LOOKING FORWARD

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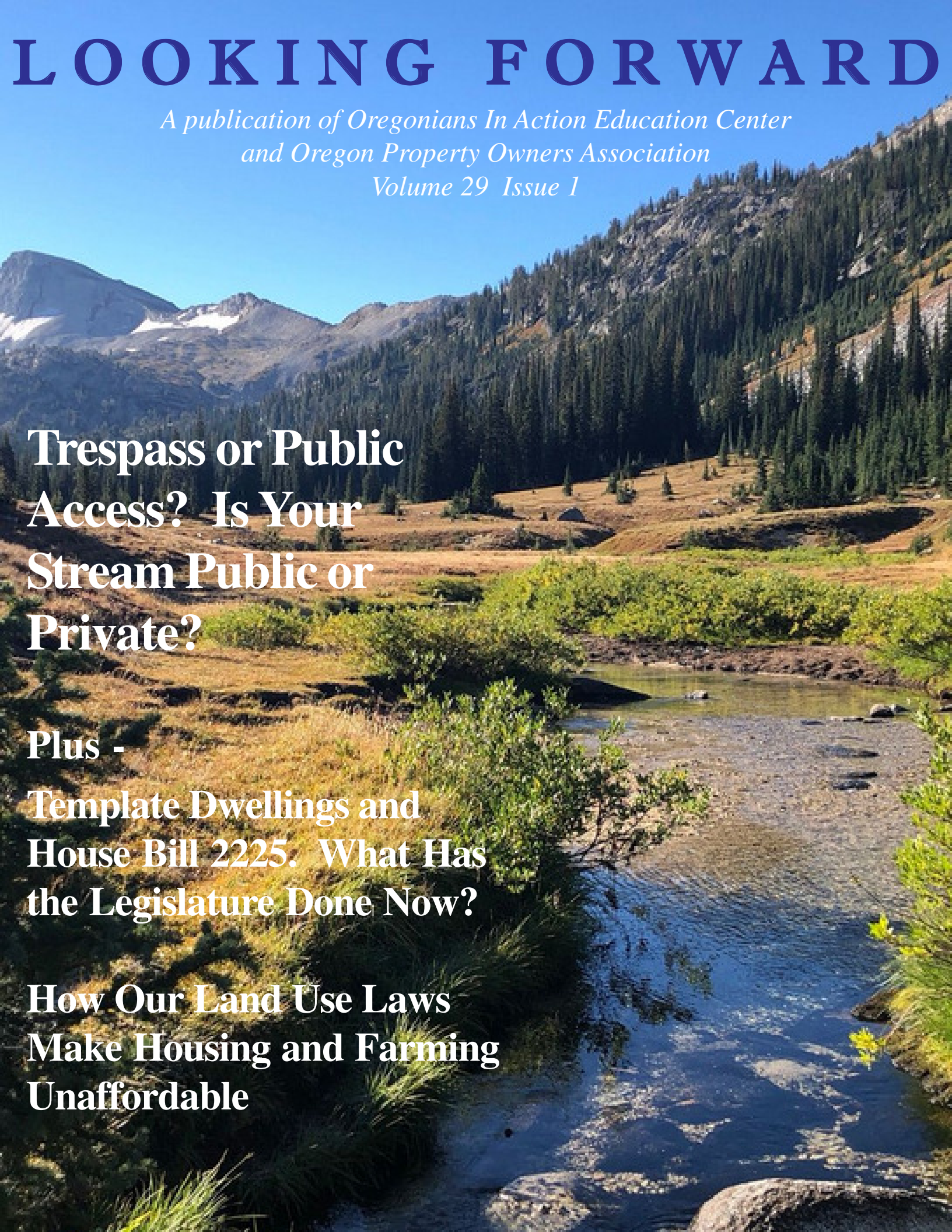

Trespass or Public Access? Is Your Stream Public or Private?

Plus -

Template Dwellings and House Bill 2225. What Has the Legislature Done Now?

How Our Land Use Laws Make Housing and Farming Unaffordable

Looking Forward

Volume 29 Issue 1

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The Law Of Navigability - Can the Public Use the Stream on My Property?

Imagine you own 100 acres in a rural Oregon county. There's a stream running through your property. The stream isn't a river, but it isn't a ditch either. For decades, your family has worked hard to comply with all state and federal rules regarding use of the stream. The stream is a key part of the property, and is important for both the use of the remaining portions of the property as well as the recreation it provides for you and your family.

On a slow summer day, you and your grandkids decide to walk down to the stream to fish. When you get there, a stranger is in a canoe in the middle of the stream holding a fly rod and getting ready to cast. At the same time, another canoe sits on the edge of the stream, with the occupants frying up some fish that they've just caught over a small fire they've built on the edge of the bank.

This isn't the first time you've had trespassers on the stream, and you've always been able to get them to move on by being polite and telling them that they're on private property and need to leave. But this time, when you ask them to leave, they tell you no, and that they have a right to be there. What do you do?

As Oregon's population becomes more urban and respect for property rights weakens within the legislature and in the Oregon courts, an increasing number of rural Oregon property owners are facing exactly this kind of scenario. In order to know what your rights are as a property owner, you need to understand a little bit about the law on navigability, public trust, and public use. Sadly, the law is not particularly straightforward, and unfortunately, the facts usually aren't clear either.

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When does the State of Oregon own the beds and banks of a water body, and what does that mean to adjacent private property?

The "navigability" of a water body (like a river, stream, or lake) is the first question that must be resolved to know what rights, if any, the public has to access the water body. Oregon courts have established two tests for navigability – navigability in title and navigability in fact.

The United States Supreme Court declares a water body "navigable in title" when it is:

> "used, or susceptible of being used in their ordinary conditions as highways for commerce over which trade and travel are, or may be conducted, in the customary modes of trade and travel on water."

Not only is this standard vague, the determination is based upon the conditions of the water body at the time of statehood – 1859 for Oregon. This leads to some interesting factual battles, since records were typically sparse at that time, and few people were around to document them.

The determination of whether a water body is navigable in title is important for a number of reasons. If the water body is navigable in title, then the state holds title to the beds and banks of the water body, and the adjoining upland owner does not have an ownership interest.

If the ownership of the beds and banks on title navigable water bodies is held by the state, both the use of the beds and banks and the use of the water body itself is subject to the "public trust" doctrine. Under the public trust doctrine, the state's title to the beds and banks and use of the water is held in trust for the public to use for navigation, fishing, commerce, and recreation.

Unlike the test for title navigability, which is based on federal law, the rights of the public under the public trust doctrine are determined by state law, and differ from state to state. Over time, the Oregon Supreme Court has expanded the uses on title navigable waterways under the public trust, and as time goes on, the list of possible uses is likely to expand further.

"For water bodies that are title navigable, the upland property owner has no standing to control the beds or banks, or the uses that are made on them"

For water bodies that are title navigable, the upland property owner has no standing to control the beds or banks, or the uses that are made on them – they simply aren't part of the private property, even if the owner's deed claims that they are. That means that if the water body is navigable in title, the property owner cannot control activities on the beds or banks of the water body.

The question of whether a water body is navigable in

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Is this stream "navigable in fact" and open to public use? Common sense says no, but the tests used by the Oregon Supreme Court are very unclear.

title under federal law is made in one of two ways – by court decree in a lawsuit or by declaration of the Oregon State Land Board after a lengthy study process. To date, Oregon has asserted title navigability to all or part of 12 rivers in Oregon, and 75 lake beds. The list of title navigable rivers and lakes can be found on the Oregon Department of State Land's website (www.oregon.gov/DSL).

What if a water body isn't on the list? That doesn't necessarily mean that the water body, or a portion of it, isn't navigable in title. There remain large numbers of water bodies in Oregon that have not been analyzed for title navigability. On these water bodies, title to the beds and banks has yet to be determined, and awaits a legal challenge. One way for that challenge to arise would be in a situation like the example in this article.

If I own the beds and banks of the water body through my property, can the public still access the water?

If a water body is not considered navigable for title, then the ownership of the beds and banks almost always belongs to the upland property owner, unless ownership of the beds and banks was transferred to another party or reserved by the federal government when the original patent for the land was issued. That doesn't guarantee that the property owner can close access to the public, however.

Oregon, like a number of other states, has created a right of the public to use streams and other water bodiesthat do not meet the navigable in title test. In Oregon, if a stream is "navigable in fact," the Oregon courts will allow the public the right to access the waterway, even though ownership of the beds and banks remains with the upland water owner.

Although many states allow for public access to water bodies that aren't navigable in title under the federal test, all have done so by expanding the scope of the public trust doctrine to include certain water bodies that would never be considered navigable in title. Oregon, however, has taken a different approach.

The navigable in fact approach adopted by the Oregon Supreme Court is also known as the "public use" doctrine. Under the public use doctrine, if a water body is "navigable in a qualified or limited sense", the public

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Blue Lake and Fairview Lakes, Multnomah County. In 1936, the Oregon Supreme Court declared Blue Lake "navigable in fact," meaning the adjacent owners own the beds and banks of the lake, subject to public access for recreation.

maintains an easement to use the water body and the beds and banks for commerce, which includes floating logs to market, and the use of boats and vessels for both commercial and recreational uses. Even though the upland owner owns the beds and banks, the ownership is burdened by the right of the public to use those beds and banks, and the water.

What is the test to determine whether the water body on my property is open to the public?

To determine whether a water body is subject to public access under the public use doctrine, the Oregon Supreme Court has adopted a somewhat vague standard. According to the Court:

> "The test of navigability of a stream in the summing up, is the capacity to afford the length, width and depth to enable boats and vessels to make successful progress through its waters, rather than circumstances involving the present right of approach to its banks. The latter are changeable and subject to the will of man, the former is a physical condition dependent upon nature. Even confining the definition of navigability, as many courts do, to suitability for the purposes of trade and commerce, we fail to see why commerce should not be construed to include the use of boats and vessels for the purposes of pleasure."

Guilliams v. Beaver Lake Club, 90 Or 13 (1918).

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Although the Oregon courts have never specifically decided the issue, it appears that the test for whether a water body is navigable in fact and therefore subject to public use is based on a determination of the current state of the water body, not the state of the water body in 1859 at the time of Oregon statehood. This is a significant difference between the federal test for title navigability and the state test for navigability for public use.

"If a water body is not navigable in fact when property is purchased, but becomes navigable in fact as a change in waterway conditions, is there a taking of the property under the Takings Clause of either the Oregon or United States Constitutions?"

For example, if a water body is not navigable in fact when property is purchased, but becomes navigable in fact as a change in waterway conditions, is there a taking of the property under the Takings Clause of either the Oregon or United States Constitutions? After all, when the property was acquired, the public had no right to the stream beds or banks. Subsequent to that time, the public acquired those rights, limiting the property owner's use and forcing the property owner to allow public access to the property. That certainly seems to create a taking.

Or conversely, what if the property is purchased with a stream that is navigable in fact and therefore subject to public use, but conditions change, and the stream is no longer navigable in fact. Does the change in conditions terminate the public use? These questions have not been answered by the Oregon courts.

Needless to say, the definitions used by the Oregon Supreme Court and the State Land Board to determine where a water body is 1) navigable in title, 2) navigable in fact, or 3) neither are not clear and objective. In fact, the Court's various tests for navigability can be read broadly enough to make any stream (or portion of a stream) that's capable of being floated by a person in an inner tube or canoe navigable, and therefore open to the public, even though none of the facts in the Court's navigability cases present that extreme. If the Court were to rule that broadly, virtually all small creeks and streams in Oregon would be open to the public, greatly impacting property owners across the state.

About the best a property owner can do at this point is to try and focus on what the Oregon Supreme Court seems to have considered over the decades as it has issued navigability decisions. When making its determination, the Court appears to consider the width and depth of the water body, historical and present use, the frequency of navigability (is the water body navigable year round on only for short periods each year), and thelength of the navigable portion of the water body. For purposes of title navigability, these determinations

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If this stream is too small to be navigable, the public has no access rights.

are made based upon the condition of the water body in 1859. For purposes of navigability in fact and the public use doctrine, these determinations appear to be made based upon present conditions, and are subject to change.

What if the water body is too small to be considered navigable?

Finally, if a water body is neither navigable for title or navigable in fact, it is not subject to either the public trust or public use doctrines, and is entirely private, meaning the property owner is free to exclude the public from using the water body for any purpose, and can enforce that right through trespass laws.

If the public has the right to access the water body, can they trespass on my upland to gain access?

If you've reached this point of the article, there is one vitally important issue left to discuss. If a water body is navigable in either title or fact, does the public have the right to access upland property in private ownership to get to the water body? If so, the results would be a disaster for private property owners.

A recent decision of the Oregon Supreme Court partially answered this issue. In *Kramer v. City of Lake Oswego, 365 Or 422* (2019), the Court held that the public use doctrine does not grant the public a right to access upland private property next to a water body that is navigable in fact. The only exception to this rule is when upland access is absolutely necessary to enable the use of the water body, and when the upland access is incidental and temporary. The Court went so far as to question the exception as well, meaning the exception may give way in a subsequent lawsuit. This is good news for property owners.

In the same decision, the Court held that the public trust doctrine would likely allow the public the right to use upland public property to access a water body that is navigable in title.

What the Court left unaddressed are 1) does the public trust doctrine permit public access across private property next to water bodies that are navigable in title, and 2) does the public use doctrine permit public across public property next to water bodies that are navigable in fact? Imagine a situation where the Court held that the public could walk through a closed industrial site in order to make way to the Columbia River. The Court has not addressed that issue, although the hope is that common sense will prevail. ■

Building A Home In The Forest -House Bill 2225 Creates Added Limits

We continue to receive calls about House Bill 2225, a 2019 bill that made significant changes to Oregon's "template dwelling" law (ORS 215.750). The "template dwelling" is the primary method of getting approval to build a home on property zoned for forest use. From the calls we're getting, it's clear that HB 2225 is misunderstood. We'll try and clear it up with this article. Here are the most frequently asked questions we've been getting:

1. **What is a template dwelling?** A "template dwelling" is a type of dwelling authorized in a forest zone. The "template" does not refer to the dwelling itself, but to the test the county uses to determine whether the property qualifies for the dwelling. Under the template test, the county uses a map of the parcel and surrounding area, centers a 160-acre "template" on the center of the parcel, and counts the number of neighboring parcels that are wholly or partially within that 160-acre template. In addition, the county also counts the number of dwellings on the parcels that are wholly or partially within the template. If there are enough parcels within the template, and enough dwellings on those parcels, the property may qualify for a template dwelling.

2. **I own one parcel – does HB 2225 affect my template dwelling rights?** No. HB 2225 is designed to prevent property owners with more than one contiguous parcel from receiving approval for two or more template dwellings on their parcels. If you only own one parcel, the template dwelling test is unchanged by HB 2225.

3. **I own more than one parcel, but my parcels do not share a common boundary line. Does HB 2225 affect my template dwelling rights?**

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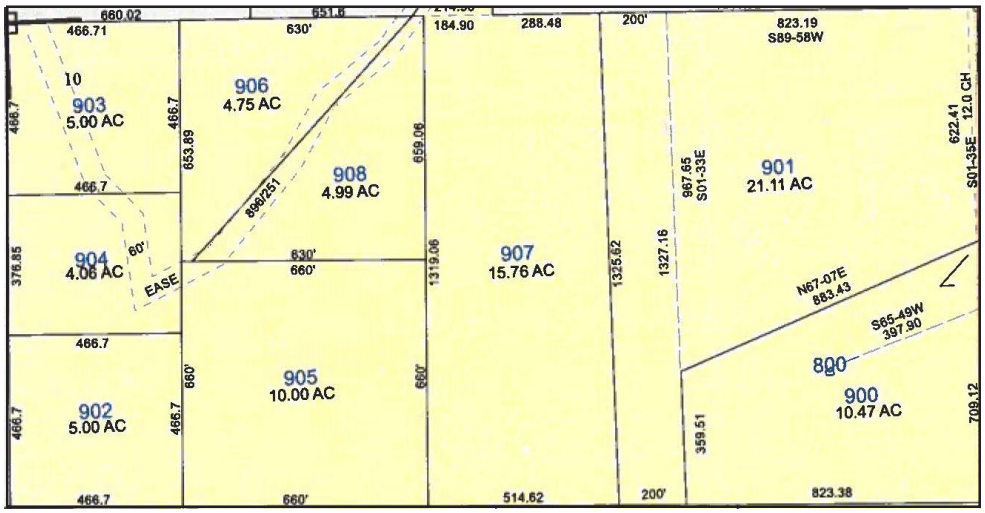
No. HB 2225 limits the number of dwellings that can be built on a "tract". A "tract" consists of more than one parcel in common ownership that shares a common boundary (i.e. is contiguous). For example, if Jones owns parcels A and B, and parcels A and B are right next to each other and share a common boundary line, then the Jones "tract" consists of parcels A and B. See the example below. HB 2225 only applies to parcels that were part of a tract on January 1, 2019.

4. **I inherited 5 acres from my parents in my name only. My husband and I own a 10 acre parcel right next to the property I inherited. Does HB 2225 affect me?** No. In order for two contiguous parcels to form a "tract", the properties must be in common ownership. Common ownership means the owners of the parcels must be identical. If Joe and Betty own parcel A, but only Betty owns parcel B, the parcels are not in common ownership, and do not form a tract. But if Joe and Betty own both parcels A and B, then the ownership is identical, and the parcels form a tract.

5. **I own two adjoining parcels zoned EFU. Does HB 2225 affect my right to build homes on each parcel?** No. HB 2225 applies only to template dwellings under ORS 215.750. Template dwellings are allowed on forest zoned (and some mixed farm/forest zoned) properties, but not on farm zoned property. If your parcel is zoned EFU, HB 2225 does not impact you.

6. **My parents owned multiple forest zoned parcels. When they died, my siblings and I each inherited a single parcel. If we meet the test for a template dwelling, does HB 2225 prohibit us from building?** Maybe. It depends upon when the parcels were inherited. HB 2225 applies to tracts as they existed on January 1, 2019. If the parents still owned the parcels on that date, they are considered part of a tract, even if they no longer are owned jointly,



If Jones owns tax lots 903 and 907, the two parcels are not a "tract" under HB 2225, because they don't share a common property line. If Mrs. Jones owns tax lot 905, and Mr. and Mrs. Jones own tax lot 907, the two parcels are not a tract under HB 2225, because they are not in identical ownership.

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because each child inherited a separate parcel. However, if the children each inherited a parcel before January 1, 2019, then there is no tract, even though the parcels formed a tract when they were owned by the parents.

7. **I own multiple forest parcels in two counties - Clackamas and Clatsop. Does HB 2225 apply to me?** Yes, but with a twist. HB 2225 is the only bill in recent memory, and maybe ever, that has three different effective dates. For parcels in Clackamas, Jackson, Lane, and Polk Counties, the bill became effective on January 1, 2020. For parcels in Columbia, Coos, Curry, Deschutes, Douglas, Josephine, Linn, Marion, Washington and Yamhill Counties, the bill became effective on November 1, 2021. For the remaining 22 Oregon counties, the bill does not become effective until November 1, 2023. That means that a property owner with a tract of forestland in Clackamas County would be subject to HB 2225, where a property owner with a tract of forestland in Clatsop County would not be subject to HB 2225 until November 1, 2023. If you own forest zoned property in one of the 22 Oregon counties where HB 2225 is not yet effective, you should check to see if the bill will impact your rights. If it does, you should consider submitting one or more template dwelling applications before November 1, 2023, when the bill takes effect.

8. **I lost the right to build a second home on one of the parcels I own because of HB 2225 – what can I do about it?**

There are two ways to obtain relief if you lost the right to build a template dwelling as a result of the passage of HB 2225. First, if your property was part of a tract on January 1, 2019 and January 1, 2021, and there is only one other dwelling on the tract, you can qualify for a second template dwelling on one of the parcels that doesn't already have the existing dwelling, provided the dwelling is established prior to November 1, 2023. For example, if Joe and Betty live on a 40 acre parcel, and they also own the neighboring 10 acre parcel that doesn't have a dwelling, they can get approval to build a dwelling on the 10 acre parcel, provided they can meet the template test, even though HB 2225 would otherwise prevent the dwelling from being built. What's unclear about this language is whether the house has to be approved by November 1, 2023, built by November 1, 2023, or whether you can still build as long as the application is filed before November 1, 2023. We recommend submitting the application now and getting the house constructed before November 2023 to be safe.

The other way to obtain relief if you're impacted by HB 2225 would be to file a Measure 49 claim against HB 2225 with the state. In order to file a Measure 49 claim, the claim would have to be filed within 5 years of the enactment of HB 2225. That date is June 20, 2019, so a claim would need to be filed on or before June 20, 2024. If you have any questions about how to file a Measure 49 claim, feel free to contact us. ■

View From Scholls

DLCD Tells the Legislature That Our Land Use Laws Hurt Communities of Color and the Poor – the Legislature Does (almost) Nothing

As some of you know, I grew up in St. Helens, a great small town. St. Helens in the 1970's was very much a blue collar community. It wasn't racially mixed, but it certainly was economically diverse. Like most small Oregon towns, St. Helens had its share of families at all income levels –rich, poor, and somewhere in between.

But unlike today, when fewer and fewer families can realistically dream of buying a home, homeownership was attainable by almost everyone in St. Helens. Housing was plentiful and cheap by today's standards, even when adjusted for inflation. Being able to purchase a home let a young family plant roots and become part of the city. It created a community.

In those days, buying a home was the easiest way to escape poverty. Today, it still is. Report after report cites homeownership as a crucial foundation for families to break out of the cycle of poverty. Building equity, improving health outcomes, increasing educational attainment – all are benefits of homeownership.

With the unquestioned benefits of homeownership, doesn't it seem like a no-brainer that government officials at all levels would do everything they could to encourage it? No matter your political philosophy, communities improve when more families own their own home.

Unfortunately, while the leadership in Oregon's legislature and Governor Brown talk a big game, they really don't seem to be interested in getting families into homes. In the last decade, housing has increasingly become less affordable for Oregonians. For example, in Oregon's larger cities, median home prices exceed the price the average family can afford by well over $100,000. In Corvallis, the price for the average-priced home (a home that is priced exactly in the middle of recently sold homes in the city) is over $200,000 more than the bank will lend to a family making the median family income (the annual income that is exactly in the middle of incomes in the city). In Albany, the figure is closer to $150,000. There are similar numbers for other larger Oregon cities.

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That means that working class and young families have no possibility of purchasing a home in the community where they work. It means they don't generate equity making a house payment each month. It means they rent apartments, ensuring a constant shortage of rental units. None of this is good for the community.

The numbers don't lie. Oregon has a critical shortage of housing. We can't build enough houses to meet demand, we're over 100,000 units short to meet our current need, and we're falling further behind every year.

Our state leaders know all these numbers, and say all the right things about fixing the problem. But fixing the problem requires admitting some things about our current laws that people in charge in Salem just don't want to admit. Exhibit A is Oregon's land use system.

Earlier this year, the Oregon Department of Land Conservation and Oregon Housing and Community Services partnered to produce a report on housing. Their report, entitled "Meeting Oregon's Housing Needs: Next Steps For Equitable Housing Production", is a must read for the Governor and legislative leaders, who claim to care about solving Oregon's housing crisis.

For the first time in the agencies history, the DLCD/OHCS report acknowledged that our land use system is directly responsible for Oregon's current housing shortage and our unaffordable housing prices. As the report acknowledges:

> "The current housing planning system chronically underestimates housing need, especially for households with lower income, does not identify or enforce the responsibilities of local governments to comprehensively address housing need, and perpetuates geographic patterns of racial and economic segregation, exclusion, and inequity."

But wait, there's more. The DLCD/OHCS report also admits that our land use laws:

- Are better suited to preventing unwanted developments than to encouraging those that are needed;
- Resolve land use applications through expensive, time-consuming applications;
- Provide numerous opportunities to delay or obstruct needed-housing production that some in the community don't like.

This admission is absolutely stunning. If you understand Oregon land use law or have ever tried to get an application to build something on your land, you would think "well duh, what took you so long to admit it", but having the agencies acknowledge that our land use system "perpetuates geographic patterns of racial and economic segregation, exclusion, and inequity" would be a wake-up call for even the most die-hard worshipers of Senate Bill 100. The additional problems make the system even worse.

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The agencies weren't finished, however. As one last indictment of our existing system, the report provides:

> "These findings are a wake-up call for everyone involved in housing planning and production in the state. Our systems are simply not organized to meet this magnitude of need. Each year that we fail to make progress will push homeownership further out of reach, force more households to make choices between rent and other necessities, and push more households into homelessness."

Wow! It's almost as if DLCD/OHCS are pleading with the legislature to do something about the problem they've helped create. You'd think that a paragraph like that would serve as a blaring siren for the Governor and legislative leadership to do something more than express "concern" about "our housing crisis."

"Wow! It's almost as if DLCD/OHCS are pleading with the legislature to do something about the problem they've helped create."

For young farmers, the problem is different, but just as bad. One of the favorite talking points for the advocates of our land use laws is that our laws keep farmland prices low by essentially prohibiting the owner of those lands from doing anything but farm. But in reality, farmland is every bit as unaffordable as housing land. Undevelopable farmland in the Willamette Valley routinely sells for $25,000/acre.

Take those farm prices and couple them with Oregon land use law that forbids the creation of a parcel smaller than 80 acres, and requires a farmer to generate $80,000 in farm income for two straight years before being allowed to build a home on the farm, and the problem becomes obvious.

That means that unless a young farmer inherits the farm from her parents, she's going to have to pay somewhere in the neighborhood of $2 million to purchase farmland to farm, in addition to paying rent for a home in town since the state prohibits her from living on her farm. Is it any wonder why Oregon has virtually no minority-owned farms and the average age of farmers rises every year? Shouldn't that be a problem we try to solve?

So what progress did the 2022 legislature make to resolve our housing problem? Not much. Representative Jack Zika (R-Redmond) proposed House Bill 4118, which would have allowed cities and property owners to form a partnership to bring land designated for future development into the urban growth boundary for quick development as low priced housing. His bill would have eliminated the ability of NIMBY's to "delay or obstruct needed-housing production that some in the community don't like," one of the problems DLCD identified in their report.

You can guess what happened to Rep. Zika's bill. The House majority wouldn't approve the bill over environmentalist objections, so it died. Apparently, building affordable housing is bad for the environment.

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So Rep. Zika proposed an amendment to his bill to create a task force to study all of the issues which OHCS/ DLCD identified in their report, and work on language for a bill that could be presented to the 2023 legislature. Rep. Zika read the DLCD report, and took seriously the admonition that every year the legislature did nothing, it made the problem worse. If the environmental community was opposed to empowering cities to build more affordable housing now, at least they could urge legislators to study the problem and be prepared with a bill in 2023 - right?

Dave Hunnicutt, President Oregon Property Owners Association

Wrong. Rep. Zika's amendment to create the task force was also ignored. In fact, the only thing the legislature did was give DLCD $150,000 to study why our cities don't have enough land supply to meet their housing needs. That's fine, but we already know the answer to that question, and more importantly, DLCD can't do anything about it, because control of the land supply is written into the Oregon Revised Statutes, which only the legislature can change. That's why they wrote the report urging the legislature to do something about it in the first place!

The end result is this – the two agencies which the legislature tasks with controlling our land use and housing systems wrote an unprecedented report making candid acknowledgments of the flaws in the laws they manage, the impact those flaws have on communities of color and the poor, and the racial and economic injustice they report. They practically beg the legislature to do something about the problems they discuss, and let the legislature know in clear terms that every year we wait makes the problems worse and harder to resolve.

And what did the legislature do? Not a darn thing.

Unfortunately, there are some groups who maintain significant power with the legislative leadership and Governor Brown who are so afraid of any change to our land use laws that they'll work relentlessly to stop the questions from being asked and studied. Short of refusing to fund these private groups, there's nothing any of us can do about them – you can't fix crazy.

For legislative leaders to ignore the agencies, listen to these groups, and kill reasonable efforts to address the problems is irresponsible and shameful. For young families in St. Helens and every other town in Oregon, communities of color who want to share in the dream of homeownership, parents who want their adult children to buy a home and set up roots in Oregon, young farmers who want to start a family farm, and many others, there's a lot of us that are trying to help, but we need your help to make change happen. ■

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