LOOKING FORWARD

A publication of Oregonians In Action Education Center and Oregon Property Owners Association

Regulators Punished This Family - OPOA Fixed The Problem

2023 Legislative Update - New Laws for Oregon Property Owners

Volume 30 Issue 1

Looking Forward

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Inside This Issue

Cover Photo:
Cody and Elysia Johnson and their two sons
(Photo by Lynn Howlett)

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Legislature Steps Up to Provide Relief to Lane County Property Owners in Bizarre Land Use Case

In what can only be described as an example of, "you can't make this stuff up", the 2023 Oregon legislature stepped in to resolve a land use nightmare for two Lane County families caught in the middle of a fight between the County and a local land use attorney.

The situation began in 2012, when a Eugene land use attorney received verification from Lane County that a 55-acre parcel owned by the attorney was composed of three legal parcels, instead of just one single parcel.

Based on the 2012 County approval, the attorney received additional approvals to adjust the boundaries between the three parcels and qualify two of the three parcels for dwellings. The applications were submitted from 2012 to 2017. The County approved each application.

In 2015, the attorney listed one of the three parcels for sale. The parcel, which contained the original homestead dwelling, was purchased by Tom and Shealene Vogel. The Vogels had wanted to live in the country since moving to Oregon after Tom's retirement from the Navy. They had saved for years to be able to afford a down payment on a rural property if they ever found the right one.

Based on the County's approvals, the title report, and reliance on the realtors involved, the Vogels put their hard-earned savings into their dream and bought one of the parcels from the attorney.

Shealene and Tom Vogel

In 2017, the attorney sold the second of the three parcels to Cody and Elysia Johnson, a young couple wanting to live in the country and raise a family. Like the Vogels, the Johnsons relied on the County approvals, the title report, and the realtors in buying their property, which the County had approved for a dwelling. After purchasing the property, the Johnsons built a home on the property and are raising their children.

Everything seemed fine until 2021, when it all fell apart.

At some point in early 2022, the County discovered that the deeds the County relied upon as evidence to approve the 2012 decision were fake. Upon hiring a forensic expert to review the deeds, the County determined that the 55-acre parcel had never been three separate parcels and the attorney's application should have never been approved.

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At that point, the County could have determined that since so much time had passed and so many applications had been subsequently approved, it would just let the matter go. Alternatively, the County could have invalidated the applications that impacted the attorney while leaving the Vogel and Johnson properties alone. That made sense, since the Vogels and Johnsons had relied on the earlier County approvals when buying their properties.

But rather than being reasonable, the County invalidated every approval it had issued since the original 2012 approval, putting the Vogels and Johnsons in the crossfire of a battle they had absolutely nothing to do with creating.

The Johnson family at home on their property.

When the Vogel and Johnson families received notice in the mail that the County was revoking all of the approvals that they had issued, they were shocked. Both families had relied on the County approvals before buying their parcels. The fake deeds and bad acts had occurred years before they purchased their property, and they had absolutely no idea, and no way of knowing, that the original approval was based upon fake deeds. They had been fooled, as had their title company, their lenders, and everyone else who had relied on the County approvals.

Last spring, OPOA received a call from Shealene Vogel. We agreed to help. The OIA Legal Center and lawyers for each family asked the County to exercise discretion and leave the Vogel and Johnson families alone. The County refused. That's when the legislature stepped in.

The legislature usually avoids disputes involving unique facts and few parties. That's a job for the courts. But in this case, the Vogel and Johnson families needed the right to keep their homes and property that they had purchased. That would require a change to the law that only the legislature could approve.

So both OPOA and Lane County stepped in and asked the legislature for relief. Working with Representative Charlie Conrad, OPOA successfully lobbied for the passage of House Bill 3362, which recognized the rights of innocent purchasers to keep what they paid for. The law should never punish people who've done nothing wrong.

In the meantime, much more work needs to be done to ensure that future innocent purchasers like the Vogel and Johnson families don't have to suffer the same fate they did. Without intervention by the legislature, innocent purchasers will continue to be left holding the bag for bad acts committed by others. The legislature can fix this permanently and should do exactly that. ■

2023 Legislative Update
Common Sense Fixes for Rural Oregon, Modest Changes for Urban Homeowners

The 2023 session of the Oregon Legislature was predicted to be bring big property rights changes for Oregon property owners. Unfortunately, what started out with a bang ended with a whimper.

As one of her first acts, newly elected Governor Tina Kotek issued an executive order declaring a housing emergency throughout Oregon and calling for the construction of at least 36,000 new housing units annually. In addition, based on revelations that Oregon was losing opportunities for high-tech manufacturing plants and other industrial development, the Governor demanded action by the legislature to change the law so that the state could attract those industries and the high paying jobs they create.

The Governor's demands state the obvious. Oregon isn't keeping up with the demand for housing to meet current needs, and we have well-documented examples of high-tech industry leaders bypassing Oregon to go to states where they face less hostility toward development. This isn't surprising.

What was surprising, however, is that the call for change was coming from the Governor. Oregon's lack of housing and inability to attract high paying industries have fallen into the "well duh" category for years, but a string of recent Oregon Governors have done nothing to address the issue, or even pretend that they really cared.

To even greater surprise, Governor Kotek did not shy away from placing partial blame for Oregon's housing shortage and difficulty attracting new industry precisely where it belongs – on Oregon's bizarre, unique, and failing land use planning "system", which punishes opportunity and gives unfettered opportunity to NIMBY (not in my backyard) groups to kill needed progress.

Unfortunately, faced with withering criticism from the environmental industry, legislative leaders in both the Oregon House and Senate responded to the Governor's demands by doing what they seem to do best – almost nothing. The result is a significant failure for Oregon.

In the end, the legislature passed two bills aimed at responding to the Governor's call for action. **Senate Bill 4** was adopted with bipartisan support as a response to Oregon's failure to attract new high-tech development to the state. The bill gives the Governor the authority to ignore Oregon land use laws to redesignate up to 8 sites around the state for development as high-tech facilities. The Governor's ability is significantly limited, however, and the supersiting provisions sunset in 2029.

Supersiting bills like Senate Bill 4 are inherently flawed and bad policy. They amount to nothing more than a declaration by the legislature that our land use laws don't work very well, but the legislature lacks the courage and will to fix the problem and would rather punt the choice to the Governor to make the call.

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If Oregon wants to be competitive in attracting family-wage industrial jobs, the state needs to ensure that there is a readily available supply of land that is suited for those industries. There are plenty of Oregon property owners with land that meets industry needs, and plenty of Oregon local governments that would be thrilled to attract these new jobs. The solution is simple.

There are several flaws that are likely to make HB 2001 a failure.

On the housing front, the legislature adopted **House Bill 2001**, the so-called "Oregon Housing Needs Analysis" (OHNA) bill. Although well-intentioned, HB 2001 attempts to make it easier to build more housing in Oregon cities by creating more bureaucracy. That seems like a dubious proposition, but that's the best that legislative leadership could muster.

HB 2001 directs the state to establish housing production targets (HPT's) for each of Oregon's larger cities. Once a city receives its HPT from the state, it must then adopt a housing production strategy (HPS) to meet those targets.

So what happens if a city doesn't meet its HPT's? The Oregon Department of Land Conservation and Development (DLCD) is given authority to step in and "help" the city meet its targets through the use of a variety of different approaches, including the enforcement of a model development code that bypasses the city's existing zoning laws.

There are several flaws that are likely to make HB 2001 a failure. First, the bill does nothing to address the two root causes of the housing shortage – 1) too much state and local bureaucratic process for property owners to receive approval to develop their land and 2) an insufficient supply of land suitable for housing production. Until those issues are addressed, adding more bureaucracy accomplishes nothing.

Second, success under the bill relies on the willingness of DLCD to be the "bad guy" when faced with a hostile city and NIMBY residents. DLCD has no history of being tough on NIMBY's. In fact, many DLCD rules cater to them. What makes the legislature think that the agency is all of a sudden going to care about whether something gets built, when they've spent the last 50 years with a complete no-growth mentality?

Third, when has more bureaucracy ever resulted in greater private sector activity? The legislature knows that it is the private sector that will be tasked with building the housing that is needed to address the housing shortage – housing development by the public sector is nearly non-existent. Adding additional government intervention and rules are likely to make needed development more difficult, not less.

Kudos to the Governor and many legislators for

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recognizing the problem and demanding solutions. In the end, however, the environmental NIMBY's were able to persuade legislative leadership to produce legislation that does virtually nothing. In the face of a critical demand, this amounts to a failure.

The news is better on the rural side. The legislature passed three bills to provide relief from Oregon's "one size fits all" rural land use regulations. The most impactful of the four bills is **House Bill 2192**. HB 2192 harmonizes the law allowing the replacement of a home on property zoned for farm or forest use that has been damaged or destroyed by a natural or human caused disaster.

Under current law, it is much easier to replace a home on property zoned for exclusive farm use than it is on property zoned as forestland. In forest zones, a home may be replaced if it "**has**" four walls, an intact roof, plumbing, wiring and heat.

For years, counties have allowed property owners on forestland to replace homes that had been damaged or destroyed, whether by fire, tree damage, flood, earthquake or other cause. Unfortunately, in 2022, Lane County officials decided that a home could not be replaced in these events, because the home no longer "has" the necessary features (walls, roof, plumbing, wiring, heat) as a result of the natural disaster. A home certainly "had" those features, but the moment the home was damaged or destroyed, it could no longer be replaced.

HB 2192 allows property owners in farm and forest zones to replace or rebuild damaged or destroyed homes.

Lane County's new interpretation sent shockwaves through rural Oregon. OPOA began receiving calls immediately after Lane County issued its new interpretation of the replacement dwelling law. Based on those calls, we contacted legislators, and HB 2192 was introduced and sponsored by Senator David Brock Smith and Representative Boomer Wright. HB 2192 allows a property owner in either a farm or forest zone to replace a dwelling that has been damaged or destroyed by disaster.

Despite being a simple bill, passage was difficult due to environmentalist opposition. We worked hard to get it across the finish line. The bill is a simple but important win for rural homeowners.

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If you own rural residential property, you may be able to use a recreational vehicle as a rental unit on the property.

The legislature also passed **Senate Bill 1013**, a bill requested by Clackamas County Commission Chair Tootie Smith. SB 1013 allows property owners in rural residential zones to allow a property owner to site a RV or trailer on a parcel with an existing home for use as a rental. The bill also applies on land within the Metro urban growth boundary but outside the city limits of an incorporated city.

SB 1013 is optional for counties, meaning a county must first amend its zoning ordinance to allow the use to occur. If allowed, the bill will give property owners in rural residential zones a great opportunity to provide a RV space for a family member or tenant.

Finally, **House Bill 3362** addressed a particularly egregious and rare situation in Lane County involving innocent purchasers. See the article in this edition for greater detail.

You can view each bill by scanning the QR code on the back page. The best description for the 2023 session was that it was an enormous missed opportunity. As Oregon's legislative leaders continue to allow their policy choices to be dictated to by a small but vocal minority of extremists, Oregon continues its slide into economic irrelevance. That future is not good for Oregon. ■

Clackamas County Amends Local Land Use Regulations - More Counties Should Follow

The Clackamas County Board of Commissioners recently made important changes to ease their rural land use regulations to help property owners. Ordinance ZDO-283 is the result of work by OPOA and others to convince the County to protect property rights. Among the ordinance changes are two very important amendments for rural property owners.

Oregon state land use law often creates minimum standards that local governments must adopt and apply, even if the local government would prefer alternative and less restrictive land use standards. These state standards create a "floor" which the local government cannot go below.

Typically, the Oregon state standards are simply minimums, meaning that a local government is free to adopt local standards that exceed the state minimum standard. In rural areas, the Oregon legislature and LCDC have created comprehensive and strict controls on rural land uses, meaning the minimum standards are already very difficult for property owners to meet.

Simply put, it is hard for rural property owners to receive permission to do anything other than farm or grow trees on their land. Counties merely act as enforcers of state mandates, regardless of whether the standards actually make sense.

Clackamas County Board of Commisioners (L-R) Mark Shull, Tootie Smith, Ben West, Martha Schrader, Paul Savas

Unfortunately, state mandates usually don't prevent a county from adopting even more restrictive zoning criteria in rural areas. That was the case in Clackamas County.

Nearly 30 years ago, Clackamas County passed two ordinances that went beyond state law and made it even more difficult for rural property owners to build a home. The first change was to the County's "template dwelling" requirements for houses in forest zones.

The 1993 Oregon legislature created a "template dwelling" test to limit property owners from building a single home on their property in the forest zone. In order to qualify for a home using the template test, a property owner must demonstrate that the parcel where they wish to build their home is within an area of other smaller sized parcels containing homes.

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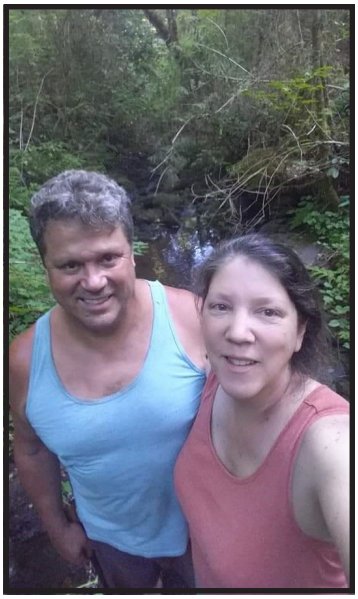

Ann and Jason Delfel clearing brush on their property - ZDO 283 clears the way for their home.

After the template test was adopted by the legislature in 1993, Clackamas County added it to their ZDO as required. But rather than adopting the state standard, the County made it more restrictive than the state required.

Since that time, other Oregon counties have had the opportunity to adopt even more stringent requirements on template dwellings, like Clackamas County. Very few have done so, including none of Clackamas County's neighbors.

The problem was highlighted by the testimony of Ann and Jason Delfel. The Delfels own a 20-acre parcel of land in the County zoned for forest use. Under the state's template dwelling test, their parcel would qualify for a template dwelling. Unfortunately, the added County requirements prohibit the Delfel's from qualifying. They would qualify in every neighboring county, but not Clackamas.

Ann Delfel contacted OPOA nearly two years ago, and we began working on fixing her situation. ZDO-283 does just that.

The other major change to the County ZDO with the passage of ZDO-283 is in how the County defines a "lot of record". The County's "lot of record" definition made no sense and resulted in property owners being unable to develop property for uses that were permitted outright in the zone. No other county in Oregon had this requirement. Fortunately, the Board fixed this in ZDO-283.

The passage of ZDO-283 by Clackamas County sets an example that every Oregon county should follow, particularly in rural areas where state zoning is already extremely strict. There is no reason for a County to go beyond the requirements of state law by making local laws that are even more difficult for a rural property owner to meet. Thanks to the Clackamas County Commissioners, that's no longer the case. Well done!

OPOA stands ready to work with any Oregon county wishing to examine its local zoning ordinance to see if there are areas where the county standards go beyond the state requirements. If a county is interested, please contact us. ■

View From Scholls

There's a disturbing trend going on in America today. Because of housing prices, interest rates, and increased regulations, property ownership rates are steadily falling. For anyone who's a fan of democracy, this should frighten you, as property ownership is the key to wealth generation and a thriving middle class.

Building equity through property ownership is the means by which generations of young Americans joined the middle class and learned the importance of property rights. Without respect for the ability of a person to own, use, and control real estate, our country will cease to function as we know it.

In short, we need more property owners. Here are some recent observations on where we're heading on property rights:

Oregon has completely lost its mind on "farmland protection". I make sure to show a pie chart of Oregon's land use patterns at every speech I give. What it shows is that Oregon's urban areas (areas inside urban growth boundaries) total approximately 750,000 acres statewide, which equals slightly over 1 percent of Oregon's 63 million acres. The remaining 98.8 percent of Oregon lies outside of cities and is not available for any type of urban development. No housing, no factories, no warehouses, etc.

Does that sound like sprawl to you? It doesn't to me.

But that's only part of it – of the 750,000 acres of land that's inside cities, less than half is zoned residential. That means that Oregon expects nearly 99 percent of its residents to live on approximately 0.6 percent of the state's land, develop nearly all its industry on approximately 0.6 percent of its land, and leave the other 98.8 percent of the land as open space. This is nuts.

We all know the impact of cramming more and more people into the same tight space. Housing becomes significantly more expensive, because the cost to buy the scraps of land available for housing rises due to an artificially created lack of supply.

By shorting available housing land, housing diversity becomes non-existent. You've all seen the new housing developments being built in Oregon. Absolutely zero

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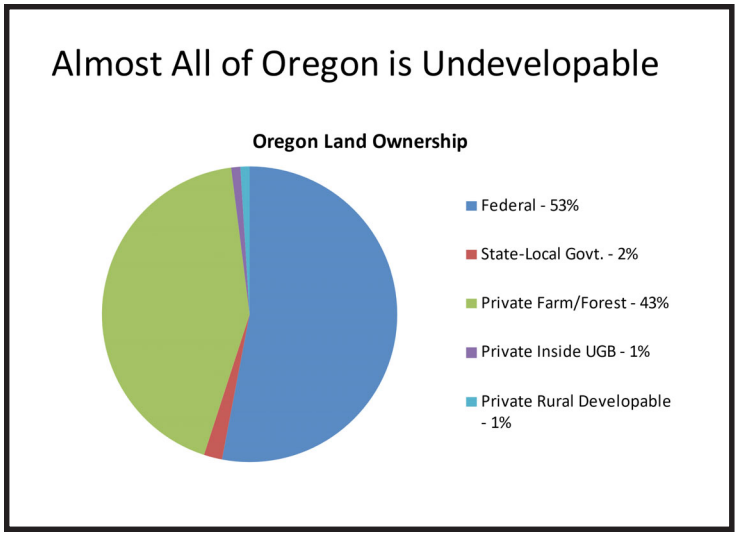
yards. Neighbors stacked on top of one another. New houses in the Portland Metro area are priced in the $700k's.

Unfortunately, for the extreme environmental industry, that's not good enough. They want even more "infill" in the existing neighborhoods. That means more density.

Young adults today are working harder than ever, earning less money relative to the cost of goods and services, and barely scraping together the money to pay their monthly rent. Modern history has proven over and over that when a society removes hope and opportunity from young adults, you end up with revolution. We are heading that direction.



Oregon is not running out of farmland, but Oregon is out of land for urban residential development.

That also means even more expensive housing, as it is far more expensive to build multi-story housing developments than single-family, and the cost to retrofit the infrastructure to serve units that were never contemplated is enormously expensive. It also means gentrifying the few remaining affordable neighborhoods and replacing them with high density, expensive units. Why do environmentalists ignore the poor?

If you have children who are young adults, you know exactly what I'm talking about. Rents have skyrocketed across Oregon, as people who would normally be buying starter homes don't have the slightest chance of saving for a down payment or affording a small starter home.

It doesn't have to be this way. LCDC has 19 statewide planning goals. Goal 3 is agricultural land, Goal 4 is forestland, Goal 9 is economic development, Goal 10 is housing, and Goal 14 is urbanization. The legislature directs that each goal be as important as the others, yet LCDC and the legislature have never given a damn about Goal 9 or Goal 10.

We can make Goals 9 and 10 important, provide more land for housing and industrial development, and still protect farm and forestland. But we're going to have to start ignoring the land use purists who scream about "farmland protection". That means thinking for yourself and doing your own research. We'll help. This leads to ...

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A panel I was recently on in Bend. In June, I was on a land use panel at the Bend City Club. The keynote speaker was William Fulton, an urban planner, university professor and author from California. Mr. Fulton is nationally known as an advocate of the "smart growth" movement that was all the rage a decade ago.

After his speech, Mr. Fulton and I, along with Ben Gordon, the director of Central Oregon Landwatch, answered questions from the audience about Oregon's planning program. Knowing that I was speaking to a progressive crowd and reading Mr. Fulton's bio, I assumed my role was going to be the "opposition" to Messrs. Fulton and Gordon. Boy was I pleasantly surprised.

Speaking as a self-proclaimed "outsider", Mr. Fulton delivered a very honest and candid overview of Oregon planning law, praising its focus on preventing sprawl while criticizing its intentional complexity, over-regulation of development and breadth. His suggestions for correction were intriguing and could lead to a much better system and greater focus on property rights. I believe what he was taking about was exactly the intention of Senate Bill 100, which has unfortunately morphed into a land use system that is nothing like what the 1973 legislature intended. Fulton's speech should be required viewing for LCDC Commissioners and legislators.

If you want to see the presentation, including our panel, you can check it out on YouTube. Just use the QR code on the back page. We discussed all aspects of our planning system, including . . .

Wetlands. In May, the United States Supreme Court issued its decision in *Sackett v. Environmental Protection Agency*, the latest in a long line of cases

Chantell and Michael Sackett have endured a two - decade battle with the United States EPA to build a home on their property.

attempting to decipher what Congress meant by the term "waters of the United States" (WOTUS). The federal Clean Water Act (CWA) allows two federal agencies - the EPA and the United States Army Corps of Engineers - to regulate the discharge of pollutants into "waters of the United States." Unfortunately, Congress never bothered to define what they considered to be a WOTUS.

Over the years, the Corps and EPA WOTUS definition changed repeatedly. Since violation of the CWA carries significant penalties, both civil and criminal, and applies to even unknowing acts of discharge into WOTUS, the

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WOTUS definition is vitally important for property owners across the country, who face massive fines and criminal penalties for seemingly benign acts.

In *Sackett*, the Supreme Court finally reached the issue of what Congress intended by the term WOTUS. The Court held that a wetland is not a WOTUS unless it has a "continuous surface connection to an adjacent body of water that is connected to traditional interstate navigable waters". Most wetlands in the United States will not meet that test, meaning the regulation of wetlands will return to the states, not Congress, unless Congress passes a law amending the CWA, which is highly unlikely.

Sackett is a delightful ruling. You can read it by scanning the QR code on the back page. Justice Samuel Alito's opinion is a must read for those interested in how a court is supposed to interpret a law. The decision will impact property owners and industries across the country, including the . . .

Mining Industry. It has become a cottage industry for environmental groups to blame the mining industry for everything. Fighting the crazies is a cost of doing business for a mining company, meaning all of us pay higher prices to cover the years of litigation inflicted by environmental lawyers on miners.

Recently, however, the hard right has joined the fray, taking after "evil mining" for mining minerals used in green energy production, including solar and wind. According to this crowd, mining is the tool used by environmentalists and the left to force people out of their gas-powered vehicles, which will somehow lead to the end of capitalism and a takeover by one-world government.

Cold hard reality is lost on the opponents of mining. Everyone uses mining products, and modern society would stop without them, but when an American property owner proposes a mine, everyone becomes an environmentalist.

As Charles Barkley would say to both camps, "c'mon man". The hypocrisy runs deep. We all need to realize that nearly everything needed to create a modern society comes from mining. Everything. It's irritating to know that some lawyer is drafting the latest lawsuit to shut down a mining proposal on a computer constructed nearly entirely from products of the mining industry, in a building composed of products of the mining industry, while talking on a phone made from mining industry materials and drinking coffee out of a cup made possible by the mining industry. To get home, our environmentalist drives a car, rides a bike or sits in a mass transit vehicle, all brought to you by the mining industry.

Cold hard reality is lost on the opponents of mining. Everyone uses mining products, and modern society would stop without them, but when an American property owner proposes a mine, everyone becomes an environmentalist. This is actually worse for the environment, because most materials mined outside

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America are produced in some developing nation by kids subjected to forced labor with wages and working conditions that would make an 18th century robber baron blush. Apparently that's better than mining locally, even though an American mine pays family wages in parts of the country that need the jobs and is subject to far more stringent oversight than what you'd find nearly everywhere else in the world.

That's not all. Mining in America enhances national security. Relying on Russia and China for minerals critical to our national defense infrastructure because we're NIMBY's isn't a good strategy, is it?
All I'm saying is that the next time you hear someone complaining about how terrible mining is, ask them to give up reliance on any material produced by the mining industry. After all, mines, like all other rural land uses, are subject to a myriad of other potential problems, such as . . .

Wildfires. I have the privilege of serving on the Oregon Wildfire Programs Advisory Committee as the representative for Oregon's rural residential property owners. The WPAC is tasked with overseeing the state agencies who implement Oregon's wildfire program. We're all volunteers, have no regulatory authority, and can't force the agencies to do anything, but we report on the program to the legislature and Governor, and our reports have been relied upon to implement the program.

We all know that parts of Oregon are prone to wildfires. Most are rural. If Oregon begins to see an exodus of insurance companies that won't insure rural homeowners, the market for rural land will drop like a rock, as lenders don't lend on property without homeowners insurance. That's happening in California due to wildfires.

Dave Hunnicutt,
President
Oregon Property
Owners Association

In short, for both health and financial reasons, it benefits Oregon rural property owners to do what it takes to reduce their wildfire risk.

The Oregon State Fire Marshal (OSFM) is currently working on rules to require homeowners in high-risk wildfire areas to maintain defensible space perimeters around their homes to reduce fire risk. The new rules will create additional requirements on impacted property owners, but I believe the impacts will be minor and manageable, and OSFM will work cooperatively with property owners to educate, not regulate.

Creating defensible space around your home is a win-win for you and your neighbors. It will probably mean that you'll have to do some routine maintenance of the areas within the immediate vicinity of the exterior of your home, but if it saves the home or convinces the insurance carriers to continue to offer homeowners insurance on your property, that's a win. ■

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2023 Bills

Fulton Land Use Presentation

Sackett v. EPA Supreme Court Opinion

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