

Looking Forward

*A publication of Oregonians In Action Education Center
on land use and property rights*

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**For balanced,
flexible
and fair land-use
regulations, with
respect and
protection for
the rights of
landowners**

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Legal Center Agrees to Represent Jackson County Business Before Oregon Supreme Court

The OIA Legal Center recently agreed to represent Mountain View Paving, a Jackson County asphalt company, in an important case pending before the Oregon Supreme Court that could embolden environmental groups and land use “watchdogs” to file multiple lawsuits against property owners at the same time, with the goal of stopping land use applications by making them too costly and time consuming.

In 2001, MVP purchased a concrete batch plant and aggregate site near Talent. Both the batch plant and the aggregate site were lawful uses on the property. MVP modified the concrete batch plant, converting it to an asphalt batch plant, and operated the plant without incident for 10 years.

In 2011, MVP received a letter from Jackson County demanding that MVP obtain land use approval to continue to operate the plant. MVP submitted the land use application demanded by the County, and the County held that MVP’s use of the property was lawful, but that MVP had expanded the use in a manner that required additional land use permits. MVP and the County then agreed to halt further legal proceedings while

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Oregonians In Action
Education Center
PO Box 230637 Tigard,
OR 97281
Phone: 503-620-0258 or
1-888 LAND USE
Fax: 503-639-6891
E-mail: oiaec@oia.org

The *Looking Forward* is

Produced by:
*Oregonians In Action
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OIA Education Center Board of Directors,
Officers & Staff:

Executive Director:
Dave Hunnicutt

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Legal Center Agrees to Represent Jackson County Business Before Oregon Supreme Court

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MVP modified its plant to meet the County's requirements. It seemed as if common sense would prevail.

Unfortunately, a local environmental group, the Rogue Advocates, appealed the County's decision to the Oregon Land Use Board of Appeals (LUBA), arguing that MVP must shut down its plant immediately. LUBA remanded the case to the County, finding that the County did not have sufficient evidence to approve MVP's permit. MVP then asked the County to conduct additional hearings as instructed by LUBA.

While the County was in the process of holding the additional hearings required by LUBA, Rogue Advocates filed a lawsuit in Jackson County Circuit Court, suing both the County and MVP and demanding that the court issue an injunction barring MVP from operating their plant.

The County and MVP appeared and argued to the local court that it had no jurisdiction over the case, as LUBA had ordered the County to hold additional hearings, MVP had requested those additional hearings, and the County, not the court, was entitled to decide whether MVP could continue operating its plant. Rogue Advocates could appear before the County, make its arguments, and appeal the County decision to LUBA, if the decision was not in their favor.

After hearing argument from all parties, the Jackson County Circuit Court agreed with the County and MVP, holding that a court does not have jurisdiction to decide a land use case that is active and unresolved. Under Oregon law, a land use application is resolved by the local government, with appeal to LUBA. Local trial courts do not resolve land use disputes – to allow a party to challenge a land use application in both the local government and in the local

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courtroom would create the possibility of two opposite rulings, confusion over where to appeal, and enormous cost to the applicant and the local government. In other words, a mess.

Undaunted by their loss, Rogue Advocates appealed the trial court's ruling to the Oregon Court of Appeals. In June, the Court of Appeals issued its decision, rejecting Rogue Advocates appeal and agreeing with the County and MVP that the case should proceed before the County, as LUBA instructed.

Having been told "no" twice, Rogue Advocates appealed the Court of Appeals decision to the Oregon Supreme Court. In early fall, the Supreme Court agreed to hear the case. Lawyers for MVP contacted the Legal Center, and asked the Legal Center to represent MVP before the Supreme Court. The Legal Center agreed, and is now awaiting new briefing from Rogue Advocates. Argument before the Court is set for March, 2017.

Although technical in nature, the MVP case is very important for Oregon property owners. If environmental groups and extremists can haul a property owner and a local government into court while the property owner is in the process of trying to get land use approval from the local government, every controversial land use application will be challenged in two different places at the same time. The costs to the property owner and to taxpayers will go up exponentially, the land use system will not function correctly, and property owners could, and in many cases will, be forced to give up due to the cost of continuing forward.

There are many in Oregon who would like to see Oregon stop growing completely, and never change. That thinking leads to unemployment, job loss, and a declining Oregon economy. Our rural communities can't afford that kind of thinking. ■

OIA Education Center Holds Land Use Forums in Eugene, Portland

The Oregonians In Action Education Center held two recent Land Use Mini Forums in Eugene and Portland. The purpose of the Mini Forums is to provide information to area property owners on land use and property issues in Oregon and the local area. In the last year, the Education Center has sponsored Mini Forums in Baker City, Dallas, Eugene and Portland.

The Eugene Forum featured four separate panels. Shaun Jillions, lobbyist for the Oregon Association of Realtors, discussed the proposed changes to the National Flood Insurance Programs (NFIP) operated by the Federal Emergency Management Agency (FEMA), and the pending battle between FEMA and the National Marine Fisheries Service (NMFS). Every property owner in Oregon needs to pay attention to this issue, as NMFS is demanding that FEMA adopt rules that directly regulate land uses on private property. If the NMFS proposed rules are adopted by FEMA, the federal government will step into the shoes of state and local governments, and planning and zoning decisions will be made by federal rules, not state or local rules. This is a very dangerous proposal, and the rules would have significant impacts on Oregon property owners.

Jon Chandler, CEO of the Oregon Homebuilders Association, discussed the recent 2016 legislation on affordable housing, including Senate Bill 1573, the OIA sponsored bill to protect property owners wishing to annex into cities to receive needed public infrastructure, such as sewer and water. Chandler noted that the legislature would likely revisit the issue again in 2017, as the prices for housing continue to rise in the Portland-metropolitan area, and metro cities consider local laws to lower housing prices.

Seth Barnes, Director of Forest Policy for the Oregon Forest &

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Industries Council, discussed the proposed rules being prepared by the Oregon Department of Forestry that would increase the amount of trees which cannot be harvested alongside streams and other water bodies in Western Oregon. Barnes indicated that the ODF's proposed rules have yet to be formulated with certainty, so it is too early to tell the impact that the new rules will have on Oregon timberland owners. But it is clear from the new rules that the amount of trees which a property owner must leave standing and not harvest will increase substantially under the new rules, and property owners must be prepared to file Measure 49 claims against the ODF, once the rules are adopted.

Dave Hunnicutt, OIA President, presented on the new land use rules relating to marijuana harvesting in Oregon. Hunnicutt indicated that OIA has received multiple calls from property owners interested in the topic, with many property owners considering marijuana production on their rural properties, and an equal number wishing to know what to do to oppose a proposed marijuana site on neighboring property. Hunnicutt discussed the many contentious and unresolved issues surrounding Measure 91 and the various bills approved by the 2015 and 2016 Oregon legislature.

The Portland Forum featured three separate panels. Shaun Jillions gave the same presentation on the NMFS/FEMA rules that he presented in Eugene, and Dave Hunnicutt discussed Measure 91/land use/marijuana. Dorothy Cofield, former Legal Affairs Director for OIA and long-time land use attorney, discussed "Land Use 101," a how-to presentation on how Oregon's land use system works.

The Education Center's primary mission is to educate the public on land use/property rights issues. If you'd like us to host a Forum in your town, give us a call. We're currently scheduling Forum dates for 2017. ■

Have an idea for a law? Here's your chance

Have you ever thought about how you'd change the law if you could? Have you run into a law that has stopped you from using your property, or hurt your business? If so, we'd like to hear from you.

The Oregon legislature is preparing for its upcoming 2017 legislative session. The 2017 session convenes in January, and will continue until the first part of July. When the legislature is in session, bills are introduced and debated. Most bills that are introduced fail, but a few are introduced and make their way through the process to become law.

As we have for nearly 30 years, Oregonians In Action will be deeply involved at the Capitol in the 2017 session, working with legislators of both parties on behalf of Oregon property owners. Over the years, many bills have been introduced and adopted as a result of OIA's efforts, and a number of bills were the result of problems/suggestions we heard about from you.

Now's the time for you to be heard! If you have an idea/suggestion for a new law, give us a call. Not all ideas make it to the legislature, but some do, and we'd love to hear from you about issues that impact Oregon property owners, urban and rural. ■

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www.oregonwatchdog.com

View From Scholls

By David Hunnicutt



I've been receiving quite a few calls recently from property owners who have received phone calls or letters from the Oregon Department of State Lands (DSL) concerning wetlands on their property. It appears that DSL is taking a more aggressive position

on wetlands identification on private property in Oregon. This should concern all property owners.

Imagine investing a large amount of money to buy a parcel of land in Oregon, rural or urban. Because most Oregon property is very expensive, prospective buyers usually undertake a rigorous examination of the property before agreeing to purchase it.

After all, if you're going to commit yourself to a six-figure purchase, you want to be sure that you can actually use the property you're buying, right?

As part of the pre-purchase examination, most buyers will check to see whether the property they want to buy contains wetlands. Although wetlands regulations aren't particularly well understood by the general public, most people have read or been told horror stories about property owners who bought land that the government considered a wetland, and the nightmare that ensued for the poor unsuspecting property owner.

In other words, it's common knowledge that if you're property contains wetlands, that's not a good thing.

But how do you know whether or not a property contains a wetland? In some cases, all you have to do is look at the property and you can

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figure it out. Obviously, if there's a year-round creek or a pond on the property, or a low spot with standing water, chances are pretty high that there are wetlands on the property.

But what if the property looks dry? There's no standing water, no creek beds, no places where water has or is pooled. In that case, there's no wetlands, right? Well, maybe.

The problem for property owners across the nation is that the definition of wetland is incredibly broad. In Oregon, a wetland is defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. "

What Oregon's definition means is that the test for a wetlands is typically based on the type of vegetation growing in the area. And of the 3,400 plant species in the Western Mountains, Valleys, and Coast region, nearly half of them (1,620) are considered either always a wetland plant or nearly always a wetland plant, with another 760 species (including blackberries) considered a plant that grows equally well in either a wetland or upland setting.

That means that when DSL decides whether your property has wetlands, the predominant test is to look at the vegetation growing on the property. If the vegetation is an indicator species, DSL will likely conclude that you have wetlands on your property, even if your property is dry year round.

You would think that DSL would have maps that show what areas are wetlands, and in fact, DSL does have maps. In fact, DSL does have these maps. DSL maintains a statewide wetlands inventory (SWI), which is designed to show all areas in Oregon that DSL

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has identified as wetlands. In addition, DSL also has up-to-date copies of the national wetlands inventory (NWI), which is prepared by the United States Fish and Wildlife Service (USFWS).

Finally, to be triple sure, DSL requires every local government in Oregon to adopt a local wetlands inventory (LWI) for land inside their urban growth boundaries (i.e. city land), and to map all wetland areas inside the UGB. For rural areas in Oregon, local governments are required to use the SWI. DSL further requires all local governments in Oregon to amend their local land use regulations to notify DSL of any potential development proposed on property that has an identified wetland.

In sum, that means that wetlands determinations and maps in Oregon are made by the federal government (USFWS), the state government (DSL), and local governments, and there are three maps that DSL can rely on to determine if there are wetlands on your property – the NWI, SWI, and LWI.

With three maps available, a potential buyer should be able to contact the local planning office before buying the property, and ask the city or county planner whether there are any wetlands on the property. After consulting the NWI, SWI, and LWI, the planner should be able to give you a definitive answer. Right?

Wrong. In fact, even if the property you want to buy is not shown as having wetlands on the NWI, SWI, or LWI, DSL can still claim that the property contains wetlands, and require the wetland areas to remain untouched. And the problem is, DSL can make this determination at any time, even after you have developed your property (or started farming it).

Imagine buying property, getting all permits to develop the property, only to have DSL show up one day and inform you that a

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portion of the property that you developed was (or is) a wetland, and you must retroactively obtain a fill/removal permit from DSL before you can continue your use. Sound unfair? You bet it is. Unfortunately, under current law, DSL has that ability, and is exercising it.

This is why we'll be asking the Oregon legislature to put some sideboards on DSL's wetlands authority in the next legislative session. If a property is not shown on the NWI, SWI, or LWI, a property owner should be able to rely on those maps and conclude that there are no wetlands on the property. The maps will be used as they should be, as criteria for determining wetlands. This system is fair to DSL, and fair to the property owner. We're hoping common sense prevails. ■

LEAVE A LEGACY!

Use your will or trust to protect property rights for future generations

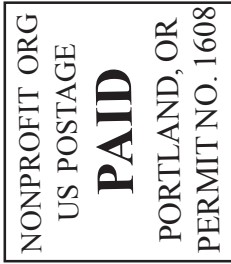
Unfortunately, as current generations enjoy the affluence that protection for private property has provided, support for property rights has eroded.

This is dangerous. Property rights are the cornerstone of our economic system. Without property rights, our freedom and precious civil rights are in jeopardy.

The Oregonians In Action organizations are actively and effectively fighting to protect property rights, and they need continuing support to carry on this critical battle.

One important way to help is to donate money or property in your will or trust. All you have to do is to include a sentence which simply states, "I hereby donate \$____ to Oregonians In Action." Or you can donate personal or real property by describing it. Or you can donate to the Oregonians In Action Legal Center or the Oregonians In Action Education Center.

Please contact *Dave Hunnicutt* at **503-620-0258** if you have any questions or want more information. ■



Oregonians In Action
Education Center
PO Box 230637
Tigard, OR 97281-0637

Address service requested

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Yes, I support OIA Education Center's efforts to protect private property rights!

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Please mail check to: OIA EC, PO Box 230637 Tigard, OR 97223