



The Homestead

Summer 2004

Message from Your President

Thanks to everyone who attended our annual meeting on June 17. We had over 50 people in attendance for this meeting, jointly sponsored by Friends of Polk County, Friends of Marion County and Friends of Linn County. Lane Shetterly, the new Director of the Department of Land Conservation and Development was the guest speaker. The meeting began with brief introductions of the various citizens groups in attendance, and Lane spoke about his role in implementing the Governor's directives concerning a comprehensive review of the land-use system. His presentation was followed by an extensive question and answer period. The evening was educational and lively. - *Pat Wheeler*

Board of Commissioners Overturn Hearings Officer's Decision

In December 2003, there was a public hearing to review a request to build a home on a two-acre parcel of timber conservation land. The parcel was formally a portion of the Valley and Siletz Railroad and is only 60 ft wide. Development standards require minimum front yard dimensions of 30 ft, and side and rear yards of 80 ft. Obviously the applicant could not meet these standards for a lot that is only 60 ft wide. Neighboring property owners attended the hearing because the approved fire buffer zones did not meet the standards for forest property, and the

proposed home would be too close to the neighboring properties.

Nonetheless, the Hearings Officer approved a variance and setbacks of 20 ft for the front and 24 ft for the back for a dwelling that would be 16 ft wide. The proposed variance also reduced the primary fuel break from 30 ft wide to 20 ft in the front and 24 ft in the back, and waived the requirements for a secondary fuel break in the front and back.

Ted Claremont appealed the decision and requested a Hearing before the Board of Commissioners. The same arguments were repeated, and the Board of Commissioners did a site visit to the property. On March 10, 2004 they overturned the Hearings Officer's decision. Although the legal considerations pertaining to the proposed variance can be debated, and the majority of the Commissioners admit to being strong advocates of individual property rights, in this case they stated that having a house on that property did not "feel" right, and they also cited fire hazard as a basis for their decision.

This is one of the few cases in Polk County during the last 10 years where the Commissioner's favored neighboring property rights over an applicant's property rights. Members of Friends of Polk County have been bringing public health and safety and water and septic concerns forward as important concerns for many land-use applications, often without acknowledgment

from either the Hearings Officer or Commissioners. Water shortage is still dismissed as a land-use consideration, but the Board of Commissioners apparently now listens to public concern about fire hazards. If you are not yet a member of the Friends of Polk County, please join today and help us continue to assist Polk County property owners in protecting their neighborhoods and communities against unwise land-use decisions.

Gaining Compliance with Land-Use Laws

Have you ever had a neighbor start a business next to you that irritated you? Ever noticed someone in the neighborhood that is putting another dwelling on their property? Or building a new house along an old house and when the new house is done, they rent the old house to someone else? Or adding another side business to an existing business? Each of these examples could be an illegal land use.

You may ask why Polk County doesn't proactively enforce land-use laws? Good question. This "blinded" approach is used because the Polk County Board of Commissioners has taken the position that county employees may not enforce land-use laws without a citizen's complaint. Consequently, *only you* can make land-use laws work!

The first step is identifying who is doing the suspected abuse. The things you need to know are:

1. names of the owner and occupier of the property (not necessarily the same)
2. address of the property in question
3. the legal description of the property (which parcel is it?)
4. what they are doing wrong

If you don't already know the answers, the Assessors Office in Polk County Courthouse can help you find this information. You can also view all parcels on taxlot maps yourself on the Internet:

<http://www.ormap.org/maps/maps.htm> .

The next step is to become at least vaguely familiar with the particular section of the land-use laws that pertains to the issue at hand. To do so you might:

1. Go to the Polk County Community Development Office just down the hall and ask to talk to a planner about this property. You will need to ask to see any files that concern this property; staff will usually help you interpret the documents.
2. Read the relevant section of the Polk County Zoning Ordinance online: <http://www.co.polk.or.us/ComDev/ZoningOrd.asp> .

If you find that there is indeed an illegal land use on that property, *file a complaint* (after all, that's why such processes exist!).

- Ask for a Code Enforcement Complaint Form and fill it out with the help from either a planner or the land-use Code Enforcement officer.
- On the front of the form you fill out the residents name, property owner, address of the violation, and details of the complaint.
- On the back of the form you fill out your name and address (there is a checkbox that says "do not release my name to anyone". If you are shy and do not wish to deal directly with your neighbors, check this box. County staff will not release your name to anyone.

The Code Enforcement Officer will review the site and check out your complaint, and send you an official response letter indicating that

the alleged violation is being investigated. Within a month, the Code Enforcement Officer will send you a letter informing you of the status of the investigation and any action(s) taken by the County.

If you need help or advice, please ask!

Remember, the first one is the most difficult. The rest get easier and feel better and better.

Land Use Does Change With Times

by Roger Kaye, President, Friends of Marion County March 2, 2004

The Associated Press story “Shetterly eager to begin review of land-use rules” (Feb. 23) ignores the history of changes that have given Oregon’s system its unique design. Oregon has one of the most flexible land-use systems in the country. In 1973, Gov. Tom McCall led the charge to protect our lands from uncontrolled development. By statute, Senate Bill 100 established a system of statewide protections that has been the envy of every sprawl-infected community from coast to coast.

For more than 30 years, other states have tried to adopt our system — some with more success than others. In most cases, they started too late. Oregon was fortunate to have Gov. McCall lead the charge before we were overcome by uncontrolled sprawl. Lane Shetterly says, “Our land-use system has served us well, but we have to recognize it was created 30 years ago. We have to take a new look at it with the perspective that Oregon is a different place than it was 30 years ago.” He apparently is unaware that between 1973 and 1997, Oregon Revised Statutes (ORS) Chapters 197, 215, 227, which pertain to land-use planning, have been

amended more than 125 times.

Farmland protection bills in 1977, 1979, 1985, 1987, 1989, 1993, 1995 and 1997 helped preserve the land mass needed to retain a vibrant agricultural industry. In 1979, the creation of the Land-Use Board of Appeals helped streamline the appeals process, providing applicants and opponents a shorter and less costly way to resolve land-use disputes. In 1983, major changes included planning for economic development, coordination with state agencies during the permitting process, and incorporation of new cities. In 1991, the Legislature created new categories involving “limited land-use decisions,” which involved a shorter review process with limited grounds for appeal. In 1997, bills allowed more flexibility for the film industry and provided for conversion and reuse of buildings in farm zones. In 1999, the composition of the Land Conservation and Development Commission, which governs the land-use program, was modified to better reflect the differences between different regions of the state.

Most recently, in 2003, legislation was passed that will improve coordination between state agencies looking to make land available for job creation and appropriate industrial development. We should never be afraid to review our land-use laws and, as we have done for three decades, improve them in light of changing circumstances. But as Oregon’s planning program comes under the scrutiny of Department of Land Conservation and Development Director Shetterly and Gov. Kulongoski, they should remember how effective, efficient and flexible our current system has been.

Gov. McCall led the way with Senate Bill 100. Thereafter, each legislative session has

amended the system. The basic system we have now allows planners and developers to operate within a predictable framework. Above all, farmland has been protected, and sprawl has been prevented.

The Real Agenda of Initiative 36

By Liz Frenkel, Natural Resources Action Coordinator, League of Women Voters-Oregon

As Chris Robbins of the LWV of Minnesota pointed out, "the social contract that has evolved in this country says, in essence, that when there is a "common good" like public safety, wildlife, or water quality, people who could possibly degrade that common good have to ask permission from the community. The social contract that property rights advocates favor is different: It says that property owners can do what they like and the community must pay them not to damage the common good."

LWVOR opposes Initiative 36 which is currently circulating for signatures. The League is supporting a campaign to not sign the initiative, and will oppose the measure if it reaches the November ballot.

Since 1973, three ballot measures have aimed explicitly at repealing statewide land-use planning. In 1976, a ballot measure, "Repeals Land-Use Planning Coordination," failed. In 1978, "Land-Use Planning, Zoning" failed; and in 1982, "Ends State's Land-Use Planning Powers" failed.

From 1982 to 2002, strategies to overturn statewide land-use planning have been mixed. Some called for repeal of land-use laws, some for demolishing the land-use agency, and some took a more indirect route raising issues about "takings" and compensation. All were

legislative measures, not initiatives. An example is SB 600, the "Ecotake" bill of 1995 which passed both houses but was vetoed by Governor Kitzhaber. The bill did not overtly condemn statewide land-use planning; rather it defined most regulatory powers as "ecotakes" for which compensation would be required.

The most recent strategy, while not explicitly condemning statewide land-use planning, also effectively would do so. Both Ballot Measure 7, and now Initiative 36, make use of the initiative process. Ballot Measure 7 was passed by voters in November 2000, and then overturned by the Oregon Supreme Court on technical constitutional grounds. Initiative 36, which has not yet qualified for the ballot, has been called the "Son of 7." Certainly both the intent and language are related. Ballot Measure 7 for a constitutional amendment was titled "Requires Payment to Landowner if Government Regulation Reduces Property Value." Initiative 36 is a statutory proposal with a similar title, "Governments Must Pay Owners, or Forgo Enforcement, When Certain Land-Use Restrictions Reduce Property Value."

Though the Chief Petitioners for Initiative 36 are Eugene and Barbara Prete of Sisters, and Dorothy English of Portland, Oregonians In Action (OIA) takes credit on its website for the initiative. The present and past executive directors of OIA, Dave Hunnicutt and Larry George, were chief petitioners for M-7. Both Ballot Measure 7 and its "son," Initiative Measure 36, propose to limit land-use regulations which allegedly reduce the value of the affected property and to require public compensation for that loss.

There are other similarities between M-7 and I-36. Both measures exempt "public

nuisances," "federal laws" and "pornography or nude dancing" (presumably Free Speech issues) from the definition of governmental regulations requiring compensation. "Public health and safety" regulations were added exemptions, probably in response to objections raised during the M-7 debate that unless these were exempted the measure's compensation requirements were overly broad. The fundamental anti-regulatory requirements of both measures are similar. A look at the differences is, however, critical to understanding the potential consequences of I-36.

Initiative 36 "waives the law"

The baldest of dissimilarities in Initiative 36 is the outrageous provision that local government may waive the law. I-36 states that "the governing body responsible for enacting the land-use regulation may modify, remove, or not apply the land-use regulation or land-use regulations." In other words, despite a state law, and even if money is available to compensate under I-36, the regulatory body is encouraged to ignore the law.

Cities and counties were frightened as M-7 passed from initiative to ballot status and then passed at the ballot box. The cost of compensation could clearly bankrupt not only local, but state government. Local government, in particular, looked for ways out of this regulatory dilemma while the measure wound its way through the courts. Numerous cities and counties began to figure out ways to avoid paying compensation by passing ordinances which, in essence, waived the regulation that was presumed to require compensation.

The authority of local governments to do this was challenged in court. The clear answer was

they could not waive legal regulations. Under I-36, if passed, the law would allow government to waive a regulation, even if required by a land-use goal or by law. Furthermore, even if, by some extraordinary means money were available, financial ability to pay need not be a decisive factor in the decision as to whether to waive the law.

As a background note, it is important to remember that both the U.S. Constitution and Oregon's Constitution guarantee that private property cannot be taken from an owner for public use without "just compensation." Court cases dealing with this protection against the "taking" of private property have construed "just compensation" to mean that government has the right of eminent domain or condemnation under certain circumstances, and that levels of compensation should be either amicably settled or that a fair price be determined through arbitration. This is far removed from requiring compensation for enforcing regulations required for the public good.

Initiative 36 is retroactive

One of the major debates over M-7 was whether it was retroactive or not. Would it affect only new regulations? Would compensation for lost value of property be required from time of ownership? I-36 proposes to statutorily resolve those issues. The "scofflaw" provision quoted above that would allow government to modify, remove or not apply the land-use regulation goes on "to allow the owner to use the property for a use permitted at the time the owner acquired the property." Acquisition of the property includes by inheritance from a family member and the measure would apply to land-use regulations that were enacted anytime after the acquisition by the original family member. Under definitions, "family member" is

broadened to include in-laws, uncles and aunts, nieces and nephews, stepparents and children, grandparents and grandchildren, or "a legal entity owned by any one or combination of these family members or the owner of the property." The result is quite a new concept of "owner."

Given legal, genealogical and historical connections, it is likely that many land-use regulations will have been enacted after acquisition of affected properties, thanks to the new definition of "owner." The "owner" can thus require compensation. Sprinkled through the measure is the phrase "the present owner of the property, or any interest therein" to make this very clear.

Initiative 36 overturns the statutory definition of "land-use decisions"

Existing law defines "land-use decisions" as decisions made by local government or special districts concerning statewide land-use goals, comprehensive plan provisions, existing or new land-use regulations, as well as state agency decisions. A benign-sounding provision of I-36 effectively overturns this statute. I-36 simply states that "a decision by a governing body under this act shall not be considered a land-use decision" as defined by the existing law.

The significance of this is to abolish LUBA (Land-Use Board of Appeals). LUBA only hears land-use cases based on land-use decisions. The League and anyone else who appears before the appropriate governmental body and presents appropriate testimony can appeal the governmental decision to LUBA. This gives organizations and persons "standing" before LUBA. If the decision is no longer considered a land-use decision, such as a demand for compensation under I-36, then the only recourse would be to state courts. As

the League found out in *Utsey vs. Coos County*, while the League had standing at LUBA, the League did not have standing before the Court of Appeals because it does not have a "legally protected interest", and hence could not demonstrate "injury."

Summary

Initiative 36 is extremely dangerous. Its effect would be to destroy Oregon's Land-Use Planning Program, and that is the apparent intent. Under the guise of "property rights," I-36 threatens land-use regulation by requiring compensation for lost values. No provisions allow for calculating gained values (when owners *benefit* from land-use decisions). This measure fundamentally compromises the very meaning of public good, and the critical need for planning for the future of our state.

- *Please DON'T sign Initiative 36.*
- *DO extol the values of statewide land-use planning.*
- *JOIN WITH OTHERS in defense of Oregon's statewide land-use planning program.*

Calendar

- Aug 19 FoPC Board Meeting
Independence Public Library 7 pm
- Sep 16 FoPC Board Meeting
Location TBA
- Nov 2 Election Day (sharpen your pencils)

You must be the change you wish to see in the world. - *Gandhi*

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