



Open Space Protection in Medford, Oregon: A Menu of Legal and Planning Strategies

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KC McFerson • Environmental and Natural Resources Law Center
Jared Margolis, Esq. • Research Associate • Environmental and Natural Resources Law Center



Sustainable Cities Initiative

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About SCI

The Sustainable Cities Initiative (SCI) is a cross-disciplinary organization at the University of Oregon that promotes education, service, public outreach, and research on the design and development of sustainable cities. We are redefining higher education for the public good and catalyzing community change toward sustainability. Our work addresses sustainability at multiple scales and emerges from the conviction that creating the sustainable city cannot happen within any single discipline. SCI is grounded in cross-disciplinary engagement as the key strategy for improving community sustainability. Our work connects student energy, faculty experience, and community needs to produce innovative, tangible solutions for the creation of a sustainable society.

About SCYP

The Sustainable City Year Program (SCYP) is a year-long partnership between SCI and one city in Oregon, in which students and faculty in courses from across the university collaborate with the partner city on sustainability and livability projects. SCYP faculty and students work in collaboration with staff from the partner city through a variety of studio projects and service-learning courses to provide students with real-world projects to investigate. Students bring energy, enthusiasm, and innovative approaches to difficult, persistent problems. SCYP's primary value derives from collaborations resulting in on-the-ground impact and expanded conversations for a community ready to transition to a more sustainable and livable future.

SCI Directors and Staff

Nico Larco, SCI Co-Director and Associate Professor of Architecture

Marc Schlossberg, SCI Co-Director and Associate Professor of Planning, Public Policy, and Management

Bob Choquette, Sustainable City Year Program Manager

About City of Medford

Medford, located in Jackson County in Southern Oregon's Rogue Valley, has a population of 75,920 within a metropolitan statistical area of 206,310 people, the 4th largest in the state. The City was founded in 1883 at its present site because of its proximity to Bear Creek and the Oregon and California Railroad, becoming the County seat in 1927.

The downtown is a National Historic District and it is flourishing today due to support from the City's Urban Renewal Agency in cooperation with business and property owners. New construction, building restorations, infrastructure improvements and community events are creating a forward-looking downtown grounded in its diverse past. Streets have been realigned and improved with with new pedestrian and bicycle amenities.

Medford is the economic center for a region of over 460,000 people in Southern Oregon and Northern California. In the past, its economy was fueled by agriculture and lumber products. Although the lumber industry has declined, three lumber mills, Boise Cascade, Timber Products and Sierra Pine, remain. The area also is home to an expanding vineyard and wine industry that includes a large assortment of varietals and over 60 wineries. Lithia Motors, the 9th largest auto retailer in the U.S., has been headquartered in Medford since 1970.

The City is a regional hub for medical services. Two major medical centers employ over 7,000 people in the region. Medford is also a retirement destination, with senior housing, assisted living and other elder care services acting as an important part of the economy.

The Bear Creek Greenway extends from Ashland through central Medford and includes a 26-mile multi-use path, linking several cities and numerous parks. Roxy Ann Peak, one of Medford's most prominent landmarks, is a 3,573-foot dormant volcano located on the east side in Prescott Park, Medford's largest city park at 1,740 acres.

Table of Contents

Executive Summary	8
Chapter 1: Introduction	10
Chapter 2: Legal Framework	12
Chapter 3: Legal Impediments	17
Chapter 4: Legal Tools	27
Chapter 5: Planning Tools	53
Chapter 6: Suggestions for Future Work	60
Appendix A: Tool Matrix	62
Appendix B: Model Open Space Development Ordinance	68
Appendix C: Model Agreements	75

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Executive Summary

The goal of this project is to improve open space protection in Medford, Oregon. This report describes potential legal obstacles and effective legal and planning strategies behind successful municipal open space protection efforts.

Beginning in September 2013, the University of Oregon Sustainable Cities Initiative worked with the City of Medford to address the City's desire for improved open space protection by directly partnering with the University of Oregon on this project. KC McFerson of the University of Oregon School of Law and a fellow in the Environmental and Natural Resources Law Center's Sustainable Land Use Project planned and executed project activities under the supervision of Jared Margolis, Esq.

Over the 2013-2014 academic year, Ms. McFerson conducted legal research, identified successful traditional and recent open space planning practices, met with City staff, conducted phone interviews, performed City document analysis, and presented findings. The principal project product is a report comprising: 1) a guideline for defensible legal decisions, 2) a menu of legal and planning strategies, and 3) recommendations for next steps. As a key near-term outcome, the City will itself be enabled to create new operating procedures for open space protection. Already this project has effectively engaged City staff, council, and other participants. With timely implementation efforts, this report will have a direct impact on the City's ability to preserve local values while fully complying with state goals and regulations.

This report provides the City with a wide range of strategies to improve open space protection while minimizing legal obstacles. Strategy categories include land acquisition, conservation regulation, and conservation incentives. Each category and legal tool presents benefits and obstacles. The primary obstacles the City will face are funding, generating public awareness/support, and staff capacity for additional time spent implementing new strategies. Specific recommendations follow the discussion of each tool. Tools are compared side-by-side in the appendices.

This report recommends that the City first update its definition for open space to an umbrella term for several categories of land (e.g., parks, riparian areas, etc.) that applies across all City departments. This allows the City to manage these categories in a legally defensible way. Next, the City should reformulate leadership and adopt a clear plan to ensure that a person or group has the administrative power, incentive, and guidelines to carry out strategies/programs that implement protection of the newly defined open space. Finally, this report recommends using acquisition, regulation, and incentive tools that involve voluntary landowners because, while raising awareness and interest takes time and resources, voluntary partners will be the most dedicated and likely give the least legal pushback to City strategies.

Chapter 1: Introduction

Open space is an important and appealing service local governments provide to their residents and visitors. Benefits of adequate open space infrastructure include recreational opportunities, air and water filtration, habitat and biodiversity, revenue-generation, flood prevention, smart growth, and an aesthetically pleasing environment.

Open space works best when it is an umbrella term used to describe a variety of types of open space (e.g. active and passive parks, riparian areas, viewsheds, etc.). Effective open space plans work best when they have three characteristics: (1) clear standards, (2) public commitment to a plan, and (3) political leadership.¹ Clear standards avoid confusion in the development process.² Public commitment creates a shared vision and ensures accountability.³ Political leadership requires a committed visionary that can spur public action and enthusiasm.⁴ Creating and following clear standards can be difficult because of Oregon's legal definition for open space and the opportunistic nature of open space acquisition.

Open space preservation can be difficult for two primary reasons: (1) the legal definition is too flexible to provide sufficient guidance and (2) the way governments typically protect open space is through acquisition, which is opportunistic. Under Oregon law, open space is defined as whatever a local government designates as open space in a comprehensive plan. Because this provides no direction, the Oregon administrative rules list suggested land types for a local government to consider designating as open space (e.g. riparian areas and public parks). Using these suggestions, a local government can create a strategic plan to protect these lands through acquisition or regulation. But without a sense of which land types ought to be protected, no such strategy is possible. For example, under Oregon law, it would be appropriate for a local government to designate open space as a category of parkland and create a strategy to supply an extensive park system. It would also be appropriate to define open space as an umbrella term that includes parks, riparian areas, viewsheds, etc. Because administering these lands falls under the purview of multiple city departments, all city staff must have a shared understanding of what open space means in their jurisdiction to strategically work together for effective open space protection. Therefore, to overcome the first difficulty, a local government must create a shared definition for open space.

The second challenge is that local governments primarily protect open space through acquisition, which is inherently opportunistic. A city will often acquire

¹ McElfish, James M. Nature-Friendly Ordinances: Local Measures to Conserve Biodiversity. Environmental Law Institute, Washington D.C., 4-5 (2004).

² *Id.* at 4.

³ *Id.* at 5.

⁴ *Id.*

land from willing sellers or through donation, which means that acquisition is a function of funding and budgetary constraints. The local government can create and maintain a list of priority areas or land characteristics, but land donations or offers of sale and the city's financial ability to pursue the deal will primarily drive acquisition. As a result, it can be difficult to maintain a strategic plan and equitably provide open space.

To continue to provide adequate open space infrastructure for its citizens, the city of Medford, Oregon has asked for a menu of legal options for open space protection. This report provides a discussion of the legal framework for open space protection, and the potential legal impediments, legal tools, and planning tools to help guide the city in its efforts to secure adequate open space. This report further provides recommendations and suggestions for future work as Medford develops its open space planning strategy.

Chapter 2: Legal Framework

This section lays out the legal framework for open space protection in Medford. It describes sources of authority for open space protection, and an introduction to basic land use law, Oregon’s land use protection framework, and Medford’s legal authorities of open space protection.

Introduction

Land use control is a state and local matter. It is premised on the state’s inherent police power (to protect the general health, safety and welfare of its citizens) and has legal roots in legislative action (zoning) and judicial review (nuisance law). Open space provision is a subset of land use control.

States and local governments have power to provide open space by exercising eminent domain through condemnation actions, acquiring land through purchase or donation, or regulating land use and development through zoning.

2.1 Oregon Open Space Protection Framework

In Oregon, local governments regulate land use according to a complicated regulatory scheme, known as the Statewide Planning Program. As part of this program, local governments must complete comprehensive plans and adopt regulations to implement those plans. Plans must comply with 19 Statewide Planning Goals.⁵

Oregon Statewide Planning Goals

1. Citizen Involvement
2. Land Use Planning
3. Agricultural Lands
4. Forest Lands
5. Natural Resources
6. Air, Water and Land Quality
7. Natural Hazards
8. Recreational Needs
9. Economic Development
10. Housing
11. Public Facilities
12. Transportation
13. Energy Conservation
14. Urbanization
15. Willamette Greenway
16. Estuarine Resources
17. Coastal Shore Lands
18. Beaches and Dunes
19. Ocean Resources

Under Oregon law, open space is defined many ways. Primarily, open space means:

1. “Any land area so designated by an official comprehensive land use plan adopted by any city or county; **or**
2. Any land area, the preservation of which in its present use would:
 - Conserve and enhance natural or scenic resources;

⁵ OAR 660-015. See also <http://www.oregon.gov/LCD/pages/goals.aspx>.

- Protect air or streams or water supply;
- Promote conservation of soils, wetlands, beaches or tidal marshes;
- Conserve landscaped areas, such as public or private golf courses, which reduce air pollution and enhance the value of abutting or neighboring property;
- Enhance the value to the public of abutting or neighboring parks, forests, wildlife preserves, nature reservations or sanctuaries or other open space;
- Enhance recreation opportunities;
- Preserve historic sites;
- Promote orderly urban or suburban development; **or**
- Retain in their natural state tracts of land, on such conditions as may be reasonably required by the legislative body granting the open space classification.”⁶

Oregon local governments can protect these open spaces in a variety of ways. Typically, open space protection falls into one of three broad action categories: acquiring, regulating, or incentivizing. First, governments can acquire land through exercising eminent domain power (in a condemnation process), fee simple or easement purchase or donation from voluntary sellers or donors, purchase of development rights programs, or land banking. Second, the relatively broad police power to protect public health, safety, and welfare grants regulatory authority for approaches such as zoning, exactions, conservation designations in comprehensive plans, transfer of development rights programs, or covenants and servitudes. Third, governments can incentivize conservation through tools like preferential assessment and taxation, homeowners associations rules, planned unit development requirements, or density bonuses.

To use a protection tool, Oregon local governments complete the comprehensive planning process and implementing regulations. Comprehensive plans, written for twenty-year time horizons, designate areas of the city. Comprehensive plan designations are associated with and carried out by certain zoning districts in the land use and development code. A local government will apply these designations to allow or restrict use and development throughout the city. In Oregon, comprehensive plans must comply with the 19 Statewide Planning Goals,⁷ one of which relates to open space protection.

Statewide Planning Goal 5 governs open space protection expectations in Oregon’s counties and cities. Goal 5: Natural Resources, Scenic and Historic

6 ORS § 308A.300(1).

7 OAR 660-015. See also <http://www.oregon.gov/LCD/pages/goals.aspx>.

Areas, and Open Spaces,⁸ does not define open space, but the procedures and requirements for complying with Goal 5 state that it includes parks, forests, wildlife preserves, nature reservations or sanctuaries, and public or private golf courses.⁹ Counties and cities comply with Goal 5 by protecting open space outside of UGBs and inside, respectively. While local governments are not required to amend their acknowledged comprehensive plan to identify new open spaces, if they do, they must follow a detailed inventory procedure, including collecting information about the resource, determining adequacy of the information, determining the significance of the sites, and adopting a list of significant open space resource sites.¹⁰

2.2 City of Medford Open Space Protection

Medford has made many strides toward open space protection. The City's riparian ordinance,¹¹ growing parks system,¹² and completion of the regional problem solving process¹³ (incorporated as the regional plan element in Medford's comprehensive plan) are evidence of its strong will to provide adequate open space infrastructure. The riparian ordinance protects all fish bearing streams by prohibiting development, filling, dumping, and other destructive activities within fifty feet from the top of the bank.¹⁴ Permitted activities in the riparian area include restoration, flood control, preexisting structures, and water-related uses.¹⁵



Bear Creek Greenway

The parks system currently protects 2,509.42 acres of land in neighborhood parks, community parks, special use areas, linear parks, and greenways.¹⁶ According to a community survey, residents reported no need for additional

8 OAR 660-015-0000(5). See also <http://www.oregon.gov/LCD/docs/goals/goal5.pdf>.

9 OAR 660-023-0220(1).

10 OAR 660-023-0030.

11 MMC 10.920 – 10.928

12 See http://video.cityofmedford.org/?dfile=Misc\ParksAndRec\PandRBudgetVideocity_web.flv.

13 See <https://www.ci.medford.or.us/Page.asp?NavID=874>.

14 MMC 10.923 and 10.926.

15 MMC 10.924.

16 City of Medford Leisure Services Plan, Chapter 4 “Needs Assessment,” p. 39.

parks.¹⁷ However, the city is expected to add 24,548 people by 2030, which will require the city to add more parkland (approximately 45 acres).¹⁸ The City expects a need to add 13 neighborhood parks, 5 community parks, and 3 special use areas over the next 25 years, which would require adding 5-6 acres per year.¹⁹ The regional problem solving process that created Medford's regional plan element identified open space as an important component of maintaining community identity through physical separation between cities.²⁰ However, this could prove difficult because of a shortage of allotted open space acreage and acreage allocated in the regional plan (there is a 4,194 acre deficit of parks and open space land allocated to Medford from regional resources).²¹ Despite the deficit in demanded land, the regional plan contains several goals, policies, and implementation strategies to enhance and protect the city's largest recent open space investments: Prescott Park (1,740 acres) and Chrissy Park (85 acres), which are wildlands parks and Medford's primary viewsheds.²²

There are three primary sources of open space protection power: the City's comprehensive plan (and incorporated plans, such as the Leisure Services Plan), municipal code, and regional plan. The City protects an extensive parks and open space system through these authority sources. Medford capitalizes on the regional plan's authority because it is incorporated in the comprehensive plan as the regional plan element. The City will use the other two authority sources in tandem because protection strategies will be expressed in comprehensive plan designations and implemented through the code, particularly during development review processes.

2.2.1 Medford Comprehensive Plan

Medford's Comprehensive Plan discusses open space in three components: the public facilities plan element, the environmental plan element, and the general land use plan element. The Public Facilities Plan Element is an appropriate source of authority for controlling stormwater, parks, recreation, and leisure services. This element includes a capital improvement project list, which provides a legal connection between planned infrastructure improvements and charging new development System Development Charges (SDC) during the approval process to pay for infrastructure wear and tear (see Section 3.1.1(D) below for more discussion of SDCs). The Environmental Plan Element contains a purpose statement of open space preservation and connects environmental protection and action with other City goals, such as species protection, wetlands, recreation, air and water quality, and stormwater. Finally, the General

17 *Id.*

18 *Id.* at 38-39.

19 *Id.* at 40.

20 City of Medford Comprehensive Plan, Regional Plan Element, p. 5.

21 *Id.* at 7.

22 *Id.* at 9.

Land Use Plan Element discusses open space as a part of the greenway designation, effectively defining it as a subset of greenways.

Medford also deals with open space in an incorporated plan: the Leisure Services Plan (LSP). Like the General Land Use Plan Element, the LSP contains a series of goals and plans for a variety of park categories. Open space is one type of park category, alongside parks such as community parks and neighborhood parks. In some areas, this plan discusses natural open space, which seemingly defines open space as a natural-state open space park.

2.2.2 Medford Municipal Code

The Medford Municipal Land Development Code describes rules and procedures for land development in the City. While the zoning districts in the code do not include an open space zone designation, there is a greenways designation²³ that contains special design and development standards for greenways in Southeast Medford. Open space could also appear in the historic preservation overlay²⁴ and planned unit development²⁵ designations.

2.2.3 Regional Problem Solving

Medford participated in a regional problem solving process, incorporated into the Comprehensive Plan as the Regional Plan Element. This plan involves an Urban Reserve Management Agreement²⁶ between Jackson County and the City of Medford to implement regional plan strategies and allocate power and responsibilities. The Agreement is forward-looking and will likely minimize conflict as open space lands move from county to city control throughout future UGB expansions.

23 MMC 10.384.

24 MMC 10.401-10.408.

25 MMC 10.374.

26 See http://www.ci.medford.or.us/SIB/files/URMA_final_2012-08-16.pdf.

Chapter 3: Legal Impediments

Introduction

This chapter describes legal impediments to local government open space protection efforts. As a city tries to protect open space through land use regulation and incentives, the primary legal challenge it will face is takings claims (see section 3.1 of this chapter). Other legal issues will arise from limitations on the local government’s authority pursuant to the comprehensive plan and the municipal code (see section 3.2 of this chapter).

3.1 Introduction to Takings Law

The 5th Amendment to the United States Constitution prohibits government from taking property for public use without due process and just compensation. Because local governments primarily protect open space through acquisition and regulation, determining which actions constitute a take – and triggering due process and just compensation requirements – becomes highly important. When the Constitution was adopted, a “take” was understood as expropriation – a direct exercise of the eminent domain power through a condemnation action.²⁷ The U.S. Supreme Court expanded the meaning of “take” to include regulatory takings in *Pennsylvania Coal*, holding that regulation that restricts the use of property will be a takings if the regulation “goes too far.”²⁸ Later, in *First English Evangelical Lutheran Church v. City of Los Angeles*,²⁹ the court held that regulatory takings, like physical takings, are appropriately remedied by compensation.

In Oregon, Article I Section 18 of the Oregon Constitution is a close analogue to the Federal Constitution’s taking clause. The differences in Oregon’s takings law stem from legislative acts and state court opinions. Primary differences are: (1) statutory regulatory takings that allow a claimant to file for compensation for losses in property based on reduction in fair market value alone³⁰ and (2) courts not finding a taking if there is beneficial economic use left of the property.³¹ As Oregon local governments seek to protect open space pursuant to Statewide Planning Goal 5³² or another local public purpose, they must acquire land

27 Alterman, Rachele, et al. [Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights](#). American Bar Association Section of State and Local Government Law. Chicago, IL, 215 (2010).

28 *Pennsylvania Coal v. Mahon*, 260 US 393 (1922).

29 *First English Evangelical Lutheran Church v. City of Los Angeles*, 482 US 304 (1987).

30 See ORS 195.300 – 195.336.

31 See *Boise Cascade Corp. v. Boards of Forestry*, 935 P.2d 411 (Or. 1997) and *Dodd v Hood River County*, 855 P.2d 608, 614-15 (Or. 1993).

32 See <http://www.oregon.gov/LCD/docs/goals/goalssummary.PDF>.

appropriately and regulate land in a way that does not invite takings claims. See Section 3.1.2 below for a more detailed discussion of Oregon-specific takings law.

3.1.1 Types of Takings

In protecting open space, there are several ways a local government can invite a takings claim: physical invasions, eminent domain, exactions, moratoria, and regulatory takings. Each is discussed below:

3.1.1(A) Physical Invasions

While this category of takings does not often come up in the open space protection context, a physical invasion is the most clear and classic example of a taking. When government requires property owner to allow occupation by a third party, it will constitute a taking regardless of impact to property value.³³

3.1.1(B) Eminent Domain

Pursuant to the power of eminent domain, a government is permitted to take private property to put to public use, such as to build roads or for public utilities, provided that it gives just compensation in return.³⁴ Eminent domain power is exercised through condemnation procedures. If challenged, at trial the government's determination of public use will be given deference and the primary contention will be the amount of compensation.³⁵

3.1.1(C) Regulatory Takings

While governments typically protect open space through acquisition, they often use regulation to encourage or restrict use and development on both public and private lands. In general, government regulation that goes “too far” and removes all valid economic use of a property is an unconstitutional regulatory taking.³⁶ However, regulations that merely reduce property values or limit the use of a property are not takings in most cases.³⁷ Government action that removes economic value from private property can be regulatory takings if it falls into three general categories: (1) removal of all economic use, (2) some economic removal that is concentrated disproportionately on a few people, and (3) physical invasions from a regulation (e.g., requiring landowners to allow telecom infrastructure placement).³⁸ Each category carries specific legal tests

33 City Handbook. League of Oregon Cities, 233 (May 2013).

34 U.S. Const. amend V.

35 City Handbook. League of Oregon Cities (May 2013).

36 *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

37 Daniels, Tom. When City and County Collide: Managing Growth in the Metropolitan Fringe. Island Press, Washington, D.C., 78 (1999).

38 Alterman at 216.

that are aimed at providing compensation for regulation that is functionally a direct appropriation of the property.

The first potential threat from regulating to protect open space is creating a deprivation of all economic use. Under *Lucas v. South Carolina Coastal Council*,³⁹ government regulation that removes all economic use of private property is a *per se* taking that requires compensation. However, the government will not need to compensate landowners if it shows that the regulation does no more to restrict use than a state court could do under basic property or nuisance law. A government can meet this standard by showing that the new regulations stem from an “objectively reasonable application of relevant precedents.”⁴⁰ In other words, if the government can show the new rule rests on state law precedent in other areas, no compensation will be required. For example, in *Stevens v. Cannon Beach*, neither a Oregon Land Conservation and Development Commission goal that limited development on beaches nor city ordinances implementing the goal constituted a taking because it rested on background principles of the common-law doctrine of custom.⁴¹

The second potential regulatory takings threat results from regulating open space that creates partial economic deprivations. When government regulation falls short of total economic deprivation, courts will apply a multi-factor test to determine whether there has been a taking. Under *Penn Central*, a partial taking is evaluated using an *ad hoc*, factual inquiry, considering three factors: (1) economic impact on claimant, (2) extent of regulatory interference with investment-backed expectations, and (3) extent/character of government action.⁴² According to the court, economic diminution must be substantial in relation to the party’s reasonable investment-backed expectations, which cannot rest on owner expectations in a changing social climate (e.g., a landowner ought not purchase undeveloped wetlands and expect future development as the community becomes more aware of their importance).⁴³ However, this *ad hoc* fact-based balancing test treats cases so differently that determining an expected outcome is difficult, at best.

While the above holds true for most states, Oregon is one of 4 states that enshrined regulatory takings in statute, with some significant differences to settled law. Under Oregon law, government action that merely reduces private property value can constitute a regulatory taking and entitle landowners to bring suit for compensation for the amount of value lost, even if there has not been

39 *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992).

40 *Id.* at 1032, n.18.

41 *Stevens v. City of Cannon Beach*, 317 Or. 131 (2012).

42 Alterman, Rachele, et al. [Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights](#). American Bar Association Section of State and Local Government Law. Chicago, IL, 218 (2010).

43 *Id.* at 219.

a removal of all economic use.⁴⁴ See below (Section 3.1.2) for a more detailed discussion of takings in Oregon.

3.1.1(D) Exactions

An exaction is a demand that a private landowner give up a property right or mitigate development impacts through the payment of fees or dedication of property as a condition of approval for a land use application. Exactions must meet the test established in *Nollan*⁴⁵ and *Dolan*,⁴⁶ which require that the exaction: (1) advance a legitimate state interest, (2) have an “essential nexus” to that state interest, and (3) be “roughly proportional” to the impacts of the development. If this test is not met, the exaction will be considered a taking.

A recent U.S. Supreme Court case gives insight as to when an exaction could constitute a taking. In *Koontz v. St. Johns River Water Management District*,⁴⁷ a landowner proposed to develop 3.7 acres of a 14.9-acre parcel partially covered in wetlands and dedicate roughly 11 acres to the Water District for wetland conservation. The District found the dedication inadequate and proposed two alternatives: development of 1 acre with preservation of the rest; or development of 3.7 acres with preservation of the rest and assistance or payment to restore other intra-basin wetlands. The plaintiff refused and his permit was denied. Next, the court found that governments couldn’t use exactions to coerce applications into giving up a constitutional right (in this case, development). In other words, conditions cannot be so excessive as to essentially be a denial.

For Medford, the primary obstacle and opportunity for open space in the exaction context is the Parks System Development Charge (SDC). This SDC ought not to invite takings claims because SDCs are authorized under Oregon law for local governments to “mitigate costs of, among other things, new park and recreation facilities.”⁴⁸ When acting in accordance with this authorization, local governments can exact an SDC constitutionally by calculating a charge, delineating “how to obtain credits against the SDC, how to challenge expenditure of SDC revenues, and how to challenge the ‘methodology.’”⁴⁹ In its current state, the Parks SDC is legally effective and defensible. The Parks and Recreation Department follows procedures to create a Capital Improvements Project List and uses an appropriate methodology to calculate the fee at

44 City Handbook. League of Oregon Cities (May 2013).

45 *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987).

46 See *Dolan v. City of Tigard*, 512 US 374 (1994).

47 570 US ____ (June 25, 2013).

48 *Homebuilders Ass’n of Metropolitan Portland v. Tualatin Hills Park and Recreation Dist.*, 185 Or.App. 729 (2003).

49 *Id.*

varying rates for types of development to fund listed projects.⁵⁰ However, if Medford wants to protect natural-state open space (in addition to active and passive parks), then these areas should be identified and added to the Capital Improvements Plan. See the Legal Tools section of this report for further discussion.

3.1.1(E) Moratoria

Moratoria prohibit development permanently or temporarily. Local governments can use a temporary building moratorium to hold off development while updating regulations. This is legally defensible despite the fact that, generally, landowners are entitled to reasonable use of their property over a reasonable period of time.⁵¹ Merely losing a present right to use land – such as what happens as the result of a temporary moratorium – will not rise to the level of a taking.⁵² Therefore, moratoria that act as interim development controls to temporarily halt development are not typically takings and will not require compensation to landowners. However, moratoria can rise to the level of takings when there is demonstrated substantial loss or evidence of bad faith or excessive delay.⁵³ Case law is not replete with examples of what constitutes bad faith. However, *Tahoe-Sierra* stated, in dicta, that the agency stalled rather than “acted diligently and in good faith,” which “arguably could support” a takings claim based on bad faith.⁵⁴ In addition, while courts vary on what length of delay will be considered excessive, moratoria of 1-3 years will typically survive takings claims if the government is moving forward with developing new land use controls to respond to changing conditions.⁵⁵

3.1.2 Takings in Oregon

Statutes define the parameters of government authority in the context of land use decisions and lay the framework for viable takings claims. The legislative branch updates statutes and adopts new law to provide causes of action to impacted owners. The judicial branch then considers takings claims. As a result, local governments seeking to protect open space must do so in a way that heeds constitutional restrictions and meets legislative requirements.

3.1.2(A) Constitutional Restrictions

The Oregon Constitution provides, in part, that “Private property shall not be taken for public use, nor the particular services of any man be demanded,

50 See <http://www.ci.medford.or.us/Page.asp?NavID=203>.

51 *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

52 Alterman at 221.

53 *Id.*

54 *Tahoe-Sierra* at 302.

55 Alterman at 221.

without just compensation...⁵⁶ While the Oregon Constitution’s taking clause is analogous to the United States Constitution, Oregon courts have taken a different approach in analyzing takings claims than the *Penn Central* analysis and its progeny.⁵⁷ Rather, Oregon courts will apply the *Dodd* “some substantial beneficial use” test⁵⁸ or the *Boise Cascade Corp.* “some economically viable use” test.⁵⁹ While seemingly different, the tests are essentially the same. A petitioner who seeks to establish a regulatory taking in violation of Oregon’s Constitution, “[t]he property owner must show that the application of the government’s particular choice deprives the owner of all *economically viable use of the property*. If the owner has ‘some substantial beneficial use’ of the property remaining, then the owner fails to meet the test.”⁶⁰ To illustrate their meaning, under *Dodd*, an Oregon court will not find a taking if there is still “some beneficial use” that could be made of the property. In *Dodd*, a piece of property was purchased for \$33,000 and later rezoned in a way that prohibited the owners from building the retirement home they had planned. The Oregon Supreme Court found that the property still had substantial beneficial use because 24 of the 40 acres could be used for timber production for a net profit of \$10,000.⁶¹ As another example, in *Boise Cascade Corp.*, plaintiffs failed to show a denial of all economic use merely because they were prohibited from harvesting trees on part of their property during certain times of the year in accordance with the Endangered Species Act.⁶² These tests are different from the *Penn Central* test because courts do not balance impact to the landowner against regulatory interference with investment-backed expectations or the extent/character of the government action.

3.1.2(B) Legislative Requirements

Oregon also has a relatively active legislative branch with respect to takings and it is one of a handful of states that has adopted takings legislation.⁶³ Oregon’s voter-initiated takings legislation does not preempt the judicial branch’s charge to define constitutional takings, but imposes procedural steps for adoption of land use regulations and provides a cause of action for landowners to seek compensation for reduction of property value.⁶⁴ Unlike impact or assessment laws, which require the local government to assess economic effects of

56 OR Const. art I, Sec 18.

57 Alterman at 231.

58 *Dodd v Hood River County*, 855 P.2d 608, 617 (Or. 1993).

59 *Boise Cascade Corp. v. Boards of Forestry*, 935 P.2d 411 (Or. 1997).

60 *Boise Cascade Corp. v. Boards of Forestry*, 325 Or. 185 (Or. 1997).

61 *Dodd v Hood River County*, 855 P.2d 608, 614-15 (Or. 1993).

62 *Boise Cascade Corp. v. Boards of Forestry*, 325 Or. 185 (Or. 1997).

63 Juergensmeyer, Julian Conrad and Thomas E. Roberts. Land Use Planning and Development Regulation Law §10:11 (3d ed.) (2013).

64 *Id.*

proposed action, Oregon adopted a compensation law: Measure 49, codified as ORS 195.305 and replacing Measure 37.⁶⁵

3.1.3 Measure 37

Oregon is renowned for its unique and comprehensive approach to land use regulation. Because this statewide program is known and commended worldwide, Oregon also made waves when its citizens pushed back against the program by approving Measure 37 – a 2004 ballot initiative that was the most extreme compensation for regulatory takings in any state’s history.⁶⁶ Measure 37 nearly stopped the land use program in its tracks by requiring compensation for any lost value resulting from regulation.⁶⁷ As a result, Measure 37 significantly protected private property rights and curtailed local governments’ ability to adopt and implement land use controls. Under the vaguely written language, local governments could continue to regulate land use, but if any actions decreased property values to any extent, landowners were entitled to compensation. Claimants filed over 1,000 claims within the first six months, claiming over \$1 billion in total compensation. These claims reached over \$15 billion at their peak,⁶⁸ with some estimates as high as \$19.8 billion.⁶⁹ Because governments could opt to waive the regulation for the affected parcel rather than compensate, the lack of financial ability to fulfill Measure 37 claims essentially resulted in massive land use regulation waivers. Proposals for large subdivisions, strip malls, and other sprawling features surged in number and the real and potential results shocked Oregon voters, who had expected only small changes to rural properties and homes.⁷⁰ Anticipating threats to the state’s important natural resource, agricultural and forest areas, Oregon voters acted out again in backlash – this time to Measure 37.

3.1.4 Measure 49

In 2007, Oregon voters enacted Measure 49, codified as ORS 195.305. This statute provides, in pertinent part, that Measure 49 modified Measure 37. As a result, Measure 49 ensured just compensation for unfair regulatory burdens while retaining protections for Oregon’s farm and forest lands and water

65 *Id.*

66 *Id.*

67 *Id.*

68 Alterman at 235.

69 Blodgett, Abigail D. “Lessons from Oregon’s Battle over Measure 37 and Measure 49: Applying the Reserved Powers Doctrine to Defend State Land Use Regulations.” *Journal of Environmental Law and Litigation*, 26, 259 (2010).

70 Sullivan, Edward J. and Jennifer M. Bragar. “The Augean Stables: Measure 49 and the Herculean Task of Correcting an Improvident Initiative Measure in Oregon.” *Willamette Law Review*, 46 Willamette L. Rev. 577 (Spring 2010).

resources.⁷¹ To move forward, Measure 49 outlined how to deal with approved and pending Measure 37 claims as well as new claims. The new process removed the looming \$19.8 billion in claimed damages because it provided Measure 37 claimants with the right to construct up to three homes as compensation for imposed land use regulations.⁷² In addition, no matter where Measure 37 claims might be in the process, Measure 49 procedures are current law and applicable to all claims.⁷³ After Measure 49, local governments were free to regulate land use and protect open space once again without the threat of having to pay for all value loss from any regulation.

3.2 Other Legal Impediments

The previous section discussed legal impediments to open space protection that result from takings claims. However, legal issues can also arise from protecting open space in the Medford Municipal Code and Comprehensive Plan. If Medford regulates land use to protect open space through these mechanisms, it must do so carefully to avoid takings claims. By restructuring components of these documents, the City could more effectively plan for and protect open space within its jurisdiction and also create enough flexibility that landowners can retain beneficial economic use of their property.

3.2.1 Medford Municipal Code Issues

Medford's Municipal Code regulates land use and protects open space. As related to the legal impediments discussed above, potential sources of legal conflict could arise as the result of exaction, moratorium, or an open space ordinance.

The Medford Municipal Code imposes exactions for open space protection primarily through its Parks System Development Charge (SDC). As discussed above (Section 3.1.1(D) Exactions), this SDC ought not to invite takings claims because, in its current state, the Parks SDC is legally effective and defensible. However, if Medford wants to protect natural-state open space (in addition to active and passive parks), then these areas should be identified and added to the Capital Improvements Plan. By following this legally defensible methodology already used to determine SDCs for parks, Medford could designate or raise funding for protecting natural-state open space. However, the areas identified for protection must be large and general areas where the City thinks open space protection would be appropriate. Medford should avoid creating a map that designates open space protection goals at the parcel level because it would likely create panic and invite takings claims. See the Legal Tools section of this report for further discussion.

71 Alterman at 239.

72 See <http://oregonexplorer.info/landuse/LandUseandMeasure49>.

73 *Corey v. Dep't of Land Conserv. And Dev.*, 2008 WL 1970246 (Or. 2008).

Medford's Municipal Code does not specifically authorize moratoria in open space protection planning. However, the code need not do so because a local government can adopt a temporary moratorium following a pattern or practice of delaying or stopping issuance of permits pursuant to ORS 197.505 through 197.540. The Medford Municipal Code recognizes this authority by reference to Oregon statute in several places, for example, in MMC 10.235 Preliminary PUD Plan Application Procedures.⁷⁴

Medford's municipal code does not include an open space ordinance. Adopting an open space ordinance is an opportunity for the City to discourage takings claims. Under Oregon law, a court will analyze if there is still an economically beneficial use of the property. Therefore, Medford should adopt an open space ordinance that states that land designated as open space, greenways, or other similar uses and zoned accordingly will still be categorically allowed to be used for certain economically beneficial uses. For example, the ordinance should include a list of priority resources to protect – forested properties or riparian areas – and specifically state uses that would remain, perhaps timber harvesting, fishing, and any or all water-related uses. See the appendices for a sample open space ordinance.

3.2.2 Medford Comprehensive Plan

Medford's Comprehensive Plan (and incorporated plans, such as the Leisure Services Plan) sets policy and strategies for open space preservation. Comprehensive plans are legally binding documents and their land use designations are associated with zoning districts that implement the vision of the plan designation. For example, a local government can designate an area as low density residential, which would be associated with a specific zoning district. Takings claims that stem from comprehensive plan designations often arise as a result of permit denials for inconsistency with a zoning district (e.g., denying a permit application for a conditional use) or re-designation in a comprehensive plan that removes some development potential from properties (e.g., changing a designation from low density residential to open space). Medford can reduce the likelihood of takings claims arising from designation issues by reconfiguring its open space designation scheme.

Medford should create an overarching open space designation that includes explicit economically beneficial uses that will always remain in an open space designated area. Using this approach, a landowner could not argue that the City removed *all economically viable use* because there would remain *some substantial beneficial use*. What must change is the organization of open space designations. Currently, open space is a category of park (in the Leisure Services Plan) and a type of greenway (in the General Land Use Plan Element). However, open space is more accurately a broad designation that incorporates both parks and greenways and the plan designation should reflect that.

74 See <http://www.ci.medford.or.us/CodePrint.asp?CodeID=3758>.

If Medford updates the Comprehensive Plan designations, it should also update the zoning districts associated with those designations. Zoning districts implement plan designations by serving as the standards new development must conform with. Medford's greenway designation is implemented by a brief statement that all zoning districts are consistent with a greenway designation. In other words, greenway is appropriate in all zones but there is no specific zoning district that implements the designation. Similarly, the parks and schools designation is not associated with any zoning district. It is appropriate for an open space designation to be consistent with all zoning districts, however, it would be more helpful in minimizing takings claims to link an open space designation to a zoning district (or overlay zone) that explicitly lists economically viable and beneficial uses permitted in the district.

Chapter 4: Legal Tools

Introduction

As Medford grows in population and land area, it must continue to provide open space opportunities for its residents. This chapter describes the legal tools local governments use most frequently for open space protection. Tools typically fall into three categories: (1) acquisition, (2) techniques using the police power, and (3) incentives. Tools that could fit under more than one category have been placed in whichever category they fit best. The discussion of each tool will outline how the tool works and, where appropriate, what Medford can do to if it chooses to implement the tool.

In considering each of these tools, Medford should keep in mind how to implement them without inviting takings claims. Takings claims arise when regulation creates a permanent physical invasion,⁷⁵ total deprivation of all economically beneficial use,⁷⁶ or goes too far⁷⁷ based on balancing certain factors.⁷⁸ To avoid these claims, Medford should ensure that its regulations are drawn to (1) leave “some substantial beneficial use”⁷⁹ or “some economically viable use”⁸⁰ and (2) provide an escape hatch by writing in exception language for landowners in extreme or unique situations.

4.1 Acquisition

Municipal land acquisition is one of the most common mechanisms local governments use to protect land for open space. Governments favor these approaches because they permanently protect land and provide the greatest amount of control over the land. Also, land acquisition minimizes takings claims because the process involves voluntary landowners. As a result, the local government acts as a market participant rather than a regulating entity, which can cause fewer political problems among both the participating landowners and the larger community.

4.1.1 Fee Simple

Fee simple means complete ownership. Land ownership is the power, or right, to control property in a variety of ways, including the rights to exclude, access,

75 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

76 *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

77 *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

78 The factors are: (1) the economic impact, (2) the extent to which the regulation interferes with investment-backed expectations, and (3) the character or extent of government action. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

79 *Dodd v Hood River County*, 855 P.2d 608, 617 (Or. 1993).

80 *Boise Cascade Corp. v. Boards of Forestry*, 935 P.2d 411 (Or. 1997).

and transfer. When a landowner holds all of these rights, she owns the land “in fee simple.”⁸¹ This type of ownership is the most straightforward and effective way to control land for preservation or development.

Medford can choose to acquire only certain rights, like development rights. However, acquisition (by purchase or donation) of the entire bundle of rights would be the most effective way to control the use and management of the property. Fee simple acquisition is a tool best used as part of a comprehensive strategy. Medford can create a list of open space criteria, preferred acquisition areas, and work with landowners to discuss benefits of donating or selling to the City.

Recommendation:

Acquisition should be a primary tool in any open space protection program because it is legally defensible, provides the greatest amount of control, and is permanent.

4.1.2 Easements

An easement is a non-possessory right that typically grants access to another’s land.⁸² In other words, an easement is a property right or interest severed from the others. An owner can sever one or more rights to the land, such as the development potential, and retain the others, such as access for recreation. Easements come in two forms: positive and negative. Positive easements confer rights to an easement holder to use the property in a particular way, such as the right to access.⁸³ Negative easements are sold to impose a restriction, such as development prohibitions sold or donated to local governments or land trusts.⁸⁴

Medford can choose to acquire only certain rights, such as access rights, which is far less expensive than fee simple acquisition. While fee simple ownership provides the greatest level of control, easements are permanent and effective, too. As with fee simple acquisition, Medford can create a list of open space criteria, preferred acquisition areas, and work with landowners to discuss benefits of donating or selling development rights to the City. As a result, Medford residents could have access rights to private open space land.

81 Callies, David L. Takings: Land-Development Conditions and Regulatory Takings After *Dolan* and *Lucas*. Section of State and Local Government Law, American Bar Association, 266 (1996).

82 Gray, Kevin and Susan Francis Gray. Elements of Land Law. Oxford University Press. 13 (2011).

83 Callies at 267.

84 *Id.*

Recommendation:

Medford should focus on easement acquisition to encourage public access to private open space.

4.1.3 Conservation Easements

Like other easements, conservation easements are a non-possessory right. However, they are distinguished from other easements because they exclude incompatible uses. A landowner creates a conservation easement by restricting development rights on his property to exclude uses that are incompatible with the desired use (natural state conservation, farmland, etc.). The land is then burdened with a negative restriction (negative easement) that will run with the land, binding all future landowners unless otherwise limited (e.g. a limited-duration easement that expires upon change in ownership).⁸⁵ This process makes conservation easements similar to other property law tools, such as real covenants or equitable servitudes (see below.).

As a legal tool, conservation easements are typically used as part of a larger program, such as land banking or transferable development rights programs (see below for a discussion of each).⁸⁶ They are often used in planned unit developments (discussed below) to allow developers to cluster buildings on parts of subdivisions and preserve larger areas, which allow them to build the same number of dwellings and also provide open space. In a recent development, developers have started to use conservation easements to provide a natural setting for fewer dwellings, which can generate high prices for the new development.⁸⁷

Farm conservation programs are an illustrative example of successful conservation easement programs. Currently, at least 34 states have adopted measures for statewide farm and conservation trust land protection programs.⁸⁸ In these programs, state officials work closely with land trusts and with individual landowners to protect and manage land. While these methods have been effective across the country, they are governed in a specific manner in Oregon.

In Oregon, conservation easements are governed by ORS § 271.715-271.795, which incorporated the Uniform Conservation Easement Act (UCEA). The statute also added Oregon-specific provisions, placing limitations on the use of eminent domain by adding a public hearing requirement and a public interest

85 Juergensmeyer, Julian Conrad and Thomas E. Roberts. Land Use Planning and Development Regulation Law. Hornbook Series. Thomson/West, 568 (2003).

86 *Id.*

87 Porter, Douglas R. Managing Growth in America's Communities, 2nd ed. Island Press, Washington, D.C., 135 (2008).

88 Juergensmeyer at 568.

determination, and allowing land encumbered by conservation easements to benefit from preferential property tax assessment or exemption.⁸⁹ The notice and hearing requirement⁹⁰ requires public hearings before a government agency can acquire easements. Interestingly, the UCEA drafters recommended that conservation easements not be subjected to public hearings because it could discourage private landowners from participating out of a desire to not engage in complicated bureaucratic processes.⁹¹ However, Oregon exempted charitable organizations from this requirement, making land trusts, such as the Southern Oregon Land Conservancy, a particularly attractive partner.⁹² The public interest determination allows agencies to acquire conservation easements within their jurisdictions for the public interest, which is not further defined.⁹³

Departing from what is allowed under the UCEA, Oregon government agencies may not acquire easements by exercising eminent domain.⁹⁴ As a result, acquisition must occur through purchase, agreement, or donation.⁹⁵ Once a government agency acquires a conservation easement, it may create and enforce any necessary rules and regulations to provide for the care, management, and use of the property.⁹⁶

Recommendation:

Medford should focus on easement acquisition to protect public private open space. In doing so, Medford should advertise technical assistance available from the City and other entities.

4.1.4 Purchase of Development Rights Program

Local governments can effectively protect open space by implementing a purchase of development rights programs. Through these programs, governments identify areas, parcels, or characteristics of lands to prioritize, and work with volunteer landowners to purchase easements (or facilitate donation, should the opportunity arise). The local government can purchase more general easements (e.g., access) or conservation easements (e.g., easements that prevent development). As a result, local governments can preserve private open space at a lower cost than fee simple purchase.

89 Gustanski, Julie Ann and Roderick H. Squires. Protecting the Land: Conservation Easements Past, Present, and Future. Island Press, Washington, DC, 379 (2000).

90 ORS 271.735

91 Gustanski, at 379-380.

92 *Id.* at 380.

93 *Id.* at 379. See also ORS 271.725.

94 *Id.* at 380.

95 ORS 271.725

96 ORS 271.775

In practice, purchases of development rights programs are organized in a variety of ways. As one example, King County, Washington, issued a \$50 million bond, prioritized purchases, and worked with voluntary landowners to determine which rights would be sold and which retained.⁹⁷ The County determined purchase prices, purchased the development rights, and recorded restrictive covenants on the deeds that limited development to 5% of the parcel's land area.⁹⁸

A purchase of development rights program could be a good option for Medford, since these programs work well in areas with relatively low development pressures. When development pressure is too high, the value of development rights inflate, raising purchase prices above what is feasible for local government. While administrative burdens are greater, easements provide permanent protections for open space at a lower cost than fee simple acquisition and could be an effective part of a larger, strategic program.

Recommendation:

Medford should analyze development pressures in the City and survey citizens to determine if there would be support for the program and support for a bond to finance the program.

4.1.5 Advance Acquisition Land Banking

Advance acquisition land banking is a way for a local government to find a middle ground between purchasing easements and acting as a market participant for fee simple acquisition. In this situation, a local government functions as a land bank by purchasing land in fee simple before it is ready to be developed and then re-selling the property with restrictions. When the property is conveyed, the government retains some development rights, which protects the property for conservation. This approach allows the government to control the timing and type of development while discouraging speculation. However, this approach has downsides. For example, it is uncertain how long the government will hold the land, which could be expensive. Furthermore, the program could be politically controversial, and the program could be a costly administrative burden.

Another form of land banking is a leaseback arrangement.⁹⁹ Using this approach, local governments purchase land in fee simple and then lease it subject to certain restrictions. This is a more cost-effective approach because

97 Callies at 268.

98 *Id.*

99 See the California Coastal Conservancy and the California State Parks Department for examples of successful sellback and leaseback arrangement programs.

the local government can recover some of its acquisition costs through lease payments while retaining control over development.¹⁰⁰

The first step of a land banking program is to determine the desired scale. Large-lot land banking is an effective control for growth management, open space provision, and ecosystem services because it protects larger swaths of land. According to the American Law Institute Model Land Development Code, land banking for growth management requires acquisition of large enough amounts of land for the government to effect growth patterns. While using land banking to control growth is almost unnecessary in Oregon because of the statewide land use planning requirements, it could still be an effective local tool to preserve open space. One technique that could make land banking highly effective in Oregon is to work to protect larger swaths of land – a benefit derived from ecosystem services. Ecosystem services is a broad term that bundles the variety of benefits – or services – that communities receive from functioning ecosystems. For example, conserving riparian lands will allow for improved filtration of pollutants before they reach a city’s waterways, which is a cheaper alternative than building water treatment facilities.¹⁰¹ Ecosystem services are most effective when local governments preserve larger swaths of land and try to maintain ecosystem connections (avoid fragmentation).

Land banking through sellback or leaseback could be an effective tool for Medford to protect open space. The sellback program would be less of an administrative burden because Medford would ultimately convey the property. The leaseback program would be more of an administrative burden; however, Medford could recoup some of its acquisition costs through lease payments. Either program would be a benefit to Medford’s open space protection efforts and, if strategically planned, could preserve larger tracts of land.

Recommendation:

The City should analyze the possibility of creating a land bank.

4.1.6 Municipal Land Bank Review

Land banking is a method of open space protection where a local government, land trust, or quasi-governmental entity aggregates parcels of land for future sale. Land banking is an effective open space protection tool because it allows a local government to purchase land at the urban fringe, when it is relatively cheap, and either attach conservation restrictions before re-sale or use parcels as bargaining chips to acquire land more preferable for open space protection. As an alternative to targeting cheaper lands to acquire, some land banking prioritizes lands to acquire based on environmental attributes.

100 Callies at 269.

101 Porter at 133.

Municipal land bank review is the practice of regularly reviewing tax delinquent lands for potential public use. Some communities establish procedures to review potentially delinquent parcels, foreclose upon them, and add them to the land bank. If the government cannot find a public use, the land could still be foreclosed and acquired by the land bank, potentially to be used to trade for other lands.

Medford can use land banking and municipal land bank review to effectively protect open space. Setting up a land bank, acting as a land bank, or working with the Southern Oregon Land Conservancy all carries an administrative burden. However, Medford can use this tool to attach restrictions without obtaining an expensive fee simple title or conservation easement. Selling restricted parcels helps the bank recoup costs.

Recommendation:

Medford should establish procedures for reviewing potentially delinquent properties and assessing whether they could be put to public use for parks and open space. If the City chooses to do so, it should create a list of prioritized land areas, based on open space attributes.

4.1.7 Acquisition Filtered Through Land Trusts

Land trusts, such as the Southern Oregon Land Conservancy, are private nonprofit organizations with unique purposes and make excellent partners for open space preservation. First, land trusts can act like a land bank (see above) by acquiring land and selling it with development restrictions. Second, land trusts can purchase land and sell development rights only on portions deemed suitable for development.¹⁰² Third, land trusts can act as a land bank for governments by purchasing and holding property for the government to purchase at a later date. This is beneficial for private donors because they can take advantage of tax benefits for charitable donations or bargain sales and beneficial to the trust because it can recover partial or full costs upon resale to the local government.¹⁰³

Medford could enhance open space protection by working more closely with the Southern Oregon Land Conservancy. The Conservancy would be a perfect partner for acquisition filtering. Using this method, the Conservancy can acquire land, attach conservation restrictions, and re-sell the land to residents. It can also hold the property for later re-sale to the City.

Recommendation:

Medford should work with the Southern Oregon Land Conservancy to analyze the viability of the Conservancy

102 Callies at 270.

103 *Id.*

functioning as a land bank on its own or in partnership with the City.

4.2 Techniques Using the Police Power

The 10th Amendment to the United States Constitution confers upon the states a strong and expansive police power to regulate for the health, safety, and welfare of its people. States delegate police power to local governments for land use regulation and other essential functions. Police power techniques fall into several broad categories, including zoning, ordinances, exactions, and transfer of development rights programs.

4.2.1 Zoning Districts

Zoning is the oldest and most widespread mechanism local governments use to regulate land use and development. Zoning districts are an easy way to communicate to developers and landowners what sort of building will be allowed or prohibited, which provides assurance and clarity for the market. If drawn carefully, zoning districts can protect valuable resources and also leave economic use of the land, avoiding or minimizing potential takings claims. Drawing carefully means writing zoning districts that specifically leave or list economically beneficial uses that remain with the land. Because Oregon courts will find takings when there are no economically beneficial uses left, districts that list uses that remain will be looked upon more favorably in court.

Recommendation:

Medford should update its zoning districts to encourage open space protection. For example, the districts could be updated to include an open space zone (OS) that includes the types of open space within it (OS-G: Greenways, OS-R: Riparian, etc.).

4.2.1(A) Cluster Zoning

Cluster zoning, sometimes called open space zoning, enables developers to concentrate development on portions of a project site while leaving conservation-worthy portions preserved as open space. Local governments using this method will calculate maximum densities for the entire development site (as opposed to individual lots) and give appropriate development bonuses (see below for a discussion of density bonuses).¹⁰⁴ As a result, the method preserves larger swaths of open space and decreases required infrastructure inputs, while maintaining the allowed development density. While this method is flexible and can reduce takings claims, it can also lead to clustered sprawl, if not managed carefully, since it can create leapfrog development with separated

104 Callies at 271.

residential areas. In addition to zoning provisions, a city can create flexibility for clustered development through subdivision regulations or special ordinances.

As a case study, Lincoln, Massachusetts (population roughly 8,000) implemented clustered development as a component of a comprehensive, closely managed open space preservation program. A property owner in Lincoln's Open Space Residential District can receive a two-for-one density bonus if he leaves 70% or more of his property undeveloped.¹⁰⁵ Today, Lincoln has conserved over 2,200 acres of connected lands for open space for conservation, farming, and recreation.¹⁰⁶

Recommendation:

Medford should create an open space or clustered development overlay that allows residents in that zone to receive a density bonus for leaving a certain percentage of their property undeveloped.

4.2.1(B) Conservation Zoning

Conservation zoning protects sensitive lands by maintaining open space and protecting natural resources. Common conservation zones are resource-specific, such as a floodplain overlay or agricultural zones. If adopted, this zone designation must be written carefully to ensure that economic use of the land remains to discourage takings claims. For example, a conservation zone could specifically allow certain economically beneficial uses, apply to a certain portion of property it overlays, or function by providing density bonuses for conserving a certain percentage, and ought to involve a process to review and make exceptions for extraordinary cases.

Medford's Greenways District (MMC § 10.384) is a good example, as it governs design and development for greenways and adjacent development. This district designates location, permitted uses, improvements, and commercial centers. However, it only applies to the Southeast Overlay District. This district could be expanded to a citywide open space overlay that encompasses active parks, passive parks, greenways, riparian areas, and natural-state open space. If drafted, this zoning district should specifically allow uses and development that retain some beneficial economic use of the land, provide that only a certain percentage of the land would be free of development, and create a review process for variances in extreme cases.

Recommendation:

Medford should update its Greenway District to be an open space zone that includes types of open spaces. This zone should list economically beneficial uses that remain,

105 Porter at 136.

106 *Id.* at 137.

require only a portion of property be left undeveloped, and allow for exceptions.

4.2.1(C) Historic District Ordinance

A city can use historic district zones to preserve and protect historical and culturally important areas, including historically/culturally important open spaces. Medford codified a historic district overlay in Medford Municipal Code § 10.401-10.408. This overlay zone is drafted to encourage protection of historic or culturally significant buildings, sites and areas, to preserve culture, civic pride, and open space. To make this tool more effective, Medford can map whether the overlay is used to protect open space and include it as part of its larger open space preservation strategy or program.

Recommendation:

Medford should utilize its historic district overlay for open space protection. The Medford Historical Society¹⁰⁷ would be a good partner to revisit the list of designated properties and identify potential properties to add to that list.

4.2.1(D) Performance Zoning

Performance zoning is an effective tool to preserve open space. Traditional zoning designates building and use requirements in certain geographic areas. Performance zoning identifies performance standards that development in the zone must meet.¹⁰⁸ Zoning based on performance standards creates flexibility by allowing for variation in built form so long as certain standards are met.

Performance zoning benefits developers and the public by creating flexibility so that developers can innovate for financial return, while the community's resources are protected. Performance zoning standards typically include natural resource protection, open space conservation, and impervious surface minimization.¹⁰⁹ Some ordinances track proposed developments with a point system, wherein meeting a set number of points ensures project approval.¹¹⁰ Using this method, a local government can rank what is most important – preserving historic sites, viewsheds, habitat, etc. – and award points accordingly. Developers are then free to innovatively meet these criteria for ensured approval.

107 See <http://www.medfordhistorical.org>.

108 McElfish, James M. Nature-Friendly Ordinances: Local Measures to Conserve Biodiversity. Environmental Law Institute, Washington D.C., 58 (2004).

109 *Id.*

110 *Id.*

Recommendation:

Medford should analyze the current building approval process. The City could update that process by adding an expedited review if developments score above a certain number on a list of open space-oriented performance standards.

4.2.2 Comprehensive Plan Designation

Comprehensive plan designations and zoning districts delineate how landowners can develop or use their land. Typically, a local government will shy away from open space designations because they invite takings claims requiring compensation (i.e. that the government, by regulation, took or will take beneficial economic use from the land).

In Oregon, courts will not find a taking if there is still “some substantial beneficial use”¹¹¹ or “some economically viable use”¹¹² of the parcel. In addition, under the “whole parcel rule,” Oregon courts will not find a regulatory taking for a governmental restriction affecting (1) a portion of the property, (2) one type of interest in the owner’s bundle of rights, or (3) just one “temporal slice” of the landowner’s interest.¹¹³

An open space designation should provide for some economic uses of the land, which would not be a complete deprivation of economic use and, therefore, not a taking. Medford’s greenway designation (and implementing zoning designations) should make clear that there are economic uses still allowed on greenway lands. By creating flexibility in the zoning designation, landowners benefit with economic options and the City benefits with a zone that will hold up better in court.

Recommendation:

Medford should update the Public Facilities Element to create consistency regarding open space in its Comprehensive Plan and incorporated plans. For example, the facilities inventory contains a designation called open space/greenways/natural open space areas. There is also the greenway designation in the comprehensive plan that includes linear parks and open space. These ought to have a consistent designation and relationship to one another.

111 *Dodd v Hood River County*, 855 P.2d 608, 617 (Or. 1993).

112 *Boise Cascade Corp. v. Boards of Forestry*, 935 P.2d 411 (Or. 1997).

113 *Boise Cascade Crop. v. State ex rel. Bd. Of Forestry*, 216 Or.App. 338, 174 P.3d 587 (2007).

Recommendation:

Medford should update the Natural Open Space/Greenways component. Medford could update the open space/greenways designation from “publicly owned or controlled natural resources” to include private open space as well.

Recommendation:

Medford should update the Paths and Trails component. Specifically, Medford could state a preference or set a goal to designate wider swaths around trails that connect parks, where possible, because maintaining contiguous habitat and meaningful connections between habitat areas is useful for biodiversity and is a worthy goal.

4.2.3 Wetlands Conservation Plan

Oregon cities can meet their Goal 5 requirements by adopting a wetlands conservation plan. Medford has already completed a Local Wetlands Inventory (updated in 2002). Under Goal 5, a local government that completes a Local Wetlands Inventory must also create and implement a program to protect significant wetlands. Medford has created the Comprehensive Medford Area Drainage Master Plan and adopted a riparian ordinance using the “safe harbor” 50-foot setback buffering all fish-bearing streams.¹¹⁴

While this is one legal tool that Medford has deployed effectively, three small changes to these efforts could make this approach more effective and legally sound. First, while this program meets legal requirements, Medford expressed interest in how to protect open space in a more strategic, comprehensive, and defensible way. To do this, Medford could establish protections for non-fish-bearing streams. These protections could be as minimal as incentivizing private landowners to complete streamside restoration projects through public engagement and technical assistance. Second, this program could be more defensible by protecting economically beneficial uses of land. For example, the program’s implementing language should explicitly permit economically viable water-related uses and encourage riparian landowners to engage in those activities during technical assistance discussions. Third, this program could be more defensible by focusing on public acquisition and incentives for private landowners, rather than relying on regulatory control that could be considered a partial taking.

114 See Medford Comprehensive Plan, Public Facilities Element, p. 21-22.

Recommendation:

Medford can improve upon its strides in riparian protection. As a next step, the City can review its wetlands inventory, provide protection to non-fish-bearing streams, encourage restoration, and proactively acquire wetlands.

4.2.4 Conditions to Annexation, Incorporation, Inclusion

I was asked to explore the option of attaching open space conditions to annexation, incorporation, or inclusion. As communities grow, some areas likely to be annexed in the future will request city services and/or infrastructure. In some jurisdictions, the city may provide the requested services or infrastructure with an attached condition that the landowners will agree to annexation in the future. In this event, the City would require land dedication in exchange for annexation, incorporation, or inclusion in the UGB. Currently, Medford’s goal is 10% open space in newly included areas. This figure was calculated through a long planning process. However, it is merely a goal and not a requirement for lands that move from Urban Reserve lands to inclusion in the UGB.

While open space conditions to annexation would be a useful tool to preserve open space, Medford cannot attach open space dedication conditions to cities or lands to be annexed, incorporated, or included in the UGB. Pursuant to ORS 197.295-197.314, Oregon UGB expansion is predicated on a buildable lands inventory and housing need that ensures adequate urban space for population growth over a twenty-year time horizon.¹¹⁵ If this standard was more flexible, allowing for more land included into the UGB if that land was dedicated open space, then Medford could work with landowners to dedicate land upon inclusion. However, under the current UGB regulatory scheme, this avenue is not possible.

Recommendation:

Medford should not attach open space dedication conditions to annexation, incorporation, or inclusion. This tool is not legally defensible under Oregon’s statewide planning program.¹¹⁶

115 ORS 197.296(3).

116 See Chapter 4, Section 4.2.1 of this report for further explanation.

4.2.5 Transfer of Development Rights Program

Transfer of development rights (TDR) programs preserve open space by creating an incentive-based, voluntary development rights market.¹¹⁷ The market operates by selling underused development rights from “sending areas” that the government wishes to protect to “receiving areas” that have maxed out development allowances yet still have high development pressures, by allowing density increases for infill development. The sending areas are downzoned, but the landowners retain transferable development rights that are equal to the original allowable density.¹¹⁸

Pinelands National Reserve in New Jersey is a good example of a successful TDR program.¹¹⁹ One unique feature of this program is that the Pinelands Development Credit program allocates development credits to sending areas depending on the nature of the land desired to be preserved.¹²⁰ The program provides fewer credits for conservation lands with less development potential – such as wetlands – and more credits for more developable lands.

To accomplish this program, a local government must perform several strategic steps. The first step is to perform a TDR study. Here, the local government’s steps should include: assembling a citizens advisory committee, collecting information, developing alternative goals and evaluation, receiving public input, and creating sending and receiving area components (size, density, density bonuses, etc.).¹²¹ The local government’s primary goals are to create community support and identify and map areas for preservation, and provide the opportunity for exchange of development rights in the municipal code.¹²² This means creating a list of criteria to select lands to conserve and maintaining a detailed map of those lands.

The benefits of TDR programs are wide-ranging. Primarily, they permanently preserve lands and give private landowners a financial return, while directing development growth to those areas deemed most suitable. TDR programs are highly beneficial because conservation can be larger-scale, which carries higher environmental benefits, and developers pay for added development privileges

117 See Oregon Department of Land Conservation and Development at http://www.oregon.gov/LCD/pages/tdr_pilot_program.aspx.

118 Callies at 272.

119 Other examples of well known successful TDR programs include King County, Washington and Montgomery County, Maryland.

120 Callies at 272.

121 Pruetz, Rick. Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges. Chapter Five: A Step-By-Step Guide to Creating a TDR Program, Arje Press, Marina Del Rey, CA, 119-166 (2003).

122 Daniels, Tom. When City and County Collide: Managing Growth in the Metropolitan Fringe. Island Press, Washington, D.C. (1999). P 224

and conservation. However, these programs can carry an administrative burden, depending on their structure. If the program is set up with a TDR bank (managed by the local government or a land trust), then the program will require larger amounts of staff time. On the other hand, a local government can implement a TDR program without a bank. In this case, private parties can complete negotiations and transfer agreements and the local government need only have a process to record the loss of development rights in the sending area.

TDR programs are nearly nonexistent in Oregon because of the comprehensive statewide land use planning system. However, there has been recent interest in implementing TDR. In 2009, Oregon adopted Senate Bill 763, authorizing local governments to create TDR programs. Interested cities apply to the Oregon Land Conservation and Development Commission and the application deadline has been extended indefinitely. Pilot programs are intended to test TDR approaches aimed at conserving private forestlands.¹²³

123 The forestlands must be outside of the UGB, cannot exceed 10,000 acres, and cannot be developed at densities of more than four dwelling units per square mile. For more information, see LCDC's criteria in OAR 660, Division 28, at http://www.oregon.gov/LCD/docs/rulemaking/2009-11/660-028_adopted_rules.pdf.

TDR Program Advantages and Disadvantages¹²⁴

	ADVANTAGES	DISADVANTAGES
Fairness	Gives sending area landowners a choice and compensation.	Sending areas might be downzoned and receiving area landowners might feel they bear disproportionate burden for conservation.
Permanence	Unlike zoning, TDR programs create permanent conservation restrictions.	Permanent preservation can create negative reactions out of fear of future development needs.
Cost	Avoids using money from bonds, general fund, and taxes.	Can reduce profits for private developers if projects exceed the TDR threshold (and must buy TDR credits).
Administration	Can be administered by a nonprofit rather than local government.	Must have staff or outside agency approve and record deed restrictions, monitor compliance, promote the program, etc.
Adoption	Easier to adopt than bond measures, special taxes, development fees, etc.	Requires controversial decisions (designating sending/receiving areas); permanent preservation makes residents uneasy; requires infrastructure planning based on unknown market forces.

¹²⁴ Pruetz at 75-79.

Recommendation:

A Transfer of Development Rights Program would not be the most effective tool for Medford. This approach requires high amounts of development pressure, extensive administrative care to build support, and the pilot program is aimed at protecting forestland outside of the UGB.

4.2.6 Exactions

Exactions are a mechanism for cities to ensure that new development pays its own way. Oregon cities impose exactions called System Development Charges (SDC) pursuant to ORS 223.297-223.314. These charges are a defensible tool and will not affect a taking in violation of section 18, Article I of the Oregon Constitution.¹²⁵ In addition, SDCs will not be subject to the Nollan/Dolan takings tests because an SDC is a “generally applicable development fee imposed on a broad range of specific, legislatively determined subcategories of property through a scheme that left no meaningful discretion...”¹²⁶ Medford exacts SDCs for impacts to various City systems and services, including parks. The Parks SDC was developed pursuant to ORS 223.304 and provides funding to qualified public improvements listed in the capital improvements plan.

Medford’s Parks SDC is a thorough and useful tool in funding park facilities necessary to accommodate new strain on the parks system. If the City wishes to define open space as land preserved in its natural state, in addition to active and passive parkland, it can change its SDC structure to acquire some funding for that purpose. To expand the Parks SDC, the city should create a comprehensive list (and map) of targeted open space and add the lands as an identified need in the capital improvements plan so that it will be eligible for SDC credits pursuant to MMC 3.874.

The main challenge for this tool is calculating SDC charges for conserved open space. The calculation could be a difficult because added development does not necessarily create a strain on lands preserved in their natural state. It is relatively easier to show strain on the active park system, for example. As a related challenge, it must meet the (deferential) rational basis test under the Due Process Clause, which means that an SDC is constitutional if a rational legislator could believe it would further a legitimate governmental objective.¹²⁷ To create a constitutional SDC for natural-state open space, it need only follow

125 *Homebuilders Assn. v. Tualatin Hills Park and Recreation District*, 185 Or App 729 (2003).

126 *Id.*, citing *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

127 See *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 US 374 (1994).

procedures for creating its other SDCs, ensuring that it identifies a rational basis for the charge.

Another method would be rather than charging development for strain on natural-state open space, Medford can instead use the structure to incentivize private investment in preserved open space by offering an SDC credit in exchange for land preservation. Natural-state open space SDCs could be an effective way to raise funds for conservation and credits could be an effective way to incentivize private developers. However, the biggest problem with this approach is that it reduces SDC collection amounts while straining services.

Recommendation:

Medford can fund open space through its SDC structure. To do this, Medford must define open space as an umbrella term, create a strategic and comprehensive program to protect it, and identify open space areas (particularly natural-state open space) in its capital improvements plan. At that point, the City can use an open space SDC to raise money to fund open space infrastructure.

4.2.7 Adequate Public Facilities Ordinance

To ensure adequate public infrastructure, concurrency requirements link development approval to an analysis of infrastructure capacity (i.e. level of service).¹²⁸ Level of service is calculated by rating infrastructure capacity and requiring new development to meet standards of service.¹²⁹

Like most Oregon cities, Medford's level of service standards deal with transportation capacity. Medford could improve provision of open space by using its adequate public facilities regulations to formalize a level of service for open space. For example, some jurisdictions set open space requirements based on a ratio of 1 acre per 1,000 residents and try to meet the goal of 6-19 acres per 1,000 residents suggested by the National Recreation and Park Association.¹³⁰ Medford expresses parks needs and goals based on a ratio of acres per 1,000 residents in its Leisure Services Plan.¹³¹ It could improve upon this by setting a level of service goal for natural-state open space.

If Medford wants to preserve natural-state open space and has less than 1 acre per 1,000 residents, setting this concurrency requirement would be justification for SDCs that would be adopted to fund natural-state open space. Setting this

128 McElfish at 101.

129 *Id.*

130 See http://www.nrpa.org/uploadedFiles/nrpa.org/Publications_and_Research/Research/Papers/Parks-Rec-Underserved-Areas.pdf.

131 City of Medford Leisure Services Plan, 37.

standard would ensure that SDCs have the requisite “essential nexus” and “rough proportionality” between infrastructure impacts and fee requirement.¹³²

Recommendation:

Medford should create an open space level of service and require an analysis of open space infrastructure triggered by new development applications.

4.2.8 Real Covenants

A covenant is a promise by contract or deed of real property to take action (affirmative covenant) or not take action (negative covenant). Covenants tie conditions to property that will “run with the land” and attach regardless of future ownership changes. Negative, or restrictive covenants, are much like equitable servitudes or easements. Because these concepts are so similar, one property law commentator called covenant law an “unspeakable quagmire”¹³³ and the Restatement (Third) of Property tries to merge the concepts under servitudes. This tool would be appropriate as part of a larger scheme to (1) act as a land bank or (2) work with landowners to protect their private property.

Recommendation:

Medford should use real covenants as part of an open space protection program.

4.2.9 Equitable Servitudes

An equitable servitude is a non-possessory interest in land that is much like a covenant. While a servitude runs with the land, it differs from covenants in the remedy available to plaintiffs. Covenant holders may be entitled to money damages, but a holder of an equitable servitude would be entitled to an injunction if the servitude were violated. Like covenants, this tool would be appropriate as part of a larger scheme to (1) act as a land bank or (2) work with landowners to protect their private property.

Recommendation:

Medford should use equitable servitudes as part of an open space protection program.

4.3 Incentives

In addition to acquisition and regulatory approaches, Medford can incentivize private protection of private open space. There are several ways for Medford to incentivize open space protection, discussed below.

132 Callies at 5-6.

133 Rabin, Edward. Fundamentals of Modern Real Property Law, 489 (1974).

4.3.1 Preferential Assessment and Taxation

Some local governments provide differential taxation – special treatment for certain land uses. Justifications for special treatment are (1) to save money or make certain uses more profitable (e.g., farming) and (2) because some uses (e.g., farming) do not make the same demands on governmental services that other, more urban, uses do.¹³⁴

This approach is controversial and potentially ineffective, because it can lead to speculation and often merely encourages landowners to postpone sale to developers until retirement.¹³⁵ This downside can be overcome by using it as a tool in a more comprehensive program. For this reason, implementing special assessment for open space in Oregon might be less effective, but could be an effective tool under certain circumstances.

Common tax approaches include special assessments and tax exemptions or credits. If used, tax assessments could create a political storm against open space protection efforts, while tax credits could further deplete Medford's financial resources. However, support for assessments could be analyzed on the front end and, depending on the type and level of exemption, losses could be minimized and open space conservation could become more attractive and culturally commonplace.

Recommendation:

Medford should survey its citizens to gauge support for a special assessment for open space. In addition, the City should consider whether providing tax exemptions or credits for open space conservation would be worth the lost revenue and at what level.

4.3.1(A) Special Assessments

Special assessments are property taxes levied on landowners to cover costs of providing services and improvements that benefit those who are taxed. This approach is politically difficult to implement. However, some communities and organizations have effectively analyzed support.

Medford could survey citizens to gauge support and determine how much value landowners place upon open space and how much burden they would take on. For example, the Eugene Water & Electric Board contracted with the University of Oregon Community Service Center to survey Eugene residents, who were asked to value riverbank restoration to improve water quality. The survey asked residents what charge they would accept per month to fund these efforts. This

134 Juergensmeyer at 570.

135 *Id.* at 572.

survey would analyze support for a conservation easement special assessment and an open space land special assessment. With these funds, Medford could take a comprehensive approach to open space protection, and provide technical assistance to landowners.

4.3.1(B) Tax Exemptions/Credits

Tax exemptions and credits encourage development (which could be environmentally sensitive and provide density bonuses) and deplete government financial resources. However, they can encourage environmentally sensitive development, and create a culture of expecting conservation in new projects.

An example would be the Riparian Lands Tax Incentive, which is part of the Riparian Tax Incentive Program.¹³⁶ This program incentivizes riparian property owners to improve or maintain the quality of qualifying riparian lands. Pursuant to ORS § 308A.350-308A.383, property owners can receive a complete exemption for riparian property up to 100 feet from a stream. To receive exemption, a landowner must sign a riparian management plan and agreement with the Oregon Department of Fish and Wildlife that details maintenance and restoration measures. While qualifying land must be outside of the UGB (among other criteria), the City should support these efforts because protecting this land by agreement will make it easier to protect this land in the future (if it is land likely to be included at a later date).

Pursuant to ORS § 307.115, lands held by nonprofits for public parks or public recreation are exempt from taxation. While the Southern Oregon Land Conservancy would be an ideal organization for this tool, it does not prefer to hold land. As part of a comprehensive program to protect open space, Medford could work with community members and existing nonprofits to see if there is interest in forming a nonprofit to meet this end.

Pursuant to ORS § 315.104 – 315.108, landowners can receive Oregon income and excise tax credits for reforestation. A landowner can seek 50% of project costs for reforestation of forestlands. While this particular credit will apply outside of the UGB, the city could institute an analogous credit for private open space conservation efforts, particularly of oak savannah or other historic and culturally valuable resources.

4.3.2 Homeowners Associations Rules

Homeowners associations (HOA) can be effective tools in conserving private open space. An HOA may be created and operate pursuant to ORS § 94.625-94.700. With relatively broad authority over common property, an HOA can sell, transfer, convey, or encumber common property pursuant to ORS § 94.665. HOAs can encumber common property for conservation purposes, so long

136 See http://www.dfw.state.or.us/lands/tax_overview.asp.

as it does “not deprive any lot of its right of access to or support for the lot without the consent of the owner of the lot.”¹³⁷ While this is a regulatory power and Medford could affect HOA rules through regulation, Medford can create incentives for HOAs to operate with a focus on conservation.

Medford’s role would be to incentivize HOA formation and operation to a conservation end by providing technical assistance to interested owners. Technical assistance is most helpful as part of a larger, comprehensive program, such as Metro’s Nature In Neighborhoods¹³⁸ which involves over 100 organizations and features a comprehensive website¹³⁹ for restoration-minded landowners. Medford could regulate to provide incentives to HOAs that manage their developments with conservation purposes. Medford could talk with or survey HOAs to determine how the City can best help them, and then offer those improvements for preserving and protecting open space. For example, the City might provide incentives to encourage actions like stream restoration.

The largest drawback of HOAs is the need for administrative support. Successful HOAs will be able to access a wide variety of resources provided by a range of organizations. These organizations must follow strict guidelines, defend themselves against all claims or actions brought against them, and manage an annual budget. Unsurprisingly, HOAs can have a high amount of turnover. Effective HOAs have a strong support system in the local government. This means assisting with formation, maintenance, troubleshooting, and keeping a focus on productive work toward conservation. Often they are more work than conservation accomplishments merit. However, if the parcel is right and the leadership is present, an HOA with a conservation purpose written into its operating rules can be a useful tool.

Recommendation:

Medford should consider providing more strategic support to homeowners associations. Support could be informational, technical, or financial.

4.3.3 Planned Unit Developments

Grounded in the idea of cluster zoning (see above), planned unit developments (PUDs) concentrate development within a site and conserve open space. They go above and beyond cluster zoning because they also introduce a mix of uses, which reduces development pressure on adjacent farm or other open space land that would otherwise be sought after for uses that accompany residential development.¹⁴⁰ Encouraging this form of development can limit

137 ORS § 94.665(2).

138 See Chapter 5 for a deeper discussion of the Nature In Neighborhoods program. See also <http://www.oregonmetro.gov/index.cfm/go/by.web/id=13745>.

139 See <http://www.oregonmetro.gov/index.cfm/go/by.web/id=24592>.

140 Juergensmeyer at 564.

the need for open space zoning because it will create open space land and land buffers through a simpler, less regulatory approach.¹⁴¹ Model PUD acts protect public interests in restrictions on private property.¹⁴² Some PUDs involve such an extensive network of negative and affirmative restrictions, conditions, easements, and covenants, that the success of the PUD requires an administering organization.¹⁴³ These organizations may have power akin to a local government and the PUD act may authorize the local government to step in to maintain the land and assess the lot owners if the open spaces are not properly maintained.¹⁴⁴

Under Oregon law, PUDs have five specific objectives: to (1) attain flexibility, (2) improve the living environment in a more effective way than strict zoning, (3) encourage creative approaches by developers, (4) encourage efficient and desirable use of open space, and (5) increase variety in development patterns.¹⁴⁵

PUDs are implemented through a city's subdivision regulations. In Medford, PUDs are governed by Medford Municipal Code § 10.230 - § 10.245, which incorporates extensive flexibility and identifies open space creation as a primary purpose of PUDs.¹⁴⁶ There are few points to improve in this section; however, while the Code requires multi-family residential PUDs have at least 20% open space or common areas, these could be designed to exclude public use. The best way to improve this Code section is to rewrite it to include density bonuses (see below) if certain conditions are met. For example, the Code could provide density bonuses if PUD open space provides public access to riparian areas, protects particularly important or sensitive natural areas, or exceeds the 20% minimum.

Recommendation:

Medford's planned unit development designation could be updated to provide additional density bonuses for going above and beyond open space requirements.

4.3.4 Density Bonuses for Sensitive Design

Like a miniature version of a PUD, density bonuses can be written into the zoning ordinance (using incentive zoning) so that developers can exchange the provision of publicly-valuable components, like open space, to obtain additional

141 *Id.*

142 *Id.* at 300.

143 *Id.*

144 *Id.*

145 *Frankland v. City of Lake Oswego*, 267 Or. 452, 517 P.2d 1042, 1047 (1973).

146 MMC § 10.230(A).

development size or intensity. Density bonuses encourage sensitive site design and maintain open space.

Medford's Comprehensive Plan identifies density bonuses as a strategy for providing affordable housing.¹⁴⁷ The Comprehensive Plan should be updated to offer density bonuses for landowners who preserve open space by conservation of certain amounts of land or particularly sensitive resources (e.g. riparian areas).

Recommendation:

Medford should update its code to provide density bonuses for sensitive design. For example, MMC 10.230(I)(2) provides a bonus to PUDs larger than 5 acres. This could be available only if developers use green infrastructure and preserve open space.

4.3.5 Recreational Use Statute

Local governments can increase access to open space by incentivizing private landowners to open their land for recreational purposes. Recreational use statutes reduce landowner liability exposure for injuries suffered by recreational users and protect landowners from obligation to protect the user beyond above and beyond duties owed to a trespasser.¹⁴⁸ These statutes often serve to create happy coexistence between agricultural and recreational uses and maintain productive economic use of land while allowing recreational activity and enjoyment of open space near urban areas.¹⁴⁹

Oregon landowners are protected from liability under Oregon's recreational use statute.¹⁵⁰ Pursuant to this law, a landowner who allows the general public¹⁵¹ to use land for recreational purposes¹⁵² and does not charge a fee¹⁵³ will not be

147 See Medford Comprehensive Plan: Goals, Policies, and Implementation § Implementation 5-B(2).

148 Juergensmeyer at 540.

149 *Id.* at 540.

150 ORS § 105.682: Liabilities of Owner of Land Used by Public for Recreational Purposes, Gardening, Woodcutting or Harvest of Special Forest Products.

151 A landowner will not be immune from liability if permission was granted by a specific invitation rather than granted to a person as a member of the general public. *Conant v. Stroup*, 183 Or App 270, 51 P3.d 1263 (2002).

152 "Recreational purposes includes, but is not limited to, outdoor activities such as hunting, fishing, swimming, boating, camping, picnicking, hiking, nature study, outdoor educational activities, waterskiing, winter sports, viewing or enjoying historical, archaeological, scenic or scientific sites or volunteering for any public purpose project." ORS §105.672(5).

153 ORS §105.688(4)

held liable “for any personal injury, death or property damage that arises out of the use of the land for recreational purposes...”¹⁵⁴ Should a landowner decide to close land to the public, she can do so and receive damages if she establishes that she closed the land¹⁵⁵ and the defendant entered and remained on her land without the owner’s permission.¹⁵⁶

Medford can use the Oregon Recreational Use Statute as part of a larger strategy to increase open space by increasing access to open space. By publicizing this statute, landowners who would not wish to engage in negotiations and agreements with the City may be incentivized to participate in the larger provision of open space on their own.

Recommendation:

Medford should publicize Oregon’s recreational use statute. For example, the City could include it in technical assistance information or develop a brochure or one-pager for interested landowners.

4.3.6 Mitigation Bank

Mitigation banks are ventures that restore specific resources, such as wetlands, to offset development impacts. Some mitigation banks are used in In-Lieu Fee (ILF) programs, which allow developers to buy mitigation credits for their impacts.¹⁵⁷ A local government can use funds from ILF program for off-site restoration at the time of development or within a certain time period.¹⁵⁸

Most mitigation banks fall into one of two categories: wetland/stream banks or conservation banks. Wetland/stream banks provide credits to comply with Section 404 of the Clean Water Act as well as state and local regulations. These banks mitigate impacts to wetlands and streams by restoring off-site resources. Conservation banks provide credits to comply with Sections 7 and 10 of the Endangered Species Act as well as state and local regulations. These banks mitigate impacts to threatened and endangered species.

The City of Eugene Parks and Open Space Division has run a wetlands mitigation bank since the early 1990s.¹⁵⁹ The City operates the bank as an implementing part of the West Eugene Wetlands Plan, adopted in 1992.¹⁶⁰ This plan has successfully minimized legal challenges – and the city has not been

154 ORS §105.682(1)

155 To “close the land,” a landowner or agent must take specific actions outlined in ORS §105.700(2), such as posting notice that meets specific criteria.

156 ORS §105.700(1)

157 See http://www.oregon.gov/dsl/PERMITS/Pages/mitbank_intro.aspx.

158 *Id.*

159 See <http://www.eugene-or.gov/index.aspx?nid=497>.

160 See <http://www.eugene-or.gov/index.aspx?NID=1766>.

sued for takings under this plan since 2004 – because the plan linked all goals, objectives, and strategies to federal and state requirements.¹⁶¹

Medford could use the mitigation bank tool in a couple of ways. First, Medford could create a conservation bank to protect larger amounts of interconnected open space. The Oregon Department of State Lands provides technical information and a point person for local governments interested in setting up mitigation banks.¹⁶² In practice, this would likely be an In-Lieu Fee (ILF) rather than a required dedication of open space because mitigation banking happens off-site. Second, Medford could encourage existing efforts, such as the Medford Vernal Pool Bank.¹⁶³ In a 2002 report prepared for Medford, Wetland Consulting identified sixteen sites ripe for protection that cover 437 acres.¹⁶⁴ Using guidance from the U.S. Fish and Wildlife Service,¹⁶⁵ Medford could work to protect these lands through mitigation banking as part of open space protection efforts. The largest obstacle to this tool is the likely need for a bond measure to raise funding for setting up an open space mitigation bank.

Recommendation:

Medford should discuss the potential for mitigation banking with the Oregon Department of State Lands and consider surveying community support for a bond measure.

161 Neil Bjorklund, personal communication, March 7, 2014.

162 See http://www.oregon.gov/dsl/PERMITS/Pages/mit_banker.aspx.

163 See <http://www.environment.fhwa.dot.gov/ecosystems/eei/or06.asp>.

164 Wetland Consulting, “Medford Local Wetlands Inventory and Locally Significant Wetlands Determinations,” 27, <http://www.ci.medford.or.us/Files/LWI%20Report.pdf> (2002).

165 See http://www.oregon.gov/dsl/WETLAND/docs/usfws_guidance_assessment_vernal_pool.pdf.

Chapter 5: Planning Tools

Introduction

Legal tools are effective for open space protection, but their real power comes when they are implemented in a larger, strategic program. A strategic program can take many forms. Medford can consider programmatic, policy, and administrative approaches. But no matter the approach, the first step is to identify local obstacles.

5.1 Potential Obstacles

There are two primary areas where cities protect open space: (1) within the city as opportunities for acquisition arise and (2) on the fringe of the city as it plans for growth. Medford is particularly interested in fringe opportunities, because land there is much cheaper than land within the UGB or city limits. Planning literature has identified several potential obstacles to fringe land management. Luckily, Medford is already doing well on many of them. A non-exhaustive list of potential challenges includes:

1. Fragmented and overlapping governments, authorities, and special districts;
2. The large size of fringe areas;
3. Lack of a community, county, or regional vision;
4. Lack of a sense of place and identity;
5. Newcomers, social conflicts, and rapid population growth;
6. The spread of scattered new development;
7. Too few planning resources; and
8. Outdated planning and zoning techniques.¹⁶⁶

Luckily, Medford is ahead of the curve in addressing many of these obstacles. For example, the recently completed regional plan overcomes many of the potential problems with fragmented and overlapping governments. However, this list is a useful reflection tool. For example, Medford has a significant and growing Latino population, which could add pressures identified in obstacle #5: newcomers, social conflicts, and rapid population growth. As Medford identifies needed open space and parks, this growing demographic must be taken into account. For more information, see a report¹⁶⁷ on Latino community outreach, which identifies Latino-oriented park goals.

¹⁶⁶ Daniels, Tom. When City and County Collide: Managing Growth in the Metropolitan Fringe. Island Press, Washington, D.C., 47 (1999).

¹⁶⁷ Sandoval, Gerardo and Roanel Herrera. "Public Engagement with Diverse Communities in Medford." University of Oregon Sustainable Cities Initiative (2013).

5.2 Programmatic Approach

Any legal or planning tool will be most effective as part of a strategic program. The best programs are those that unite all types of open space under one, comprehensive banner and those that encourage incentives, voluntary efforts, and public-private partnerships

5.2.1 Nature in Neighborhoods

In 2005, the Metro Council considered and adopted Resolution No. 05-3574: “Establishing a Regional Habitat Protection, Restoration and Greenspaces Initiative Called Nature in Neighborhoods.”¹⁶⁸ Nature in Neighborhoods¹⁶⁹ is a technical assistance program that unites government departments, nonprofit organizations, and interested landowners to restore and conserve privately owned open space.

Metro followed a community-oriented process to make this program a success. First, Metro assessed community values. After surveying the public, Metro found that 80% of residents mentioned that they enjoy the environment when asked what they enjoy most about their quality of life.¹⁷⁰ This is not surprising because, according to a statewide analysis of Oregonian values and beliefs called True North,¹⁷¹ Oregonians rank environment as the third most important priority, with air and water protection behind only K-12 education and public safety.¹⁷² Using REIN.org, a conservation initiative information clearinghouse, Metro tracks the hundreds of organizations involved in projects ranging from small volunteer



Nature in Neighborhoods Stream Restoration

168 See meeting minutes at <http://rim.oregonmetro.gov/webdrawer/rec/37348/view/Metro%20Council%20-%20Council%20Meeting%20Records%20-%20Agendas%20-%20Council.PDF>.

169 See program website at <http://www.oregonmetro.gov/index.cfm/go/by.web/id=13745>.

170 See <http://www.oregonmetro.gov/index.cfm/go/by.web/id=13745>.

171 See <http://oregonvaluesproject.org>.

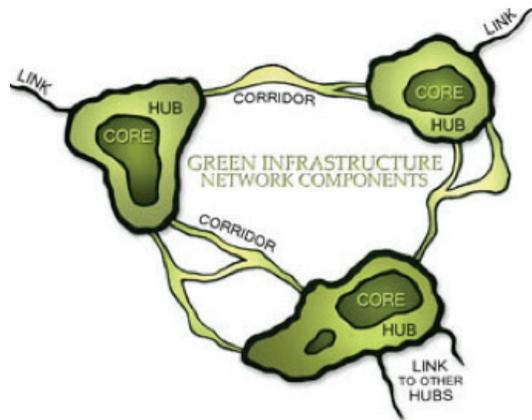
172 See http://oregonvaluesproject.org/wp-content/uploads/2013/10/OVB_Environment_Summary.pdf.

riparian restoration to long-term professional habitat restoration.¹⁷³ All of this was made possible by a \$227.4 million bond measure in 2006.¹⁷⁴

Nature in Neighborhoods is a good option for Medford because it focuses on providing technical and financial assistance to private landowners. However, funding this program is an obstacle. Medford could create a program on a smaller level – one at a financial level that matches the level of community support. One option would be to work with the University of Oregon Community Service Center.¹⁷⁵ The Community Planning Workshop¹⁷⁶ completes multi-term planning projects and could survey the community and create an implementation plan, complete with funding suggestions. Medford could also partner with Sustainable Cities Initiative to the same end.

5.2.2 Green Infrastructure

Open space and its functions are becoming increasingly broad. Open space can function not only as an enjoyable and revenue-generating park but can also direct growth, reduce flood damage, improve water and air quality, protect historical areas, and provide habitat.¹⁷⁷ A strategic vision can unify these wide-ranging purposes. Some local governments implement such strategic programs and call them greenway planning, watershed protection, or habitat restoration.¹⁷⁸ Another name for such an umbrella program is green infrastructure.



Green infrastructure programs create a shared vision that all types of open space are as much a part of a city's infrastructure as any other public works. As such, they are typically included in the annual budget and funded through bond measures, dedicated development fees, and/or direct budgetary line items.¹⁷⁹ In addition, as a unified piece of infrastructure, there is a focus on preserving and

173 See <http://www.oregonmetro.gov/index.cfm/go/by.web/id=13745>.

174 See <http://www.oregonmetro.gov/index.cfm/go/by.web/id=13745>.

175 See <http://csc.uoregon.edu>.

176 See <http://csc.uoregon.edu/cpw/>.

177 McQueen, Mike and Ed McMahon. *Land Conservation Financing*. Island Press, Washington D.C., 135 (2003).

178 *Id.*

179 *Id.*

providing multipurpose, large-scale, connected open space (active and passive parks, riparian lands, natural-state open space, etc.).¹⁸⁰

In practice, green infrastructure is a connected system of hubs, links, and sites.¹⁸¹ Hubs are anchor areas that provide destinations, such as reserves, regional and community parks, and managed natural landscapes.¹⁸² Sites are small green areas, like pocket parks and small natural areas that preserve social and ecological values, but may be unconnected to the larger framework.¹⁸³ Links connect the system and enhance the value of hubs and sites. Links include greenways, greenbelts, conservation corridors, and landscape linkages.¹⁸⁴ To create this functioning system, green infrastructure programs follow seven guiding principles:

1. Green infrastructure should function as the framework for conservation and development,
2. Design and plan green infrastructure before development,
3. Linkage is key,
4. Green infrastructure functions across multiple jurisdictions and at different scales,
5. Green infrastructure is grounded in sound science and land use planning theories and practices,
6. Green infrastructure is a critical public investment, and
7. Green infrastructure involves diverse stakeholders.¹⁸⁵

For a sample of a hubs and corridors system, see Maryland's StateStat website for an interactive map.¹⁸⁶

5.3 Policy Approach

Policy shifts can increase community support and create more effective administrative procedures.

5.3.1 Applying Triple Bottom Line Theory to Open Space Decision Making

Triple Bottom Line (TBL) Theory is a focus-shift from the "single" bottom line of profit to the triple bottom line of profit, people, and place ("the three P's"). TBL is typically associated with sustainability, but more recently has been

180 *Id.* at 136.

181 *Id.*

182 *Id.* at 137-138.

183 *Id.* at 138-139.

184 *Id.* at 138.

185 *Id.* at 139-144 (2003).

186 See <https://data.maryland.gov/Energy-and-Environment/Maryland-Green-Infrastructure-Hubs-and-Corridors/hahp-aks6>.

used as a decision-making framework.¹⁸⁷ As a framework, TBL ensures that discussions consider each bottom line before arriving at a decision, but does not necessarily require that the final decision actually meet each bottom line.

As applied to open space decision-making, TBL would be a policy choice that would require all open space decisions to consider effects to people, place, and profit for all alternatives. The City Council and all City departments would ensure that all conversations that would affect open space include, at some point, consideration of how potential alternatives would affect people, place, and profit (also called “the three E’s of environment, equity, and economics”).



Triple Bottom Line: “The Three P’s”

This policy shift could be a beneficial step toward open space decisions that better serve the public, enhance the environment, and provide financial return. While the Oregon statewide planning system requirements work toward positive outcomes for “the three P’s” and additional interests, it could still be useful to have a formalized policy that encourages a multi-lens approach to decision-making on all levels. Because there are many ways to justify decisions, the TBL framework encourages decision-makers and conversation participants to make their arguments in a way that recognizes how decisions could affect various interests and acknowledge that a wide range of interests are valid.

5.4 Administrative Options

Changes in administrative procedures can effectively protect open space. A strategic approach to administratively handling open space decisions is an effective way to implement open space protection changes.

5.4.1 Shared, Formalized Definition

A local government needs a shared definition of open space to effectively implement an open space protection program or any given tool. Under Oregon law, open space is whatever the local governments designates as open space or land that tends to preserve certain characteristics (e.g. riparian areas, viewsheds).¹⁸⁸ This flexible definition gives local governments freedom to create laws that make sense in their cultural and ecological contexts. However, without

¹⁸⁷ Moore, Terry and Robert Zako. “Sustainable Transportation Decision-Making.” University of Oregon Sustainable Cities Initiative, prepared for Oregon Transportation Research and Education Consortium (2013).

¹⁸⁸ ORS 308A.300-308A.330

much direction, different departments or groups could have varying ideas about what open space is and, therefore, how it should be protected or provided.

Typically, open space is an umbrella definition that includes many types of land. More than natural-state open space, the term can include active and passive parks, pocket parks, riparian areas, golf courses, farmland, forestland, and wilderness. Currently, Medford defines open space in the Leisure Services Plan. In this plan, the five park classifications include neighborhood parks, community parks, special use areas, linear parks, and natural open space/greenways. Open space parks are defined, in pertinent part, as "...undeveloped land primarily left in its natural form and secondarily managed for recreational use."¹⁸⁹ Defining open space as a subset of parks is a legally defensible route for Medford.

In addition to "natural form land," Medford can choose to define open space in a number of ways. For example, Medford can define open space narrowly and limit it to passive and active parks. However, since the City is interested in ways to better protect open space, its goals are broader than the parks system. No matter the course, the first step will be to create a formalized definition of open space so that everyone can operate in a cohesive way. Next the City should update all regulations, programs, and plans to reflect the new definition. For example, the greenways designation in the comprehensive plan should be updated to be a sub-designation of a larger open space designation.

The Choice:

If the City wants multiple departments to work on a multifaceted, multi-resource open space protection effort, then open space should be an umbrella term. If Medford wants to put open space authority in the Parks Department, then open space should be defined as a park category.

5.4.2 Regional Planning

Regional planning is one of the most effective ways to ensure that open spaces are connected, pervasive, and properly regulated by appropriate jurisdictions. Medford reached an enormous milestone by recently completing a regional planning process.¹⁹⁰ This effort is comprehensive and impressive. This planning tool is included here to reiterate the importance of thinking regionally when making ecological and open space decisions and acknowledge Medford's success.

189 Medford Leisure Services Plan Update, p. 22.

190 See <https://www.ci.medford.or.us/Page.asp?NavID=874>.

5.4.3 Leadership

Appropriate administrative structure is key to a successful strategic open space program. There are many ways that Medford can create administrative structure to support an open space program, including:

- Create an Open Space Commission (or multi-functional conservation commission)
- Create a Parks and Recreation Commission Subcommittee
- Dedicate a portion of time to open space in the existing Parks and Recreation Committee
- Designate an open space point person within the Parks and Recreation Department and/or Planning Department and/or Public Works

Dedicated leadership will ensure that the shared definition of open space will endure over time and across departments. Depending on which open space protection measures Medford implements, this should not create excessive additional work. Currently, many Medford employees and departments already spend money and staff time protecting open space in its various forms. With a formal definition and targeted programming, it would be possible to streamline this work by formally putting it under whichever lead department makes sense.

Guiding Recommendation:

In general, I recommend that Medford define goals, create a menu of potential approaches, and then employ selected approaches.¹⁹¹ This will require (1) a shared vision of what open space means to Medford, (2) a comprehensive program that is (3) under the leadership of a set individual or group, (4) tweaks to the Medford Municipal Code and Comprehensive Plan, and (5) dedicated staff time to work with partners and the community.

191 Porter, Douglas R. Managing Growth in America's Communities, 2nd ed. Island Press, Washington, D.C., 146 (2008).

Chapter 6: Suggestions for Future Work

Introduction

This paper has set out the legal framework for open space protection, provided a set of options to protect open space in Medford, and given recommendations for Medford to implement an open space protection strategy. This section outlines potential next steps.

As described in Chapter 5, open space conservation efforts should first define the city's goals, create a menu of potential approaches, and then employ selected approaches.¹⁹² In Medford, protecting open space will require (1) a shared vision of what open space means to Medford, (2) a comprehensive program that is (3) under the leadership of a set individual or group, (4) tweaks to the Medford Municipal Code and Comprehensive Plan, and (5) dedicated staff time to work with partners and the community. What follows is a list of suggestions for the next several steps in this process.

6.1 Set Goals

Using the menu of legal tools and planning tools in this report, Medford should set specific open space protection goals. These goals should create a shared vision that will grease the wheels for implementing tools. Goals could include:

- Set an acreage per person open space protection standard (e.g., 1 acre per 1,000 residents)
- Create a program that focuses on riparian areas
- Create an appropriate administrative structure (e.g. assign open space leadership to one department, commission, or clarify the roles for various departments)

6.2 Determine Criteria

Medford must establish criteria to use in identifying resources for conservation. Some criteria are already established in federal and state environmental laws and other criteria will reflect local values.¹⁹³ For example, Oregon state law defines open space as (a) whatever the local government designates, or (b) land that, when protected, would protect air and water, conserve landscapes, conserve natural resources, enhance recreation opportunities, and others.¹⁹⁴ Medford should use these suggested criteria and build upon it with local preference. To determine local preference the City can survey citizens and/or have a public meeting or engagement process to evaluate local preferences.

192 Porter, Douglas R. Managing Growth in America's Communities, 2nd ed. Island Press, Washington, D.C., 146 (2008).

193 *Id.* at 145

194 ORS § 308A.300(1).

Medford could use Triple Bottom Line (TBL) to increase balance in criteria for prioritized lands to acquire (see Section 5.3.1). When the City prioritizes land to acquire, it could do so based on a list of criteria that is based on the TBL framework. The City could use the TBL framework to update its criteria list in two ways. First, the City could create balance among criteria to ensure each “P” is represented on the list and that lands will be prioritized based on meeting criteria in each category. Second, the City could ensure that the City staff’s discussion in adding or updating criteria at least covers each “P,” but not require prioritized lands actually meet all “three P’s.”

6.3 Analyze Resource Values and Vulnerabilities

To build on the determined criteria, Medford should next reevaluate local resources and identify the value and vulnerabilities of local resource lands.

6.4 Select from Menu

Once Medford has a list of resource lands and their value and vulnerabilities, the City should select the most appropriate tool for open space protection. One or a few tweaks would be helpful, but a comprehensive and strategic open space program that implements many tools would be the most effective. Please see the appendices for a matrix of tools that compares costs and benefits and suggests which should be implemented first.

6.5 Implement and Monitor

After selecting a program and appropriate tools, Medford can implement and monitor the results. An open-ended process will ensure that the tools are actually effective and time and money is well spent.

Appendix A | Tool Matrix

Tool	Rank (1-5)	Pros	Cons	Timeframe	Resources
Fee Simple Purchase	2	Permanent, complete control, minimizes takings claims	Expensive, opportunistic	Short term, ongoing	Consider partnering with University of Oregon Community Service Center for funding strategies; see "Canby Park and Open Space Acquisition Plan" at https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/10660/Canby_Parks_Acquisition_final.pdf?sequence=1
Easement Purchase	2	Permanent, complete control, minimizes takings claim, cheaper than fee simple purchase	Relatively expensive, opportunistic	Short term, ongoing	Byers, Elizabeth and Karin Marchetti Ponte. <u>The Conservation Easement Handbook</u> . <u>The Trust for Public Land</u> (2005).
Conservation Easement	2	Permanent, complete control, minimizes takings claim, cheaper than fee simple purchase	Relatively expensive, opportunistic	Short term, ongoing	Same as above
Purchase of Development Rights Program	2	Unifies efforts to purchase easements	Administrative burden	Medium term (post feasibility assessment)	
Advance Acquisition Land Banking	2	Cheaper than permanent acquisition, permanent protection	Administrative burden	Medium term (post feasibility assessment)	

Legal Tools

Acquisition

Tool	Rank (1-5)	Pros	Cons	Timeframe	Resources
Municipal Land Bank Review	2	Flexible for acquisition or to attach restrictions and re-sell	Expensive, opportunistic	Medium term (post process development)	
Acquisition Through Land Trusts	2	Partnership-based, permanent protection	Relatively expensive, opportunistic	Medium term (post feasibility assessment with Southern Oregon Land Conservancy)	
Zoning	2	Assures landowners of uses left on open space category lands, protects land	Relatively expensive, opportunistic	Medium term (post redefining open space)	
Comprehensive Plan Designation	2	Assures landowners of uses left on open space category lands	Administrative burden	Medium term (post redefining open space)	(1) League of Oregon Cities. "City Handbook. Chapter 12: Land Use and Development Programs." (2010). (2) Oregon Department of Land Conservation and Development. "An Introductory Guide to Land Use Planning for Small Cities and Counties in Oregon." (2007).
Wetland Conservation Plan	5	Protects sensitive and environmentally-beneficial type of open space, acquisition-focused, can minimize takings claims	Administrative burden	Long term	City of Eugene Wetlands Plan at http://www.eugene-or.gov/index.aspx?NID=1766
Conditions to Incorporation	N/A	If it were legally defensible, would dedicate and protect permanently	Not legally defensible in Oregon	N/A	

Regulation

Tool	Rank (1-5)	Pros	Cons	Timeframe	Resources
Transfer of Development Rights	5	Voluntary, market-driven, permanent protection	Requires a lot of development pressure, pilot program in Oregon is focused on forest outside of UGBs	N/A (or long term)	Oregon DLCD at http://www.oregon.gov/LCD/pages/tdr_pilot_program.aspx
Exactions (SDCs)	3	Raise funding, minimize takings claims	Do not fully cover acquisition/maintenance costs	Medium term (post redefining open space and its level of service)	
Adequate Public Facilities Ordinance	3	Can link natural-state open space to SDC, provide a quantifiable goal	Some quantifiable goals are hard to apply to open space because X acres/person doesn't necessarily apply to some open spaces, like required acreage to protect a certain wetland	Medium term (post redefining open space)	
Real Covenants	3	Permanent, effective as part of a larger program	Administrative burden, somewhat opportunistic	Medium term (as part of a larger program)	
Equitable Servitudes	3	Raise funding, minimize takings claims	Do not fully cover acquisition/maintenance costs	Medium term (as part of a larger program)	
Preferential Assessment and Taxation	3	Protects uses less demanding of governmental services, makes less intensive uses more profitable	Can lead to speculation, politically difficult, exemptions could reduce tax revenue	Medium term (as part of a larger program)	

Tool	Rank (1-5)	Pros	Cons	Timeframe	Resources
Homeowners Association Rules	4	Encourages private action, voluntary action	Administrative burden	Medium term (as part of a larger program)	
Planned Unit Developments	4	Can pair with density bonuses for conserving above and beyond requirements	Administrative burden	Medium term	
Incentives	3	Voluntary (avoids takings claims)	Not necessarily permanent	Short term	
	3	Voluntary, increases public access	Administrative burden (marketing and technical assistance), not permanent	Short term (after assessing communication strategies and administrative capacity)	
	3	Ecological benefits of large and connected protected areas, administrative burden lesser than small-site mitigation	Administrative burden, initial funding	Medium and long term	Oregon Department of State Lands at http://www.oregon.gov/dsl/PERMITS/Pages/mitbank_intro.aspx
Programs	3	Voluntary, increases public buy-in, decreased administrative burden through partnerships	Not necessarily permanent, administrative burden of technical assistance	Medium and long term	Metro at http://www.oregonmetro.gov/index.cfm/go/by.web/id=13745

Planning Tools		Rank (1-5)	Pros	Cons	Timeframe	Resources
Policy	Green Infrastructure	4	Ecological benefits of large and connected protected areas	Administrative burden, high level of strategic planning	Medium and long term	
	Triple Bottom Line	3	Can lead to more balanced discussion/decisions	Administrative burden, potential pushback if perceived value is low	Medium and long term	
	Open Space Definition	1	Unified definition across City departments, can be adopted through Open Space Ordinance written carefully to minimize takings claims	Time and deliberation	Short term	
Administrative	Regional Planning	1 (done)	Coordination among jurisdictions that share resources	Administrative burden, cost, time	Already done!	
	Leadership	1	Program/tools are effectively implemented by appropriate leadership	Administrative burden of restructuring	Medium term (post defining open space and selecting program/tools)	

Appendix B | Model Open Space Development Ordinance

Source: http://water.epa.gov/polwaste/nps/upload/OS_model_ordinance1.pdf

Section I. Background

- A. Open space development has numerous environmental and community benefits, including the following:
1. Reduces the impervious cover in a development. Impervious cover contributes to degradation of water resources by increasing the volume of surface runoff and
 2. preventing infiltration into the soil surface.
 3. Reduces rainfall pollutant loads to streams and other water resources.
 4. Reduces potential pressure to encroach on resource buffer areas.
- *The aquatic buffers section has more information on resource buffer areas and ways to protect them.*
 5. Reduces soil erosion potential by reducing the amount of clearing and grading on the site.
 - *The Erosion and Sediment Control section highlights other techniques to control erosion at construction sites.*
 6. Preserves green space.
 7. Preserves open space for recreation.
 8. Reduces the capital cost of development.
 9. Reduces the cost of stormwater management by concentrating runoff in one area and reducing runoff volumes.
 10. Provides a wider range of feasible sites to locate stormwater best management practices (BMPs).
 11. Reduces the cost of future public services needed by the development.
 12. Can increase future property values.
 13. Creates urban wildlife habitat “islands.”
 14. Creates a sense of community and pedestrian movement.
 15. Can support other community planning goals, such as farmland preservation, affordable housing, and architectural diversity.

- B. It is the desire of (planning agency) to protect the natural, historic, and community resources in (municipality) by promoting open space development within our jurisdiction.

Section II. Definitions

Base Density	The original density permitted under the property’s residential zoning category (dwelling units per acre).
Community Open Space	The area of open space remaining after natural open space has been designated. The area may be used for passive or active recreation for stormwater management.
Frontage Distance	The width of a housing lot (in feet) that fronts along the street.
Green Space	Open space maintained in a natural, undisturbed, or revegetated condition.
Impervious Cover	Any surface in the urban/suburban landscape that cannot effectively absorb or infiltrate rainfall.
Natural Condition	The topography and vegetation of an area that is unaltered by clearing and grading during construction and protected in perpetuity.
Nontidal Wetlands	Those areas not influenced by tidal fluctuations that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.
	<ul style="list-style-type: none"> • <i>The definition of “nontidal wetland” here is adapted from the definition of “wetland” used by the USEPA and the US Army Corps of Engineers. See the Croton-on-Hudson Wetlands and Watercourses ordinance for an example.</i>
One-Hundred Year Floodplain	The area of land adjacent to a stream that is subject to inundation during a storm event that has a recurrence interval of 100 years.

Open Space	A portion of a development site that is permanently set aside for public or private use and will not be developed. Open space may be used as community open space or preserved as green space.
Open Space Development	A development pattern that arranges the layout of buildings in a compact area of the site so as to reserve a portion of the site for community open space or green space and is protected in perpetuity.
Right-of-Way	The width of a public roadway that encompasses the pavement width and adjacent land needed for placement of sidewalks, utilities, and stormwater drainage.
Unbuildable Land	The area of a site that includes wetlands and submerged areas, slopes of 25 percent or more, and the 100-year floodplain.

- *The definition of unbuildable land might not include all of these areas. For example, buffers might not be considered unbuildable in many jurisdictions. In addition, other areas might be considered unbuildable in some communities.*

Section III. Application

- A. The provisions of this ordinance apply to all residential zones with a density less than or equal to eight dwelling units per acre.
 - B. The minimum size of an open space development shall be five acres.
 - C. Open space is a by-right form of development and shall not require a special exception or additional review.
- *Open space development can be: by special approval or by right. In most communities, open space development requires a special approval process. This requirement discourages the use of open space development because of the time required for approval compared with conventional development. When open space development is by right, an open space plan that meets the requirements of the ordinance goes through the same permit and approval process as a conventional development. The by-right form of development prohibits denial of an open space plan in favor of a conventional plan assuming the open space plan meets the provisions of the ordinance.*

- *In some cases, open space development is mandatory. The Calvert County Open Space Ordinance is one example where open space development is required in rural and large-lot zones.*

D. Plans registered before the adoption of this ordinance are exempt from the provisions of this ordinance.

Section IV. Design Criteria

A. The total number of residential units allowable within an open space development shall not exceed the number of units that would otherwise be allowed in the existing zoning district using conventional development. The total number of units allowed shall be determined using the following formula:

$$T = BD \cdot [A - (U + R)]$$

Where:

T	=	total units (dwelling units)
BD	=	base density (dwelling units/acre)
A	=	total site area (acres)
U	=	unbuildable land as defined in Section II (acres)
R	=	road and utility right-of-way (acres)

- *This method of determining the total dwelling units is known as a “partial-density transfer.” In the alternative method, or “full-density transfer,” the base density would be multiplied by the total area. Typically, the partial-density transfer option preserves a greater amount of open space. However, the full-density transfer might be preferable in many communities, particularly if regional density goals need to be met.*

B. Frontage distance and rear, front, and side yard setbacks may be reduced to 50 percent of the requirements in the base zoning, subject to the following rules:

1. The frontage distance shall be no less than 10 feet.
2. Front and rear yard setbacks shall be no less than 10 feet.
3. Sideyard setbacks shall be a minimum of five feet. This requirement may be waived if the regulations of the (municipality) Fire Department are met.

- *As an alternative to narratively describing lot geometry requirements, a community may make a table of open space zoning requirements based on zoning category or may provide specific zoning text language that guides planning agency staff in approving appropriate subdivision projects.*

- *The values for lot geometry presented here are guidelines; jurisdictions need to select values that make sense within the context of existing regulations and community goals.*
- C.** Shared septic systems may be permitted provided that the requirements of the (municipality) Health Department are met, including appropriate provisions for legal obligations related to maintenance and replacement.
- *The use of shared septic systems is controversial, primarily because of the maintenance responsibility. In many communities, shared systems become the responsibility of the local jurisdiction. However, requiring one septic system per lot makes open space development more challenging.*
- F.** The number of parking spaces required for a residential open space development shall be two spaces per dwelling unit. Parking may be provided either on the street or in driveways.

Section V. Open Space Requirements

- A.** The total area of dedicated open space shall equal the amount by which all dwelling unit lots are reduced below the base zoning and shall meet the requirements outlined in Table 1.

Table 1: Open Space Required for Various Densities

Base Density (du/ac)	Open Space Required (% of buildable area)
>1	35%
0.5<BD<1	40%
0.2<BD<0.5	45%
>0.2	50%

- *The amount of open space should increase with decreasing density because of the feasibility of protecting open space in these areas. In rural open space designs, the techniques used are typically different from those used in more suburban areas. For example, homes might be clustered in small groups or “pods” that retain a rural character.*

- B.** The following activities or land uses may not be counted as a part of designated open space:
 1. Land considered unbuildable under Section II
 2. Existing rights-of-way and utility easements
 3. Setbacks and lawns

- *In the full-density transfer option, a greater percentage of open space would be required (up to 75 percent of the total site area). However, unbuildable land would be included in the dedicated*

- C.** The following areas shall be high priorities for inclusion in designated open space:
 1. Resource buffers
 2. High-quality forest resources
 3. Individual trees
 4. Critical habitat areas
 5. High-quality soil resources

- D.** At least 75 percent of designated open space shall be contiguous with no portion less than 100 feet wide.

- E.** At least 50 percent of designated open space shall be designated as “green space” as defined in Section II and shall be maintained in a natural, undisturbed condition.

- *In the full-density transfer option, a greater fraction of the open space would be green space, but the open space might include unbuildable areas such as wetlands.*

- F.** Reasonable effort must be made to locate green space adjacent to green space in adjoining property(s) to the satisfaction of (planning agency).

- G.** Limited access to green space may be allowed in the form of an walking or hiker/biker path, the total area of which must be no more than 2 percent of the total green space area.

- H.** The remaining designated open space may be “community space” and may be used for passive or active recreation or the location of stormwater management facilities.
 1. If used for stormwater management, all design, construction, maintenance, and public safety requirements shall be met using the design criteria set forth in (stormwater manual).
 2. If used for active recreation, impervious cover shall not exceed 5 percent of this area.

- *The Maryland Stormwater Design Manual is one example of an up-to-date stormwater design manual. For more information, go to www.mde.state.md.us. Under topics, choose “Stormwater Design Manual.”*

Section VI. Open Space Management

- A.** The boundaries of designated open space areas, recreation areas, stormwater management facilities, and green space shall be clearly delineated on plans, including record plats, and marked in the field with signage approved by (*planning agency*) to distinguish these areas from private property.
- B.** Development in designated open spaces in the future is prohibited. Ownership of open space shall be designated through one of the following options:
 1. Ownership by the individual lot owners as a homeowners’ association. The deed to each lot shall include a proportionate share of the common open space. Each lot owner shall be required to be a member of a homeowner’s association, which shall be formed prior to conveyance of the first lot. The assessment of dues or fees for structural improvements requires the affirmative vote of no less than two-thirds of the homeowners’ association membership.
 2. Conservation Easement
 - a. If owned by a separate entity, a conservation easement shall be established for the area as defined in subsection 3) below and shall be given to
 - b. A conservation easement, established as defined in subsection 3), may be transferred to an established, designated land trust organization, among whose purposes is to conserve open space and/or natural resources. This option is recommended for natural open space areas. Such transfer is allowable, provided that:
 - i. The organization is acceptable to (*planning agency*) and is a bona fide conservation organization with perpetual existence;
 - ii. The conveyance contains appropriate provision for proper reverter or retransfer in the event that organization becomes unwilling or unable to continue carrying out its functions; and
 - iii. A maintenance agreement acceptable to the homeowners’ association is entered into by the developer and the organization.

3. An open space management entity shall ensure that the open space will be protected in perpetuity from all forms of development, except as shown on an approved development plan and that it will never be changed to another use. The management entity shall
 - a. Protect open space from future development and environmental damage by restricting the area from any future building and from the removal of soil, trees, and other natural features, except as is consistent with conservation, recreation, or agricultural uses or uses accessory to permitted uses.
 - b. Provide that residents have access to the open space at all times.
 - c. Dictate whether open space is for the benefit of residents only or may be open to residents of (*municipality*)
- *A model conservation easement is included in the aquatic buffer section.*
- C.** An open space management entity shall ensure that the open space will be protected in perpetuity from all forms of development, except as shown on an approved development plan and that it will never be changed to another use. The management entity shall
1. Prescribe all allowable and unallowable uses and activities within such open space.
 2. Provide detailed standards and schedules for maintenance of the open space, including vegetative management.
 3. If there is not sufficient compliance with the homeowner's maintenance agreement, allow for county or municipal maintenance of open space.

Appendix C | Model Agreements

For several model conservation agreements, see the Pennsylvania Land Trust Association website at www.ConserveLand.org. Models include:

- Model Grant of Conservation Easement
- Model Grant of Conservation Easement for Riparian Buffer
- Model Trail Easement
- Model Grant of Purchase Option