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Oregon's Land Use Law and The Lords of Misrule

More than 50 years ago it was evident to those concerned about the loss of Oregon's farm and forestland, natural areas and open space that the "fire at Eden's gate" would become a conflagration without statewide protective measures in place.

Senate Bill 100, an enlightened governor and the state land-use program he brought to fruition established land-use regulation unique to Oregon, a model for the nation and a fire-line against the blaze occurring in the state south of us and heading our way.

For the most part Oregon's system of land-use goals and comprehensive plans has served the state well. But development pressures, manipulations and compromises were in play from the program's inception. As people continued to pour into the state, development interests and the political influence to enable them proliferated as

well. As the fire grew hotter, the rules and regulations serving as a firewall began to crumble.

Thanks in large part to anti land use lobbyists, such as Dave Hunnicutt (formerly of Oregonians in Action), Oregon's farmlands and forestlands are now growing guesthouses, accessory dwellings, wedding venues, template dwellings, schools, churches, golf courses and other invasive species. Two recent bills, HB 3384 and 3024, passed by Democratic majorities in the State House, and Senate, will further the conglomeration.

HB 3384 requests the expansion of a non-conforming use — Oak Hill School near Lane Community College — on land zoned exclusive farm use (EFU). This school, on property once owned by Ed King of King Estate and attended by his children, was approved in the EFU zone in 1994 as a conversion of a single-family dwelling. Then it was fast-tracked by planning

staff to help the school obtain a building permit before the adoption of a rule that may have inhibited its conversion.

The school has been allowed to continue as a non-conforming use — a use not allowed in the zone — since 2009, and the property and development, together assessed at close to \$4.5 million, are paying no taxes. In exchange for these generous concessions came a certain responsibility: the school could not become more non-conforming by expanding uses and activities inappropriate in the farm zone and could not cross the divide between urban and rural.

Notwithstanding, Oak Hill expanded in 2012. Wanting to expand again, it asked the Legislature to nullify two court decisions, first by the Land Use Board of Appeals (LUBA), then by the state Court of Appeals, agreeing with LandWatch that the proposed expansion violates state law.

(Lords of Misrule, continued on page 2)

(Lords of Misrule, continued from page 1)

Passing HB 3384 not only promoted a special interest that has lost twice in the court system, it also corrupted the intent of the non-conforming use provision to protect our resource land and sets a precedent by erasing the jurisdictional line that separates the powers of state government. That's a long way down a slippery slope from the original promise of Oregon's land-use program.

In 2016 Kay King, member of a wealthy logging family, applied for a permit to replace three dwellings that had been demolished by the applicant 22 years ago on one tax lot zoned exclusive farm use (EFU). A statute enacted in 2013 reasonably allows farmers to replace dilapidated farm dwellings on which they've been paying taxes for the last five years. However, no taxes had been paid on the King dwellings since they were demolished, and there was no indication that the new ones would be associated with

farm operations. In a recent decision the Oregon Supreme Court affirmed LandWatch Lane County's appeal to retain the existing regulation.

While that decision was pending, King found a freshman state representative from Redmond, heavily supported by timber and other extractive industries, to sponsor HB 3024 that overturned the Supreme Court decision. This handed King what she wanted and establishes legislation that would allow more houses on farmland regardless of when they may have been removed in the past, whether taxes have been paid and whether they are associated with farm practices.

In other words, acceding to this proposal, clearly motivated by callous self-interest, simply added more fuel to the fire that little by little, lot by lot, has been consuming our farms, forests and natural areas and, with them, our sense of place.

Even for the experts — and few legislators, if any, are likely to be expert — land-use law is difficult to comprehend, but the consequences of ignorance, misunderstanding or development bias are plain for any eye to see: the sprawling urbanization of our rural landscape.

Ironically, now we must consider that the landmark land-use program promoted and passionately defended by Republican Gov. Tom McCall almost 50 years ago has been weakened by Democratic super-majorities in Oregon's House and Senate with the passage of two bills that set a precedent for overturning the rule of law and catering to the political corruption McCall stood our ground to deny.

Robert Emmons
Fall Creek



Oak Hill School expanding on land zoned for exclusive farm use

Floodplain Regulation

During the last year especially, LandWatch has received notice of numerous applications for development in the county's floodplains. All have been approved by the Land Management Division (LMD).

Largely to meet FEMA insurance guidelines and requirements the LMD is presently updating its floodplain regulation—such as it is. Lane Code and State statute allow building not only in the floodplain but in the floodway as well. Michael and Michelle Miller, for example, received approval earlier this year for multiple lots located in the floodplain and floodway of the Siuslaw River near Lorane. As a result of flooding in March, an event that has occurred on average at least twice every 10 years, this property and its potential sites for houses, garages, driveways, wells, septs and utilities was underwater. To accommodate building in the floodway county code and state law permit fill to raise the level of driveways and allow foundations to be raised one foot above the mean flood level.

Nonetheless, houses flood and are swept away, and raised driveway soils wash into rivers and creeks as do the wastes from leaking or inundated septs. Many approvals are in the floodplains and floodways of Class 1, fish-bearing rivers such as the Siuslaw,

the McKenzie and the Willamette and fish-bearing creeks, as well.

More than 20 years ago, in an attempt to comply with the federal 4D rule to protect endangered species from “takings”—harm or killing—federal regulators reached out to local jurisdictions to strengthen their land use regulation. This was met, in Lane County at least, with a riparian rebellion alleging that any regulation against the taking of listed species that resulted in limits on development would be a “taking” of private property, because in God's hierarchy and in the ethos of the Wild West a man's rights on his own property trumped the needs of lesser creatures.

Ten years ago, when EWEB worked with a committee of Lane County residents to address impacts of development on the McKenzie River, source of Eugene's drinking water, the minor regulatory improvements they proposed drew a hostile mob of private property rights zealots — fired up by Dave Hunnicutt and Oregonians in Action — to a hearing in Harris Hall. In solidarity Commissioner Bozievich wore a red tea party tee shirt, and Commissioner Faye Stewart stifled any possibility of an airing of the issue when he swept his hand to his heart and led the Pledge of Allegiance before the dense and rabid faithful. Riparian regulation was tabled indefinitely.



Building in a floodplain is costly to the environment and its residents.

Meanwhile, Hunnicutt spends his time and his clients' money roaming the halls of the Capitol building lobbying for land use deregulation and wholesale development in natural areas and open space, farmland and forestland. His efforts have been paying high dividends (See lead article this issue).

Likely mindful of the near riot 10 years ago, Public Works, the LMD and advisors are focused on simply ensuring that the existing code regulating floodplains, floodways and riparian areas is followed. However, pertinent ordinances have proved too permissive and inadequate to protect our waterways and their floodplains from the impacts of development. To minimally improve floodplain protection LandWatch has proposed that no building be allowed in the floodway, and that the 100' riparian buffer required for fish-bearing streams on F-2 properties apply in all zones, with no variances for development permitted within these setbacks.

Presently, Lane County only requires a permit for a development site in the floodplain if it is below the Base Flood Elevation (BFE). According to a recent memo from the Land Conservation and Development Commission (LCDC) to Lane County, to meet national Flood Insurance Program guidelines the county must alter its interpretation of its code to also require a permit for a surveyed development site above the base flood elevation (BFE). As well, LCDC also notes some irregularities in, and requests corrective action for, five existing Lane County planning applications permitting floodplain development.

While tightened insurance regulation may improve Lane County's permitting practices, it stops short of the meaningful, long-term environmental and economic benefits achieved only by denying development in floodplains and riparian zones altogether.

Robert Emmons
Fall Creek



Pam Driscoll

Interview with Pam Driscoll

Pam Driscoll is a special needs teacher, producer of the radio show "Come Together Oregon", which can be heard on KEPW.org 97.3 LP FM Wednesday's at 6:00 pm and Saturday's at 11:00 am, and a life-long environmental and social justice activist.

LW: *You've been an activist for the environment and some of its communities for many years. When were you first aware of human caused harms to the environment, and what motivated you to take an active role in combating them?*

Pam: I have always loved and felt connected to the natural world. I became an environmental and social justice activist after becoming aware of the corruption and influence of wealthy corporations and the devastation being done to the environment while living in Los Angeles, mostly from listening to Pacifica Radio in 1990. I clearly remember Ralph Nader saying, "It's not about me running for president, it's about each one of you getting involved at the grassroots level; that's how change happens." I knew he was right, and I haven't stopped being active since then.

LW: *As a neighbor you were a central part of the effort several years ago to save Parvin Butte in Dexter from extinction. What did you learn from that experience?*

Pam: Working to save Parvin Butte was a microcosm of all that is wrong with the world. The community surrounding the butte wanted it to be protected, but the resource extraction industry didn't care; they just saw dollar signs. It's the same old story: The will of the people did not prevail as the majority of our county commissioners at the time were essentially working for the extractors. I'm a big believer in "following the money." I look at who are the largest donors to political campaigns to get a feel for whom they are really working. The upside of the effort, though, is that we are a stronger, tighter community.

LW: *From its inception Oregon's land use program has been weakened by development interests and complicit politicians and administrators. What are your expectations for the survival of Lane County's rural landscape and what forces and strategies might accomplish it?*

Pam: I believe campaign finance reform that would prohibit large campaign donations and implement publicly funded campaigns would be a game changer. Unlimited campaign contributions are the root cause of all of our most pressing issues, corrupting our elections and directing legislation. I've been working for the last six years or so on Lane County Commissioner campaigns, and we've had some success. But it is an uphill battle when big money drowns out others' efforts. There are some glimmers of hope when I see, for instance, Lane County Public Works Director Dan Hurley express his excitement and support for the Lane County Climate Action Plan and many others motivated to work to heal our natural world and protect what's left. Two local groups helping are 350 Eugene and Community Rights of Lane County.

LW: *Most environmentalists and the general public surely agree that global warming/climate change is the biggest problem facing mankind and its future. What should be done and what are you doing to address this seminal issue?*

Pam: The climate crisis is front and center for me. Once again, campaign finance reform is key to get the resource extraction industries in the back seat for a change. What's frustrating for me is how few people understand this is a global crisis and that the door is shutting on possibilities to mitigate the worst effects. I'm reading a fascinating book titled; *We Are The Weather* by Jonathan Safran Foer who tells a story of the beginning of the Holocaust, when, in 1942, Jan Karski reported to Supreme Court Justice Felix Frankfurter on the concentration camps. Frankfurter responded that he didn't believe him, not because he thought he was lying, but because "I am unable to believe him. My mind, my heart, they are made in such a way that I cannot accept it." The author makes the case that this is why so many do not take the climate crisis seriously. We need to somehow make people understand what is at stake and that business as usual cannot continue.

LW: *Tell us about your local radio program, its theme and feedback from listeners. How many people do you feel the program reaches, and how effective do you feel it's been?*

Pam: I was a member of Eugene Media Action years ago and very disappointed when KLCC dropped the Alternative Radio show and the local call in show hosted by Alan Siporin. After KEPW 97.3 FM went on the air a couple of years ago, I joined.

KEPW has Pacifica programming including Democracy NOW!, Alternative Radio, and local shows, to name a few. I'm a firm believer that an informed citizenry is essential to a working democracy. I report on

local and regional environmental and social justice issues, actions and legislation. We at KEPW are working to be a hub for the progressive groups in Lane County being an integral part of KEPW by putting out PSA's, news, actions, meetings, legislation and interviews to shine a light on important local issues.

I recently re-read and was inspired by Chief Seattle's letter to the U.S. Government on buying tribal lands in 1852: "The Earth does not belong to man; man belongs to the Earth...The Earth is our Mother...all things are connected like the blood that unites us all." May we all wake up in time to heal this beautiful bio-diverse planet.



Lauri Segel

The Nature and Necessity of LandWatch Land Use Appeals

Appeals of Planning Director, Hearings Official, and County Commissioner land use decisions are a necessary and significant part of the work of LandWatch Lane County. In addition, we spend a considerable amount of time commenting, in writing, on pending land use proposals before review and decisions are completed by staff and the Planning Director.

Theoretically, participating in the process upfront, before a decision is made, can have a positive effect on the decision maker's review of

and conclusions about pending applications. In reality, however, this is seldom the case. Applicants are provided an opportunity by the planning staff to respond to upfront comments from LandWatch, and those responses are often relied on, subsequently, to justify the almost inevitable approvals.

As a result, LandWatch is frequently faced with deciding whether or not an appeal is in order. These often are difficult decisions, partly because the pertinent land use laws are ambiguous. Whether or not an appeal is in order can also depend on the strength of a decision maker's findings and evidence in the record.

Since the publishing of our Spring 2019 newsletter, LandWatch has had four appeal judgments issued by the Land Use Board of Appeals (LUBA). LandWatch was the prevailing party in three of the four decisions. Two of the appeals were of decisions made by the Board of Commissioners, acting on recommendations from staff, and the other two challenged decisions of the Lane County Hearings Official.

Although appeals may be characterized as contentious, unfair, or baseless, in fact local decision makers are frequently caught in a web of long-standing practice and policy interpretations that were established on behalf of — and even at the request of — developers and land use agents. As a result, land use decisions are often influenced by the politics behind the interpretations of local code and state laws.

LandWatch takes pride in its ability to see through the bias behind the interpretations of state law and local code, and will continue to actively pursue the rule of law as it applies to development on valuable farm and forestlands.

Lauri Segel
Research analyst

McKenzie Watershed Protective

McKenzie Watershed Protective is a conservation organization, established in 2018, dedicated to the preservation of the McKenzie River water, native fish and forests. Members live and work on the McKenzie River. Daily we witness riparian destruction, residential dumping, and unbridled residential development inside the riparian zone.

The State of Oregon owns the land, referred to as “wetlands”, from the waterline to the ordinary high water mark. Lane County requires a setback of 100’ from the ordinary high water line if zoned F-1 (Non-impacted), F-2 (Impacted) or EFU (Exclusive Farm Use); for all other zones the setback is 50’. Within these buffers 25% of the vegetation can be cut, while 75% must be left in its indigenous state. In our experience Lane County rarely enforces this portion of the code. The same is true for the State “wetlands” zone.



House invading the McKenzie River riparian zone

The Protective uses a grassroots approach to collaborations and initiatives, engaging in preservation, restoration, legal enforcement, and lobbying through community alliance. We strongly support holding government agencies accountable for enforcing existing laws.

As a watchdog organization, we have filed over 40 County and State violations on the McKenzie River. Yet these are a mere fraction of current violations. Of those filed to date only three have been acted on by Lane County. Visual observation of the three properties shows no change in riparian restoration. Our group’s conclusion is that there is no effective protection for McKenzie River water quality.

On Sept. 13th we took staff and directors from the United States Environmental Protection Agency down the river to view the riparian and water quality conditions. They were stunned by the impacts they discovered.

“Save the McKenzie” is not a slogan; it’s a plea. The McKenzie River is the source of Eugene’s drinking water, provides critical aquatic and wildlife habitat and supports a multi-million dollar fishing and recreation industry all of which are endangered by riparian destruction, algae and aquatic invasive plants, wholesale development and loss of water quality.

Whether you are a river user, property owner or government agency, McKenzie River Protective is here to help you understand the consequences of inaction and what you can do to help. Every action and effort we make is done with this simple mantra: “Doing what is best for the river.” Less than half of the McKenzie’s riparian zone remains intact. Our organization is currently photographing the entire 90 miles of river frontage for riparian zone violations, and we are meeting with a number of government agencies to bring about significant enforcement of riparian laws. Our organization also has a McKenzie River Native Fish Management Plan and Forest Practices Plan, and we are in active discussions with various agencies and groups on these issues.

Lane County relies on citizen complaints to monitor the river’s riparian zone. We have notified the county that by our observation present monitoring and enforcement under Lane Code 16.253 are ineffective and meaningless. Planting invasive plants such as ivy and residential dumping in the riparian buffer are largely unchallenged by Lane County, and applications for decks, stairs, outbuildings and other riparian incursions are routinely approved. Please visit our website at www.McKenzieWatershedProtective.org for more details and documentation on the McKenzie River, and contact us if you see riparian or water quality violations.

Robert Spencer
President
McKenzie Watershed Protective



Manufactured home moved in, riparian vegetation moved out

EWEB Incentives Program on the McKenzie River

In an effort to improve and protect the health of the McKenzie River, source of Eugene’s drinking water, EWEB has conducted numerous studies for many years of impacts on the river’s water quality. Chief culprits include:

- Cumulative impacts associated with development along the river (septic systems, chemical applications, vegetation removal in the riparian area and the installation of rip-rap barricades, loss of agricultural and forest land to pervasive development)

- Forest practices that allow clear-cutting and chemical spraying
- Agricultural practices that use chemicals and remove riparian vegetation
- Climate change resulting in severe and more frequent flooding and wildfires and in longer dry seasons

Wary of pushback from private property rights claimants, EWEB has opted for incentives, instead of regulation, by offering “rewards” to landowners who voluntarily protect

“high quality land” on the McKenzie. Working with grants and other public and private funding, the utility’s Pure Water Partners (PWP) program is a collaboration of EWEB, McKenzie Watershed Council, McKenzie River Trust, Upper Willamette Soil and Water Conservation District, U of O and others that provides “financial incentives and technical assistance to landowners.” It also offers a “Naturescaping Program... for smaller landowners next to the river” that provides technical assistance with invasive species removal and replacement with native plants.

According to an October 2019 EWEB memo, the two-year old PWP has enrolled 65 McKenzie River landowners. Eight of these have signed agreements for protection and/or restoration, while 13 have signed “a more informal” Naturescaping agreement.

A recent draft mailer from Lane County’s Land Management Division to McKenzie River residents promoting the PWP incentives program notes that in the last year the county “has received a record number of code enforcement complaints regarding the removal of riparian vegetation along the McKenzie” and “that costs associated with corrective action, such as restoration work and permits can be several thousands of dollars.”

Another official recently has been added to the LMD’s code enforcement division, and LandWatch has been told that with additional personnel and commitment we can expect more rigorous enforcement of code violations such as those occurring routinely on the McKenzie.

Robert Emmons
Fall Creek