot projects under this program could be forthcoming and would be beneficial for Oregon's forest land protection efforts. However, it will require additional time for potential participants to become familiar with and feel comfortable participating in this new and still untested program. The department continues to receive inquiries that indicate that there is interest in TDR as a planning tool. **For this reason, the department recommends that the pilot program be continued and that Chapter 636, Oregon Laws 2009 remain unchanged.**

Additionally, the department sees potential in TDR as a voluntary tool that could allow Measure 49 authorizations to be transferred from farm and forest land to more appropriate urban or rural locations. This could be an option for interested landowners who do not necessarily want to build on-site even though they have received authorization to do so under Measure 49. Use of TDRs could greatly reduce the potential for conflict that residential development in farm and forest zones can generate. **For this reason, the department recommends further study of ideas to make the transfer of development rights from Measure 49 properties easier to accomplish, for interested owners of Measure 49 rights, and for willing local governments.**

Attachments