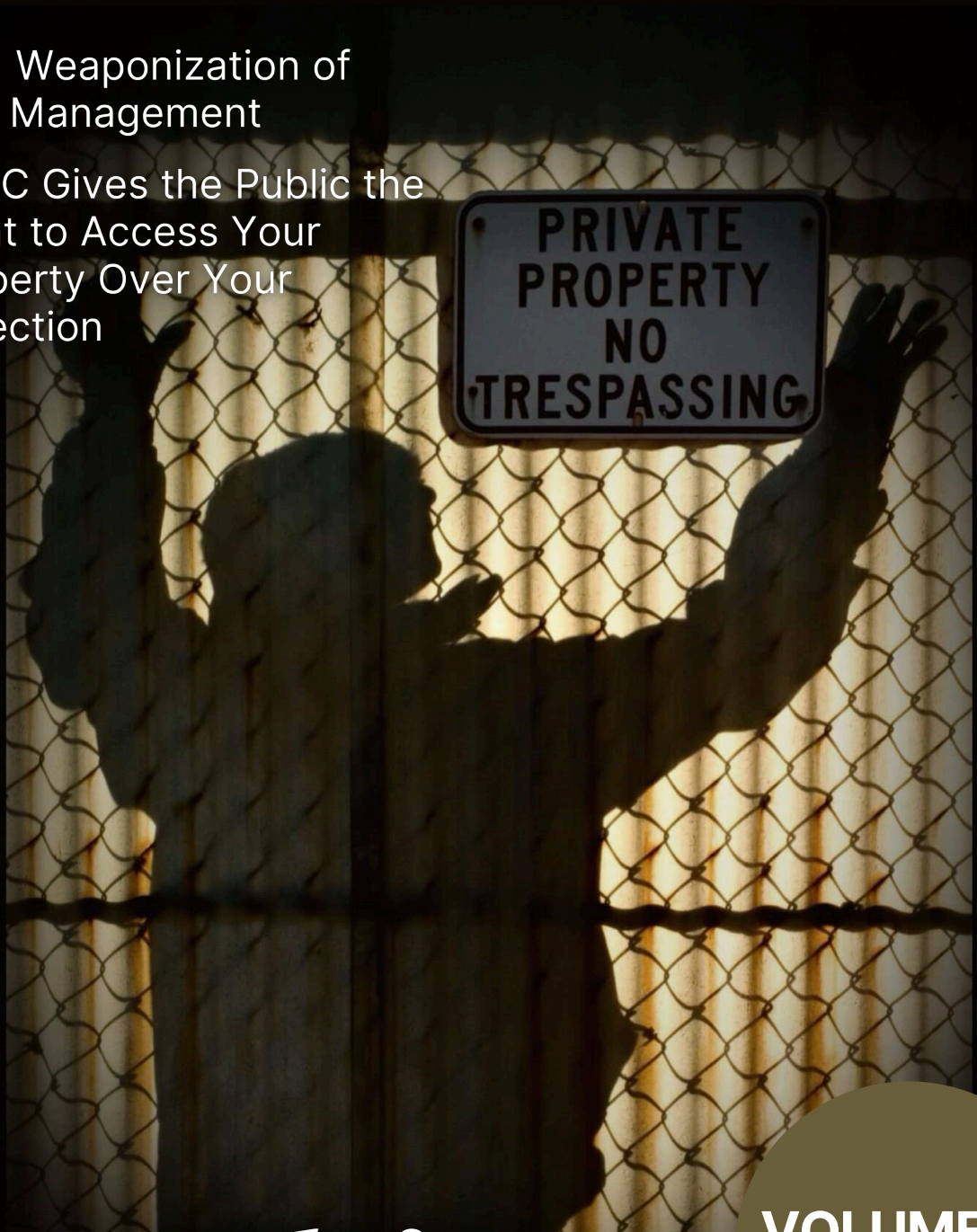
The Weaponization of Risk Management

LCDC Gives the Public the Right to Access Your Property Over Your Objection



Looking Forward

VOLUME 31
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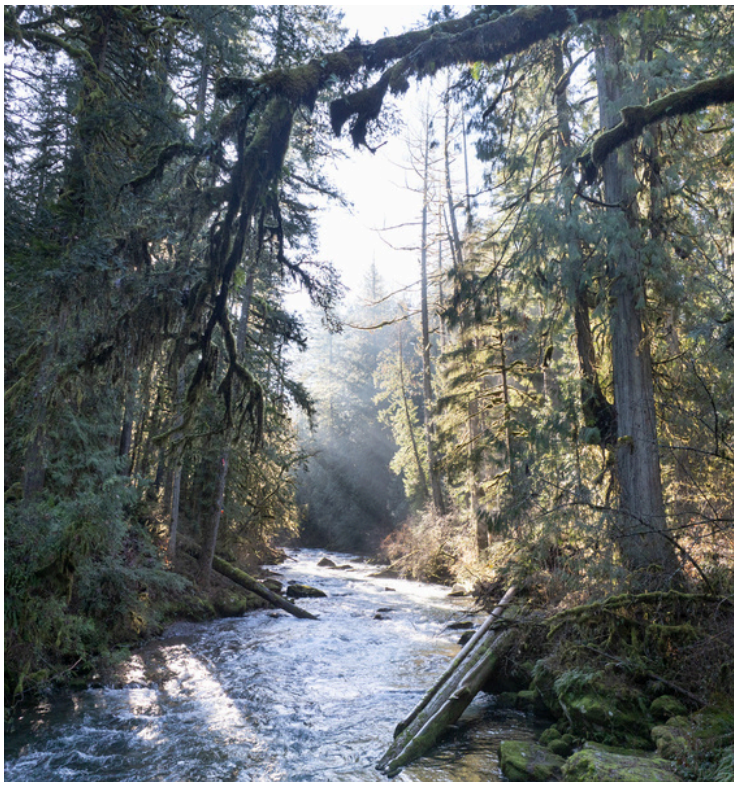
A publication by the Oregonians In Action Education Center & The Oregon Property Owners Association

This Edition



The Looking Forward Magazine is a publication by the Oregon Property Owners Association and the Oregonians in Action Education Center, in an effort to inform the public about the year's most important issues impacting Oregon's private property owners. The Looking Forward is mailed to property owners and decisionmakers statewide.

The Oregonians in Action Education Center focuses on outreach and education to the public and media concerning issues facing property owners in Oregon and across the country. The Education Center is dedicated to increasing public awareness of the difficulties faced by Oregon property owners, and ways in which the public can defend and protect home and property ownership. As a 501(c)(3) non-profit entity, contributions are deductible as a charitable contribution.

Burning the Bundle of Sticks

LCDC's latest rule proposal allows anyone to submit an application to turn your property into their private park - what could go wrong?

BY DAVE HUNNICUTT

Since the founding of our country nearly 250 years ago, the right to own and control private property has been a fundamental attribute enjoyed by countless generations of Americans. As John Adams noted, "property must be secured, or liberty cannot exist." Most Americans understand and accept that – but not the Oregon Department of Land Conservation and Development.

In fact, the right to private property is so fundamental to American law that it has been enshrined in the United States Constitution, and in many state constitutions. The Takings Clause of the Fifth Amendment to the United States Constitution provides, in part,

> *Nor shall private property be taken for public use, without just compensation.*

Two of the most important "sticks" possessed by a private property owner are the right to exclude others and the right to develop the property. The owner of private property controls access to that property and can prohibit (or allow) others to enter the property at the discretion of the owner.

In the same vein, the property owner has the right to develop (or not develop) the property, in the owner's discretion. You do not have the right to decide how to develop your neighbor's property any more than your neighbor has the right to decide how to develop your property.

Neither of these property rights are absolute. For example, access without permission may be authorized in situations where there is a clear and present emergency or threat to public health or safety. And for over a century, the right of government to enact zoning laws and regulations has served as a limitation on the right of a property owner to develop property.

In fact, American courts have long recognized the right of the government to limit the use of private property. But the government's right to limit private property uses is itself limited by the Takings Clause.

As the United States Supreme Court has repeatedly noted, there are four separate situations where a government action may violate the Takings Clause. Those four situations are, as follows:

Physical Occupation
When a government action or regulation allows physical access or occupation of private property (e.g., requiring public access to large parcels of private land for recreational purposes), it constitutes a per se taking under the Supreme Court, regardless of the extent of the occupation.

Exactions
If government approval of a discretionary application is conditioned on land dedication or monetary payments (e.g., requiring land for a park when approving a building project), it may be a taking if it fails the "rough proportionality" test from Dolan v. City of Tigard.

Total Taking
A regulation that eliminates all economic value of a property, leaving only speculative future value, constitutes a per se taking. The government must compensate the owner or modify the regulation to allow viable economic use.

Regulatory Takings
Regulations that restrict property use without destroying all value (e.g., zoning laws limiting development) are the most common. Determining whether a taking has occurred involves a subjective, complex analysis.

But what happens if the government gives your neighbor the right to submit a land use application to determine how (or whether) to develop your property? What kind of taking is that, or is it a taking at all?

We're about to demand an answer to those questions, and as you'd expect, the Oregon Land Conservation and Development Commission (LCDC) is the agency forcing the issue.

Cultural Landscape or Legal Nightmare? The Fight Over Oregon Property Rights

In early December, LCDC will vote on proposed rules to require local governments to establish "significant cultural landscape features", which are defined as:

> *A landscape feature that is: integral to a tribe's history, legends, traditions, and stories; traditionally used for wayfinding; traditionally used for gathering first foods and materials; integral to ongoing tribal cultural practices; traditional trails; and sites that support traditions of a culturally identified group.*

If your property has a view of Mount Hood it could be considered a significant cultural landscape feature.

Before talking about the takings issue, just think about how breathtakingly unclear, and therefore indecipherable, this definition is. Here a just a few basic questions that a local government must determine when presented with an application to declare some area of land a "significant cultural landscape feature":

What is a "landscape feature"? Is it small, like a small area on a rural parcel used in the past for a specific tribal practice, or is it big, like Mount Hood, the Columbia River, or the Alvord Desert? We don't know, because LCDC hasn't bothered to define "landscape feature". I guess local governments can just make it up as they go.

When is a landscape feature "traditionally used"? Does that mean it was used once, ten times, over a period of years, or something in between?

When is a landscape feature "integral" to ongoing tribal practices? Since LCDC's rules specify that a tribal government is an authoritative source of knowledge, does that mean that a landscape feature is "integral" when the tribe says it is?

What are "traditions of a culturally identified group"? In the first place, what is a culturally identified group? Does that mean a racial group, a religious group, a political group, a family group, a social group, etc.? Who knows – LCDC didn't bother to define it. If a culturally identified group is recognized, who gets to decide what constitutes that group's "traditions"? Unlike the Tribes, the LCDC rules don't specify that representatives of a culturally identified group are considered an authoritative source of knowledge on their group's traditions, which seems odd.

In short, there's enough bad policy in the definition of "significant cultural landscape feature" by itself to guarantee that local governments are going to be twisted and turned into pretzels by people allegedly representing "culturally identified groups" demanding that a neighboring private parcel they want to remain undeveloped be declared a "significant cultural landscape feature" under this new law and left in its natural state.

But LCDC's rule gets worse – way worse.

A New Stick In The Bundle: The Right To Apply For Permits On Someone Else's Property

In what appears to be a first, LCDC's rule authorizes anyone, and we mean anyone, to submit an application to declare someone else's private property as a significant cultural landscape feature. That's staggering – this rule allows anyone to submit a land use application to declare your property a significant cultural landscape feature. And there's nothing you can do about it.

This is not the same thing as having a person or group lobby the local government to consider declaring your property a significant cultural landscape feature. That is common practice, and local governments are free to decide to amend their local ordinances to do just that. This is much worse.

For the first time, LCDC is giving a private citizen (or group) the right to submit a land use application on property they don't own, even if the owner of the property is opposed to the application. Imagine that.

I think I'd like to declare the land housing the DLCD offices a significant cultural landscape feature, require the removal of any buildings on the site, and prohibit any new construction. Do you think the City of Salem would approve that? I don't know, but under this rule, I can force them to consider the application and decide, which I could then appeal to LUBA, the Oregon Court of Appeals and the Oregon Supreme Court.

Unlike other regulations that fit within one of the four takings boxes listed above, LCDC's proposed regulations allow a private party to decide what kind of limitations to seek on your property. Under the proposed rules, when an application is submitted, the local government is required to consider keeping the significant cultural landscape feature as open space and limiting access to members of the tribe or cultural group seeking the designation.

In other words, a private property owner can be forced to defend against a land use application seeking to prevent him/her from using their private property, filed by another private party who has no ownership interest at all, even if the owner objects to the application.

That creates a constitutional problem. Applying the bundle of sticks approach, LCDC is taking the property owners right to exclude others from the property, along with the right to control development on the property, and is giving that right to another private party.

Not only is that constitutionally suspect, it's also prohibited by Oregon law. But LCDC has never shown an affinity for trifling details like the United States Constitution or the Oregon Revised Statutes, so why start now.

Flood Insurance, Fire Maps, and the Weaponization of Risk Management

BY SAMANTHA BAYER

Natural disasters like wildfires, floods, earthquakes, and tsunamis are a fact of life in a state like Oregon, where every region faces some kind of natural hazard. These risks to lives and property make it essential to plan for resiliency while respecting the freedoms and property rights of Oregonians. This is why the state adopted Statewide Planning Goal 7, aimed at addressing areas subject to natural hazards, as part of its land-use planning framework under SB 100.

Recent years have made the stakes clear: we've witnessed historic wildfires, devastating floods, and major storms striking communities around the globe. As these events become more frequent, some have called for drastic changes to where and how development occurs.

But too often, these calls are less about protecting people and property and more about advancing political or personal agendas.

Reasonable hazard mitigation measures, like home hardening, defensible space, and seismic or floodplain safety standards make sense. They allow for development while ensuring structures are built to withstand potential disasters.

But there's a growing movement to restrict development altogether in hazard-prone areas – an approach that ignores the reality that people need homes, jobs, and infrastructure. According to this logic, the best way to reduce the risk of structural loss is for there to be no risk at all.

Unfortunately, there are some who exploit disaster concerns to push anti-development policies that have nothing to do with concerns over public health, safety, or the government fisc.

You know, the type – they move in from another state, buy their "little slice of heaven" on 10-acres in Deschutes County, build their dream home, and then join the local "land use watchdog" group to stop anyone else from doing the exact same thing. We're all for people moving to Oregon, buying property, and developing their dream, but you lose us completely when you devote your life trying to stop your neighbors from achieving the same thing. That's NIMBYism at its worst.

There's also advocates who just don't care about the practical consequences of their policies. We see this way too often with extreme environmental advocates who prioritize fish and frogs over housing families, and are eager, gleeful even, to eliminate thousands of jobs from rural communities, knowing full well those hardworking families may never recover. These groups weaponize natural hazards to impose extreme restrictions on important development and hamstring communities.

Take what is happening with flood insurance for example…

FEMA's Flood Insurance Fallout: How Practical Disaster Planning Can Be Derailed by Political Gamesmanship

Created by Congress in the 1960s, the National Flood Insurance Program (NFIP) provides federally backed flood insurance to communities that adopt basic floodplain management standards. It was designed to encourage responsible development and reduce flood damage without eliminating the ability to build in flood-prone areas.

It's important to understand that when we're talking about floodplain in this context, we're talking about land that has a 1% chance of flooding in any given year. That means the property has a 99% chance each year of not having any flood issues. Take Autzen Stadium at the University of Oregon as an example. The entire stadium complex, including parking, is located within the floodplain.

Americans have understood this for centuries – as we build a community, especially along rivers, creeks, and waterways, there's going to be some risk of flooding. In fact, in many Oregon communities, large portions of town inside urban growth boundaries are mapped in floodplains. In a state like Oregon, that's just unavoidable.

To be eligible for the NFIP, local governments must adopt basic floodplain management regulations to reduce flood risks. While participation is optional, the NFIP allows residents access to affordable flood insurance and encourages conservative development in the floodplain, making it an important but flexible tool for balancing development and disaster mitigation.

The NFIP has been an important and model government program for decades. But in 2009, environmental groups sued the Federal Emergency Management Agency (FEMA), claiming the NFIP violated the Endangered Species Act (ESA) by harming fish habitats. Their argument? By insuring properties in floodplains, the NFIP supposedly encouraged development that disrupted ecosystems. Never mind that the program was created to limit floodplain development, not increase it. Never mind that most communities already have strict environmental standards in place.

FEMA tenuously settled the lawsuit, and in 2016, the National Marine Fisheries Service (NMFS) issued a Biological Opinion (BiOp) claiming the NFIP jeopardized 16 species protected under the ESA. As part of the settlement, FEMA agreed to adopt a "no net loss of floodplain function" standard, requiring stricter local regulations to protect fish habitats.

What should have followed was a full and complete review of this plan under the National Environmental Policy Act (NEPA) and a rulemaking by FEMA amending its land management criteria in accordance with its regulations for programmatic decision-making and the Administrative Procedures Act.

This process (if done correctly) would have ideally looked at not only the conservation objectives of the proposed federal action, but the practical social, economic, or cultural effects of the action, including impacts to development. However, that process hasn't occurred – at least not the way it should have.

In 2023, environmentalists doubled down, suing FEMA again to force even more restrictive policies. In response, FEMA issued a rushed directive in July 2024, requiring NFIP communities to choose between three draconian options by December 1, 2024, if they wanted to remain eligible for the NFIP:

- Prohibit all new development in floodplains.
- Adopt a restrictive "no net loss" ordinance written by bureaucrats in Salem.
- Require property owners to submit costly environmental assessments proving their development won't harm habitats.

This unexpected directive created widespread confusion and panic as local governments scrambled to analyze their options. For the first time in this region, local governments are being told to integrate the ESA into their local land use regulations if they want to remain enrolled in the NFIP. And they are being asked to do so on a rapid timeframe.

Compounding the issue is that NMFS's standards for protecting listed species don't exactly align with Oregon's state land use laws for protecting needed housing and agricultural practices.

As such, local governments are being forced to choose between violating state law, infringing on property rights, or losing access to federal flood insurance altogether. Additionally, it is not even clear if FEMA even has the legal authority to impose such interim measures before NEPA review and a formal rulemaking process is complete.

This is bad news for local governments, property owners, small businesses, needed housing development, renewable energy development, and any other use that requires standardized and predictable permitting. It's a no-win scenario for communities and property owners, spurred by activists who have no qualms with weaponizing flood insurance regardless of the consequences.

Wildfire Mapping: Another Front in the Anti-Housing Agenda

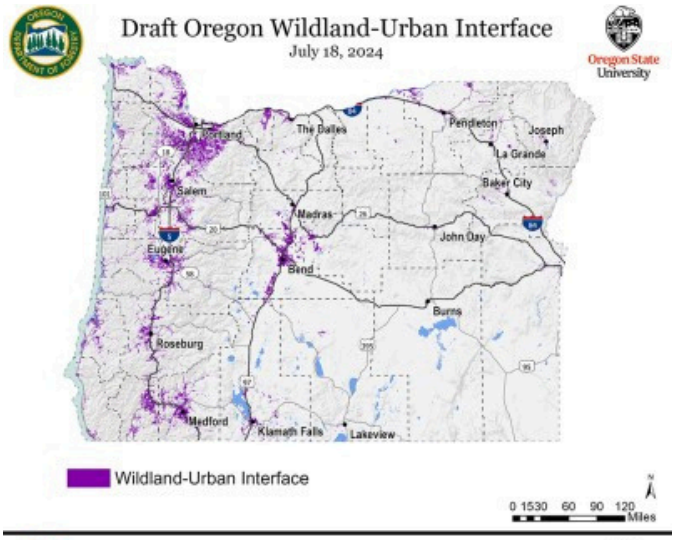
Wildfires present another challenge where practical solutions are being overshadowed by extreme policies. After the historically devasting wildfire of 2020, the Oregon Legislature passed SB 762 (2021), a comprehensive wildfire preparedness and mitigation bill designed to address the state's increasing wildfire risks. The omnibus legislation included provisions to improve wildfire response, community resilience, and forest health.

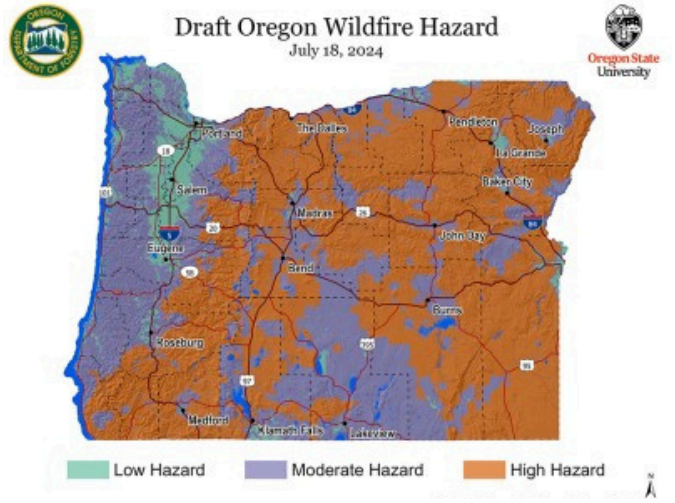
The most controversial aspect of SB 762 was the requirement for the Oregon Department of Forestry (ODF) to develop and maintain a statewide wildfire map. This map identifies areas of high wildfire hazard and is intended to guide resource allocation, and wildfire mitigation efforts, including defensible space standards and building code updates.

While widely regarded as a proactive step, the wildfire risk mapping component faced extreme public backlash due to concerns about property insurance, land use restrictions, and accuracy. This backlash led to SB 80 (2023), which refined the hazard map, made necessary adjustments for irrigated agricultural lands, and required extensive public process on the map.

By the end of 2024, the final maps will be posted on Oregon Explorer and the Oregon Department of Forestry will mail notifications to property owners whose land is within the wildland urban interface and designated as high wildfire hazard, as these landowners will have to comply with new regulations.

The legislature may consider a bill to prevent all houses in high hazard wildfire areas shown below in orange.





The Oregon Property Owners Association has supported reasonable wildfire policies, including defensible space and home-hardening requirements. These measures are backed by fire scientists and public safety experts, striking a balance between reducing risks and respecting property rights. Unfortunately, as we've long feared, the maps are ripe for abuse.

Certain organizations are now publicly using wildfire hazard as a weapon to stop rural communities and property owners from building homes or businesses —or even rebuilding after their property is destroyed by fire. For years, these same anti-growth activists have opposed building in these same areas because of farmland preservation, traffic impacts, or the need to preserve Tom McCall's legacy. No matter how badly they want it to come true, not everyone wants to live in a high-rise apartment in downtown Portland.

Now, they've latched onto wildfire risk as their latest argument to halt development and urban growth boundary expansions in these locations. Ironically, by doing so they are just pushing development smack dab into the middle of the Willamette Valley onto the state's most prime farmland, but that's another article for a different day.

This anti-growth agenda threatens rural economies, undermines property rights, and distracts from proven strategies for wildfire mitigation. Above all, it compromises the success of the wildfire program.

The Oregon State Fire Marshal (OSFM) is implementing defensible space standards designed to safeguard homes and communities. All new homes built in high-wildfire hazard areas must be hardened to heightened building code standards. These proven strategies reduce risks of structural loss while protecting property rights and allow needed development to occur. Most importantly, they strike the vital chord that these activist-led groups always seem to forget - balance.

Our Goal: Balancing Growth and Safety

I could go on for more pages about tsunamis, earthquakes, volcanos, and landslides. The reality is that every inch of our state is impacted by some sort of climactic risk. That's the reality of living on a floating rock that is constantly reinventing itself.

It is also an inevitable reality that development must occur – and no, our current UGBs can't accommodate all of it. We must build new houses to shelter people, workers need more good paying jobs, farmers need to succeed to feed our communities, families need more daycares and schools, and we need more critical infrastructure to protect, save, and help our most vulnerable.

There's so much we could do if our government operated in the plane of reasonable. We could improve evacuation routes, build better facilities for evacuees and emergency shelters, support community recovery efforts, and invest in housing and infrastructure to attract and retain first responders, just to name a few.

Instead, we find ourselves grappling with political "solutions" that seek to ban new development statewide and impose extreme ideologies on rural communities. This divisive, zero-sum game poses a far greater threat to our state than any external hazard.

View From Scholls

BY DAVE HUNNICUTT

January 1, 2025, marks my 29th year at OPOA. I can't believe it – I would never have guessed when I first started that I'd still be with OPOA in 2025. I've spent nearly my entire career here.

And you know what? If I had it to do all over again, I wouldn't change a thing.

It's rare to find a job that challenges you every day, and where each day you learn something new. Where you wake up every weekday morning thinking "Hell yes, I get to go to work today!" Where every day you meet Oregonians who were born here, raised here, live here, and will probably die here. Where you help these people (along with those who moved here to pursue opportunity) overcome ridiculous bureaucratic roadblocks placed by government at all levels.

I have that job, and I love it.

I've been blessed to be at OPOA all these years, and to work with so many great Oregonians. In my time here, we've helped Oregon families and businesses in every Oregon county. Not some counties, or most counties – every Oregon county. I was lucky to see most of Oregon as a kid growing up, but I absolutely love trips to parts of the state that are on the road less traveled.

In the last few years, the job has gotten tougher, and the trips have gotten longer. Driving home from a late-night land use hearing in a small town on the southern Oregon coast was a lot easier when I was 35 than it is now when I'm nearly 60.While the work demands have grown as more people seek our help, it's become more difficult for me to complete the task.

Our work is hard and emotional. If you want to see a video of the most difficult and emotional case that I've ever worked on, use the QR code on the back page of this edition and watch our most recent YouTube video.

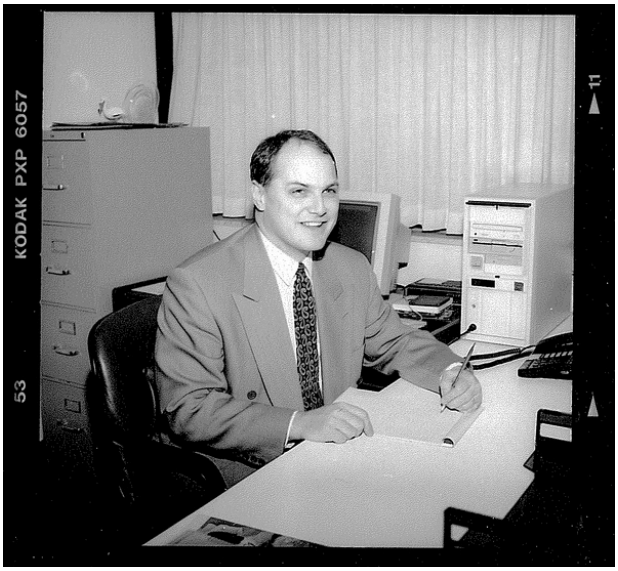
So, while my joy for the job has never diminished, something needed to be done so we could help everyone who wanted our help.

A couple of years ago I told the OPOA Board that I needed help. Fortunately, help finally arrived.

In September 2023 we brought on Samantha Bayer as our new General Counsel.Before joining OPOA, Sam and I worked together for quite a few years during her time with the Oregon Farm Bureau and the Oregon Homebuilders Association. In fact, Sam is still working half-time for OHBA and doing a great job for both our organizations.

As I've told many people over the last year, until Sam joined OPOA, I wasn't sure if we could find anyone to take over the organization when I could no longer do the work. I sure don't feel that way anymore.

Having Sam as part of the team has changed everything at OPOA. Having someone with fresh ideas, a new perspective, a shared passion and dedication to helping Oregon property owners, and a much younger legal mind has been a fantastic win for both OPOA and me personally.



Dave and Larry George from the old days (circa. 1996).

In fact, since Sam joined us, not only has our work product increased on our traditional land use issues, we've expanded our scope and outreach. OPOA is now taking on issues that we've always wanted to address but never could with just one attorney.

For example, as you can see from Sam's article in this edition on FEMA/NMFS, in the last few weeks, Sam and I have stepped in to assist Oregon property owners caught up in the fight between the federal government, environmental extremists, and Oregon state and local governments on the National Flood Insurance Program.

Solving this dilemma for Oregon property owners requires knowledge of a complicated web of federal and state laws and regulations, including the National Flood Insurance Act, the Endangered Species Act, the National Environmental Policy Act, and Oregon land use law, plus all of the various agency rules that implement each of those laws.

This is the type of project that one lawyer cannot accomplish alone. With two lawyers, it becomes possible, especially when they have experience with at least one area of the law being applied. That's us, and with the help of Molly Lawrence, a Seattle lawyer with years of experience in federal issues but limited Oregon land use experience, we were able to reach a conclusion on the intersection between these various areas of the law.

Based on our work, Sam and I prepared a 14-page legal memorandum which has been distributed to nearly every Oregon city and county impacted by the federal agency demands, and based on that memorandum, local governments have been refusing to violate Oregon law to meet the federal demands. This is just the first step in what could be a lengthy battle, but we're winning the first round.

Sam and I have also taken on a legal intern for the current semester. Sarah Griffith, a third-year law student at Willamette University School of Law, is volunteering for us this semester and learning the ins and outs of daily life as a working land use lawyer. We promised Sarah at the start of the semester that we'd show her land use law from the perspective of a property owner being overregulated, and that's exactly what she's seeing.

We've been really happy to have Sarah on the team, and we'll keep taking interns moving forward. If we can show future lawyers the "other side" of land use, we'll teach them that more regulation isn't the answer to every perceived problem, and that regular people can be financially devastated by laws with good intentions but really bad results.

We need your help to keep expanding – any support you can provide is welcome as our financial demands increase. But now is the time, as people are looking for a reduction in heavy handed regulation and a return to the middle and finding common ground. As you consider your charitable contributions, please think of us.

In the meantime, Sam and I will keep working on expansion while continuing to represent Oregon property owners. In the last few weeks, we've been from Medford to Astoria, Merrill to LaGrande, Boardman to McMinnville, Bend to Scappoose, and Gresham to Grants Pass (with a stop in Eugene). Neither one of us has any plan to stop, and every intention on growing our organization to fight bad laws, one issue at a time. Help us get there.

The OPOA team - Rachel, Dave & Sam

OREGON PROPERTY OWNERS ASSOCIATION

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When Oregonians understand their rights, they are empowered to protect their land, navigate our complex legal system, and protect their properties for future generations. Knowledge is not just power— it's the foundation for justice and liberty in our communities.

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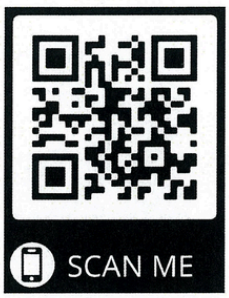

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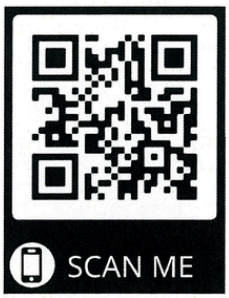

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