Reflections on 50 Years of Statewide Land Use Planning
Ed Sullivan, Feb. 2, 2022

Thanks for the opportunity to share my thoughts on Oregon's unique land use planning system, to own up to my participation in that program, and to comment on the role of PSU as a supporter, critic, and center for reflection on that system.

My teaching at PSU began the very year that the Oregon legislature enacted SB 100, which remains, even after some substantial amendments, the polestar for Oregon's physical growth and direction. A planning program is evocative of the way the state sees itself and moves towards the future. Our program allows us to formulate and implement policies we feel are important at various moments in our shared history – for example, farm and forest preservation, destination resort siting, resolution of mineral and aggregate resource conflicts, our focus on local economic programs as a part of planning, reduction of vehicle miles traveled to reduce carbon emissions, support for housing (especially affordable housing), and retention of our areas of natural beauty in the Willamette River Valley, along the Oregon Coast, and the Headwaters of the Metolius in Central Oregon. Of course, the downside of a more centralized system is that planning becomes even more contentious and politicized.

Now let me spend a few minutes with you recounting some of the significant milestones in Oregon's land use history, sharing some thoughts on the future of the program, and observing on the role of academia in general, and Portland State in particular, in shaping that future by changing the planning program to meet the needs of the day and of the future.

Although land use regulation (zoning) started in New York in 1916 and was upheld by the Supreme Court in the 1920s, it became fossilized, because it didn't require planning and left it to trial courts to settle disputes unimpaired by state policy. So, land use (again, just zoning) was a local affair from the 1920s through the 1970s.

During this period, zoning (and its inferior sibling, planning) took off. Oregon's program was pretty much similar to that of other states -- completely delegating regulatory power to local governments with no state oversight, zoning without any mandatory outside reference point, like a plan, and disputes resolved by state courts under vague standards like "arbitrary and capricious." Each state's interpretation of fairly similar legislation was its own self-contained affair.

<u>Oregon Takes a Different Way</u> – Beginning in the early 1960s, Oregon responded to concerns over the loss of farmland by devising a tax system that assessed qualifying farmland at its farm value, rather than its market value. That qualification was generally tied to the land being in an "exclusive farm use" (EFU) zone, which eventually became limited to farm uses and those rural uses the legislature determined were compatible with an agricultural economy. I worked on the

reform of agricultural zoning to make the tax benefits more connected with the operation of a farm. Over the years since 1961, that zone has become more restrictive as to what "farming" entailed, but at the same time the legislature allowed more nonfarm uses (there are now 52 or so of them) either outright or under some fairly strict standards.

Oregon also departed from the national norm by changing the way courts review land use decisions in two cases in which I played a role: One was Fasano v. Washington County (1973), which increased judicial review of small-tract rezonings and required procedural rights to be accorded to participants in local proceedings, such as the right to present and rebut witnesses, to have a fair hearing, and the adoption of findings to justify the decision. The other case was Baker v. City of Milwaukie (1975), in which cities were required to follow their comprehensive plans in their land use actions. The Baker decision was instrumental during the 1975 legislative session in defeating efforts to put off comprehensive plan requirements for cities for the Oregon Supreme Court found that those requirements had actually been in place since 1919.

These departures were the first foray, but there were more. In 1969, the legislature required all cities and counties to plan and zone by 1971. A referral of the legislation in 1970 saw voters approve the legislation, but it wasn't going to be done on time. And the "hammer" to enforce the legislation (i.e., that the governor would do the planning and zoning) just wouldn't work – even with as popular a governor as Tom McCall. So, the legislature waited until 1973 and looked at other solutions. There was increasing pressure to save farmland, which was demonstrably being lost in the Willamette Valley with the Charbonneau development and the proliferation of "martini farms." There was consensus that the state should participate in planning and zoning, instead of completely delegating these functions to local governments. After a good deal of drama, controversy, and resolution, SB 100 was enacted, creating a new state agency, the Land Conservation and Development Commission (LCDC) staffed by a Department of Land Conservation and Development (DLCD), which could adopt and enforce state standards (called "goals") to which those required plans and land use regulations must conform. Eventually, a process to demonstrate that this conformity was devised, "acknowledgment," which had the effect of immunizing the local government from goal claims (because the goals were already in the local plan). This was supposed to happen by 1976, but that work wasn't completed until 1986. But a whole new land use system was born.

That system was completed with the introduction of LUBA, the Land Use Board of Appeals, in 1979, and made permanent in 1981. This legislation departed from the pattern for review of local land use decisions in other states by taking the local trial courts out of the review process. This was significant, in that trial courts have other priorities, including those in jail awaiting trial and deciding a whole panoply of criminal and civil cases. Those courts did not want to consider land use cases with their own language and decision-making process. The development industry called for a more simple and expeditious review process. LUBA has worked out well as a less expensive, quicker and more specialized review body. Its decisions have been affirmed 80-90% of the time in the appellate courts.

I mentioned that, although it took 12 years to get all local governments acknowledged, that process wasn't pretty. After he left office, Governor Tom McCall partnered with the late Henry Richmond to found a watchdog organization that would advocate, and litigate, for local government conformity with the goals. That organization, 1000 Friends of Oregon, has been successful in that endeavor and will soon also celebrate the 50th anniversary of its founding. Richmond and his corps of committed and competent lawyers including Bob Stacey, Dick Benner, Mark Greenfield, Robert Liberty, Mary Kyle McCurdy and others appeared at interminable local government and LCDC meetings and hearings and had the firepower to get rules written and interpreted, and land use rules enforced. The program would not have succeeded without this work. 1000 Friends was skilled in legislative and administrative advocacy and in picking those cases regarding the goals that made favorable law from its viewpoint and using the precedent in future cases.

The goals set out state policy for land use. LCDC implemented those goals in many cases by the adoption of more detailed administrative rules. The goals could be divided into five groups:

1. Process Goals (Goals 1 and 2, Citizen Involvement and Comprehensive Plans).
2. Resource Goals (Goals 3-5, Agricultural and Forest Lands, and Specific Natural Resources).
3. Environment Goals (Goals 6-8 and 13, Air, Land and Water, Natural Hazards, Parks and Recreation, and Energy Conservation).
4. Urban Goals (Goals 9-12 and 14, Economy of the State, Housing, Public Facilities and Services, Transportation and the Urbanization Process).
5. Goals for Specific Areas (Goals 15-19, Willamette River Greenway and Coastal Areas).

The first twelve years of the land use program saw fairly robust activity in defining the goals, often with the assistance of more detailed administrative rules to focus on outcomes. Take the agricultural lands goal to preserve good farmland, carried out by lengthy rules that set out what good farmland meant and what could be done in farm zones. On the urban side, look at the transportation goal or the housing goal, both of which concentrate on policy objectives – then look at the almost mind-numbing detail contained in their implementing rules.

The program began with efforts to preserve farm and forest lands in Goals 3 and 4, to which were added a series of resources set out in Goal 5, an amalgam of such things as wetlands, fish and wildlife resources, mineral and aggregate mining, and historic sites. These Goal 5 resources proved to be too much fiscally and politically and the goal and its implementing rules were substantially modified in 1996, but is still not a bad effort. Federal funds provided for good coastal planning and regulation, which the local governments there could not have done on their own. The bipartisan focus on the Willamette River Greenway in the 1970s guaranteed that development in this area would be given scrutiny. The legislature got involved in economic development, prohibiting counties from regulating forest practices, and also addressed destination resorts, fair housing, and urban expansion. The state land use program occupies legislative attention because it was important enough to attract lobbyists and public participation to have an immediate and direct influence on the future of the state.

The program also overcame three initiatives that directly attempted to repeal or gut it in 1976, 1978, and 1982. There were also indirect efforts for the same result, such as requiring administrative rules to have legislative assent, which also failed. The most interesting effort against the program was the passage of Measure 37 in 2004. The measure was advanced by the timber industry, presumably to provide financial response to its losses from changing environmental regulations and threatened or endangered species listing. The measure stated blandly that there should be just compensation for takings of property – most people would agree with that statement, but the devil was in the details. "Takings" were redefined in the measure to include any devaluation in property value due to land use regulations and using a claims process that was geared to be biased for a claimant. By 2007, Oregonians got "buyer's remorse" and cut back the claims process to almost nothing. It was a wild ride in the meantime.

And then there was the Rajneeshpuram controversy, in which I played a role. In 1981, the Wasco County Court approved an election for the incorporation of a city on the John Day River near the City of Antelope. For the next five years there was much controversy, litigation, and legislative and administrative activity. Public sentiment ultimately turned against the Rajneesh, who didn't help their cause by engaging in criminal activity. However, on the land use side, they were successful in their incorporation, losing their chance to complete their city because of their criminality.

The program also had a Portland metropolitan area element, beginning in 1973 when the legislature recognized the need for regional planning, something it had Ron and Jane Cease to thank for. Ron was a state legislator and public policy advocate from Portland State University who worked tirelessly on regional issues. Metro has some functions that it has accomplished well, especially the management of a regional urban growth boundary, and management of regional facilities, such as the zoo and convention center. It has also done some things poorly, such as requiring local governments to fulfill their housing requirements. The same may be said of the "Damascus Debacle" in which an area was added to the urban growth boundary, but the expected density did not occur due to the antics of a newly created city that was in a constant state of civil war and never got a plan adopted to accommodate expected growth, and finally was dissolved by the legislature.

<u>Where Are We Going?</u> – The present trajectories are an insufficient long-term predictor of where our planning program leads us; however, there are some pretty good bets we might make on the next 20 years. Here are some of them:

1. Planning and land use regulation will not go away – In fact, they are likely to become even more important in our daily lives as land availability for various uses, especially urban uses, becomes more competitive and planning law becomes the agent of resolving conflicts;
2. Transportation, energy, and other factors affecting global emissions and climate destruction will continue to occupy our attention;

3. Our urban areas will become denser as economic factors make the single-family detached dwelling unaffordable to many, if not most, families, which will likely result in other forms of housing with smaller living areas becoming more prevalent;
4. Our state economy will still have a significant resource component, but will pivot to services and technology as its primary elements;
5. Oregonians will be blasé about the potential for natural disasters and hazards – and pay the price when "the big one" or some other single or incremental disaster (think of coastal erosion) occurs;
6. If the state continues the general consensus for protection of natural resources and the use of urban growth boundaries, we will be better prepared than any other state to meet the challenges we encounter in the use of land.

My Perspectives on the Oregon Planning Program -- My own work after retirement has primarily been in the fields of housing, especially affordable housing. The legislature has continually "upped the ante" for local governments to require planning and complimentary local regulations to assure that sufficient housing will be provided in urban areas. I am especially pleased with the administrative rules adopted last year to advance these objectives. I continue to write, teach, and speak on land use law, particularly Oregon land use law. One of the more significant things I continue to do is teach here at Portland State with such valued colleagues over the years as Sy Adler, Marissa Zapata, Aaron Golub, Lyn Musolf, Ethan Seltzer, Megan Horst, Carl Abbott, Matt Gebhardt, and Lisa Bates, among others past and present. When I speak about Oregon internationally, I identify myself with PSU, because of its recognition in urban policy matters.

Our state planning program is, in my view, the best in the nation – though that is not a particularly high bar. It can, and should, be improved. Let me give three broad concerns to consider for the next fifty years of land use planning in Oregon:

1. Funding of the program is always an issue. The legislature has a penchant for bold new planning measures to meet the perceived needs of the day – economic development, priority of airports, allowing some Eastern Oregon lands to be free of some planning regulations, providing for a "destination speedway" and the like. Some may be good ideas, but not all, and usually come to us from arrangements out of the public view, made so legislators can get along. These sideshows detract from the serious planning and land use regulatory work done at the state and local level, work that is often undervalued and almost always underfunded. If we are serious about our land use program, we must fund all of it, not just the flavor of the day.
2. We have had one serious, and one not-so-serious review of our planning program structure. The first one, following the three initiatives to cripple or repeal the program and led by Stafford Hansell, yielded reforms that continue to this day. However, a second "Big Look" from 2005-09 was a disaster from its inception, with a panel that had no credibility and came up with proposals that were inadequate. We do need to question our system, but we must take that process seriously.

3. Finally, Oregon has dropped the ball on a major element of its land use system, the periodic review process. That process was made to assure that local governments reconsidered their plans and land use regulations on a regular basis to assure they were responsive to the goals. We abandoned this process in 1999, because it proved too expensive and contentious. That was a major mistake.

Well, I've probably spoken too long, but I do hope some of these thoughts explain, at least in the context of my own experience, where we have been as a state in planning for and regulating land use. I'd be glad to respond to any questions or comments other may have. Thank you.