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LONG RANGE PLANNING
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Measure 49 Transfer of Development Credits Program Assessment

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Issue

State law and administrative rule allow for adoption of a Measure 49 Transfer of Development Credits (M49 TDC) program. Such a program would allow development rights from certain Measure 49 (M49) claims to be transferred to qualifying properties in other areas. The state's intent by developing the administrative rule is to preserve areas of high value farmland, forest land, and sensitive resources by allowing M49 development rights to be transferred to less sensitive areas. As part of the 2016 and 2017 Long Range Planning (LRP) Work Programs, the Board of Commissioners directed preparation of an issue paper to assess potential applicability of this program for Washington County. An ordinance would be required to adopt a Measure 49 TDC program into the County's land use regulations.

Recommendation

Based on the analysis in this paper, staff recommends not pursuing a M49 TDC program.

If the Board desires to move forward with a M49 TDC program, additional analysis will be needed prior to preparing an ordinance, as outlined in this issue paper.

Background

Measure 37

In November 2004, Oregon voters passed Ballot Measure 37 (M37). The measure entitles the owner of privately owned land to receive just compensation when a land use regulation restricts use of the property and reduces its fair market value, provided the land use regulation is enacted after acquisition of the property by the current owner. In lieu of compensation, M37 allows the government responsible for the regulation to "remove, modify, or not apply" the regulation if it so chooses.

Measure 49

On November 6, 2007, Oregon voters approved the legislatively referred Ballot Measure 49 (M49). Measure 49 amended M37 to provide clearer, but more limited relief to property owners affected by land use regulations adopted after they acquired their property. The intent was to bring more clarity and efficiency to the claims process for eligible property owners, while

preventing large-scale subdivision, commercial, and industrial developments in prime farm lands, forest lands, and natural resource areas.

The first part of M49 replaced the alternate remedies of M37 (waiver of land use regulations or payment of compensation). As approved under M49, eligible claimants could receive up to three home site authorizations on their property through a streamlined “express” review process, or up to ten home site authorizations through a lengthier “conditional” review process, provided the homeowner could meet certain criteria. A home site authorization allows claimants to construct a new house, or create a new lot, or a combination of both, in greater density than permitted under the property’s current land use designation. The home site authorization is provided as a form of compensation for land use regulations imposed after owners acquired their properties. These options are only available for claimants who filed M37 claims on or before June 28, 2007.

The second part of M49 concerns the filing of **new** claims, which may be based only on state or local land use regulations enacted after January 1, 2007. As with M37, property owners are still eligible for compensation or waivers for new land use regulations. New M49 claims may only be made for land use regulations enacted after January 1, 2007 that limit residential development or a farm or forest practice, and only to the extent that the claim demonstrates that the new regulation reduces the value of the property.

Washington County has one of the highest numbers of approved M49 claims in the state (349), second only to Clackamas County (660), based on numbers published by the Oregon Department of Land Conservation and Development (DLCD) in its 2011 report¹. These numbers are discussed later in the paper. The majority of claims in Washington County are located in rural reserves or in rural areas outside of reserves. At this point, all M49 claims based on M37 claims have been reviewed and either approved or denied by the County and DLCD.

M49 Transfer of Development Credits (TDC) Program

Measure 49 authorized counties to establish a system for transferring development authorizations granted under M49, but did not contain specifics as to when and how those transfers could occur.

On March 12, 2015, the Land Conservation and Development Commission (LCDC) adopted administrative rules that created a framework to allow the transferring of development authorizations (credits) from properties with M49 authorizations to other locations. These rules are located in OAR 660, Division 29 (Measure 49 Transfer of Development Credits System).

In establishing the rules, LCDC recognized that such a system could use market forces to designate high-priority lands for preservation, within which landowners may voluntarily sell and transfer their M49 rights into areas deemed more appropriate for development. The underlying goal is to slow or prevent the conversion of high value farmland, forestland, and environmentally sensitive or hazardous areas by relocating M49 claims into lands already deemed appropriate for rural residential development.

¹ Department of Land Conservation and Development, *Ballot Measures 37 (2004) and 49 (2007) Outcomes and Effects (2011)*.

The M49 TDC Program rules adopted by LCDC contain five key elements for a local TDC system:

- “Sending” Properties – The source of transferable credits. Eligible sending properties must have unused approvals for new dwellings authorized under M49. In addition, they must have lawful access and either be zoned for farm, forest, or other resource use or have special attributes that make them high-priority for protection (e.g., natural hazard areas, sensitive wildlife habitat, groundwater limited areas). Participants are granted one credit for each dwelling authorized in a M49 claim.
- Bonus Credits (Optional) – Counties may choose to provide bonus credits to increase the incentive for transferring potential development away from environmentally sensitive areas, high-value farmland, and other options as provided in the Administrative Rule. To receive bonus credits, property owners must agree to permanently protect the land through restrictive covenants or conservation easements. Counties are permitted but not required to provide bonus credits.
- “Receiving” Areas – The lands to which M49 credits will be transferred. These include rural residential exception areas, such as the County’s Rural Residential Five Acre Minimum District (RR-5), and two Agricultural and Forest Districts (AF-5 and AF-10). These also include any “substantially developed subdivisions” meeting very narrow criteria in areas outside rural reserves that are designated for farm or forest use, such as the county’s Exclusive Farm Use District (EFU) and Exclusive Forest and Conservation District (EFC) designations. Per state rules, receiving areas may not contain land within any of several protected categories, including recreational and cultural areas, environmentally sensitive areas, natural hazard areas, and urban reserves.
- Interjurisdictional Transfer (Optional) - State rules allow Washington, Multnomah and Clackamas Counties to enter into a cooperative agreement to establish a system for transfer of TDCs between the three counties. Neither Clackamas nor Multnomah County, however, is interested in implementing a TDC program at this time.
- Tracking Database and Maps – A database of tables and maps will enable landowners, counties, and others to track the eligibility of properties and transfer of development credits. The database would be maintained by the Department of Land Conservation and Development (DLCD).

The process of transferring a claim is set forth in OAR 660-029-0090. To send or receive a transferable credit, a property owner must file an application with the County. The County’s role is to review the application for compliance with a locally adopted TDC ordinance, and coordinate with DLCD for verification and tracking of credit transfers.

Adoption of a local M49 TDC Program would require the County to amend its Comprehensive Plan to incorporate the provisions of OAR 660, Division 29. The needed amendments would

likely include changes to the Rural/Natural Resource Plan and the Community Development Code, and would have to be adopted through ordinance. If the County were to adopt a M49 TDC program, it would be the first in the state.

Request from Oregonians in Action

As part of the 2016 LRP Work Program discussions, Mr. David Hunnicutt submitted a letter on behalf of Oregonians in Action, asking the County to adopt a TDC program. As a follow-on, he later requested that the County support him in lobbying DLCD to make some changes to the program.

DLCD has expressed interest in seeing a local TDC program established, and has offered encouragement as well as providing technical support and necessary GIS data in support of this issue paper. No further comments or inquiries have been received from Washington County residents, property owners, or other interested parties.

Analysis

Staff conducted a preliminary analysis to determine the implications of County adoption of a M49 TDC program. The analysis examined the following questions:

1. How many authorized M49 dwellings might be eligible for transfer to receiving areas?
2. How many potential receiving sites could be designated within Washington County?
3. Where can authorized M49 dwellings be located within receiving properties?
4. What additional analysis would the County have to undertake, as part of adopting a M49 TDC program?

The results of this analysis are summarized below and in Attachments A through C at the end of this paper.

- 1. How many authorized M49 dwellings might be eligible for transfer to receiving areas?*

The size and potential impact of a M49 TDC program would be determined by the number of transferable dwellings authorized under M49, and the number of properties able to receive those dwellings through an allowable transfer. A transferable dwelling is one that is approved in a M49 claim but has not been constructed, and is associated with a property that has lawful access and meets certain location criteria set forth in state rules.

A look at available County and DLCD records revealed approximately 355 M49 claims eligible for transfer within Washington County. Together, these claims authorized approximately 560 new dwellings spread across the County's rural areas. Of these, approximately 400 dwellings were authorized on farmland, and the remainder on forest land. It should be noted that these numbers are only a preliminary estimate, and the actual number of eligible properties may be smaller for the following reasons:

- First, a sending property must have lawful access to a public road. Neither the County nor DLCD made a determination regarding the adequacy of access while reviewing claims, but it is possible that some portion of the eligible sending properties would not meet the access requirement necessary to create a transferable credit.
 - Second, the claimholders have had 10 years to establish one or more dwellings as permitted in their claim, or they may have chosen to sell or develop their property in a manner that precludes residential development. Due to the lack of centralized tracking of claims, a more precise counting would require staff to review several hundred individual claims to determine their current status. Recent DLCD estimates place the number of completed claims (a claim where all approved dwellings have been built) at 39, or approximately 11 percent of total authorized new dwellings in Washington County.
 - Finally, external factors such as unfavorable market conditions, lack of familiarity with the transfer process amongst property owners and real estate professionals, and possible infrastructure gaps (e.g. potable water or road capacity) could slow or discourage transfer. These factors would need to be studied in greater detail before a TDC program could be developed.
2. *How many potential receiving properties could be designated within Washington County?*

Receiving properties are lots or parcels where some or all of the lot or parcel is within a receiving area, and meets minimum requirements to transfer and construct a M49 authorized dwelling. The availability of receiving properties is necessary for a TDC program to work, as both sellers and buyers are needed for a market to function. Existing data sources suggest there may be an imbalance between the number of transferable dwellings and the number of sites able to purchase or otherwise receive the claim.

State rules are highly prescriptive on the designation of receiving areas for the transfer of M49 credits, and include specific locational criteria set forth in OAR 660-028-0080 (Designation of Receiving Areas). Generally speaking, receiving properties are restricted to rural residential land use districts meeting specified criteria. In Washington County, this would include properties located within the Rural Residential Five Acre Minimum District (RR-5), the Agricultural and Forest Five Acre Minimum District (AF-5), and the Agricultural and Forest Ten Acre Minimum District (AF-10). Additionally, receiving areas may not be located within any of the following areas:

- Urban reserves;
- 100 feet of a riparian corridor or wetland;
- Any significant Goal 5 resource site;
- A flood hazard area or floodway;
- A scenic, historical, cultural, or recreational resource identified in a local Comprehensive Plan or Community Development Code;

- Within or adjacent to a national or state scenic, wildlife, conservation or recreation area or corridor; and
- A designated critical ground water area or ground water limited area.

State rules also require designated receiving areas to be established in a manner that minimizes potential conflicts between new dwellings and nearby farm and forestry operations. While the methods to be used are not explicitly defined in state rules, this requirement could further restrict the potential number of receiving areas. This is because many of the County's rural residential areas are fragmented and surrounded by high value farmland or forest land. To adopt a local TDC program, the County would need to study this issue further, including working with DLCD staff to develop standards consistent with state requirements.

In addition to specifying locational requirements for M49 receiving areas, state rules also mandate minimum lot sizes for receiving areas that limit local flexibility, making it difficult to estimate the number of eligible receiving properties. As detailed in OAR 660-029-0090(2), new lots or parcels must be at least five acres in size. This provision effectively removes any incentive for property owners in the RR-5 and AF-5 districts to purchase or otherwise receive one or more TDC, as existing CDC standards already permit the creation of five-acre lots in these districts. As such, only property owners within the AF-10 District, where a ten-acre minimum lot size is currently required, would receive any benefit from the ability to create new 5-acre lots as allowed by the state administrative rule.

The rule does allow an exception to the five-acre minimum, and permits the creation of lots as small as two acres in receiving areas when certain criteria are met. To do so, a property owner would have to provide evidence that the proposed lot or parcel is equal to or greater than the average size of all rural residential lots within one-half mile of proposed site. It would be difficult and time intensive to determine how many receiving properties might qualify for this exception, therefore staff did not analyze this beyond looking for a minimum lot size of at least four acres (the minimum necessary to create two or more two-acre lots).

The summary chart on the next page contains a "best guess" estimate of the number of receiving properties in Washington County. These estimates were created by filtering all tax lots in the County for consistency with state rules regarding the designation of receiving areas. The difference between the upper and lower number estimates is the exclusion of properties containing high-value soils. The purpose of this filter was to use high-value soils as a potential indicator of adjacent, high value farmland and general agricultural activity that may need to be accounted for during the development of a local TDC program, as discussed later in this paper.

In considering the table, it should also be noted that these estimates may be higher than the actual supply. First, not all required data sources exist, and it is reasonable to expect that some percentage of properties will no longer qualify once additional resource mapping was performed. Examples of missing or incomplete data include maps of high value farmland, riparian corridors, and locally significant wetlands. Second, the filtering identified properties where some portion of the property was within a receiving area. It is likely that some portion of the identified properties

do not have a sufficient amount of receiving area within their borders to meet the minimum lot size requirements. As a result, the numbers below should be considered rough estimates.

Preliminary Estimate of Receiving Properties		
	Lots ten-acres or greater in AF-10 District	Lots four-acres or greater in AF-10, AF-5, and RR-5 Districts
Potentially eligible receiving properties using existing data	42	632
When filtered to exclude properties containing high value soils	3	23

These numbers suggest the following:

- The number of properties dividable into five-acre lots is significantly fewer than the number of transferable dwelling authorizations (approximately 560).
- The number of properties potentially dividable into two-acre lots is significantly higher than those dividable into five-acre lots, but an unknown number meet the “average size within one-half mile” criteria necessary to create lots as small as two acres, as set forth in OAR 660-029-0090(2). Further analysis of this issue would reduce this number.
- Most receiving properties are located on and adjacent high value soils. This is not prohibited under state administrative rules, but does suggest further study would be necessary. State administrative rules require the minimization of conflicts with agricultural operations through methods such as avoiding the selection of receiving areas adjacent to high value farmland.
- All of these numbers are preliminary estimates and subject to future refinement (and probable reduction), should missing data layers be created and applied.

Preliminary analysis also indicated a clustering of receiving sites. When filtered for the presence of high-value soils, the receiving properties were largely clustered in the vicinity of Glenwood (west county) and Meacham Corner (north county). When the high-value soils layer was excluded from the analysis, the dispersion was broader with larger clusters in rural communities such as Helvetia, Manning, Hagg Lake, Cherry Grove, and elsewhere. Further outreach and analysis would be necessary to ensure these clusters possess sufficient infrastructure capacity to service the new dwellings, and that the increase in housing would not adversely impact community character, livability, and proximate farm and forestry operations.

3. *Where can authorized M49 dwellings be sited within receiving properties?*

If the County chose to adopt a M49 TDC program, the County would be required to develop and adopt new standards for the creation of lots or parcels and homes being created as part of a TDC transfer. These standards would be in addition to existing County standards for partitions, subdivisions, and the construction of single-family homes in the rural residential areas.

The administrative rule requirements for the state's M49 TDC Program state that receiving areas must meet the requirements of ORS 215.296, which requires an "impact test" as part of the approval of certain uses in exclusive farm use zones. This is already a requirement for construction of a single-family home in the EFU and AF-20 districts. This requirement could be extended into a County M49 TDC program.

The state's administrative rule also requires receiving areas to be selected so as to minimize conflicts with nearby commercial agricultural and forest operations, and that these methods for the minimization of conflicts may include, but are not limited to, the following:

- A. Minimizing the selection of receiving areas that are adjacent to high-value farmland (as defined in ORS 195.300); and
- B. Restricting increases in allowed density to the interior of applicable exceptions areas.

In Washington County, Option A may be difficult to implement because the County's exception areas are almost all on, or adjacent to, high-value soils (one determinant of high-value farmland). Given this circumstance, it is unclear how the County could "minimize" the selection of receiving areas that are on or adjacent to high-value farmland as no further guidance is provided in the administrative rule. Option B may also be difficult to implement, because the term "interior" is not defined in the administrative rule. As a result, the County would have to identify and develop a meaningful and defensible setback requirement. Adoption of a County M49 TDC Program would require the County to work with DLCD and other stakeholders to identify a defensive methodology for minimizing conflicts with commercial agricultural and forest operations.

4. What additional analysis would the County have to undertake, as part of adopting a M49 TDC program?

As noted above, the state administrative rule is highly prescriptive on the designation of sending and receiving areas, and includes specific locational criteria. However, the rule requires data on high value farmland, riparian corridors, and wetlands and the County's current data on these topics is outdated or doesn't exist.

If the County decided to adopt a M49 TDC Program, County identification and mapping of "high-value farmland" as defined in M49 (ORS 195.300) may be required to comply with the state administrative rule's siting standards for receiving areas. The County has historically relied upon a high value soils map that was created in the early 1980s, whereas the state administrative rule goes beyond soils to include factors such as diking, irrigation, viticulture, slope, and solar aspect. Only five Oregon counties have mapped their high value farmland using criteria set forth

ORS 195.300, and Washington County is not one of them. Creating an inventory of high-value farmland per current state rules would likely require the study of existing state data, combined with fieldwork by staff, and possibly the hiring of outside expertise. This work would require significant staff time as inventories of some of the required elements do not exist, and would have to be created through the analysis of aerial photographs or field verification.

County mapping of rural riparian corridors and an inventory of rural wetlands could also be required. The County has many rural riparian corridors that have been identified as local Goal 5 resources under earlier (1980s) Goal 5 standards. However, the County does not have an adopted inventory of riparian corridors that complies with current state standards, or a local wetland inventory for the rural areas.

Creating and adopting the required riparian and wetland inventories would also require significant staff resources, the hiring of outside consultants to provide the necessary expertise, and adoption of the riparian corridors and wetland inventories by a separate ordinance.

In discussing the issue with DLCD, the agency gave the opinion that in lieu of creating and adopting an inventory of riparian corridors and wetlands, the county could place the burden for identifying these resources on M49 TDC applicants by requiring them to include this information in their TDC application submittal. This approach would allow these resources to be mapped on a localized, case-by-case basis at the expense of applicants seeking to convey or acquire a TDC credit. However, this approach might dissuade property owners from participating in a M49 TDC program due to the extra time and monetary burden. Moreover, the County would be adopting a TDC program without a clear sense of how many potential receiving areas might qualify.

Summary

Washington County is second only to Clackamas County in the number of M49 claims received and authorized within its borders. Most of those claims are scattered across the rural parts of the county, with approximately 560 transferable dwellings authorized under M49. DLCD estimates that as of 2016, approximately 52 of the authorized dwellings have been built in Washington County.

Implementation of a M49 TDC program has the potential to reduce localized conflicts between new residential construction on or adjacent to farm and forest lands, natural hazard and resource areas, and scenic and recreational areas. This is underlying goal of the state, as reflected in the enabling rules for local M49 TDR programs.

Establishing a M49 TDC program may benefit those claimholders looking to sell or donate claims they cannot or are choosing to not use on their property. Such a program could also reduce potential conflicts between farm uses and natural resources near existing claims, by incentivizing the shift of housing away from resource lands.

The ability of claimholders to sell or otherwise transfer their claim is contingent on willing property owners choosing to participate in the program, and the availability of sufficient

receiving sites to accommodate transferable credits. Preliminary research suggests there may be more transferable claims than areas to receive them. This could result in low participation in the program.

In addition to the relatively small number of eligible receiving areas, participation in a M49 TDC Program may be diminished by uncertainty and cost associated with the application process. This uncertainty is the result of the gap between data that is presently available, and what receiving properties must demonstrate in order to qualify under the state administrative rule. Unless and until the County were to inventory and create the necessary maps for all resources specified in the state administrative rule, the burden of mapping things like high-value farmland and riparian resources would fall on the receiving property owner. Presently, this could include the mapping of wetlands and riparian corridors on the subject property, and possibly high-value farmland on adjacent properties.

A local M49 TDC program could allow qualifying property owners to partition their land for residential development at densities higher than currently permitted. This could result in an increase of housing density in the areas of Helvetia, Manning, Hagg Lake, and Cherry Grove. This increase in density has the potential to alter community character and burden rural roads and service agencies that have not accounted for this increased density in their infrastructure planning. Higher densities also have the potential to create conflicts with nearby farm and forest operations, and the County would have to work with DLCD to identify appropriate measures to reduce these conflicts. Additional work would be needed to identify and evaluate the range and intensity of possible impacts, including outreach to potentially affected rural stakeholders during ordinance development.

Staff Recommendation

1. Staff recommends not pursuing a M49 TDC program, for the following reasons:
 - Potentially a high cost-to-benefit project.
 - Preliminary estimates place the number of unused and transferable M49 dwelling authorizations at around 500.
 - Preliminary estimates show a maximum of 42 receiving properties meeting minimum lot size and location criteria. This is significantly fewer than the number of transferable dwellings.
 - Another 590 properties may qualify, provided they can meet the “average size within one-half mile” criteria exception.
 - The number of qualifying receiving properties is a preliminary “best guess” as not all data sources exist.
 - Levels of property owner interest are unknown.
 - Could necessitate the creation and adoption of inventories for rural riparian corridors, high value farmland, and wetlands. Alternatively, the County could defer that to receiving area property owners.
 - Could require an analysis of infrastructure capacity within receiving areas; and the need to perform outreach with rural stakeholders for a project that may only benefit a

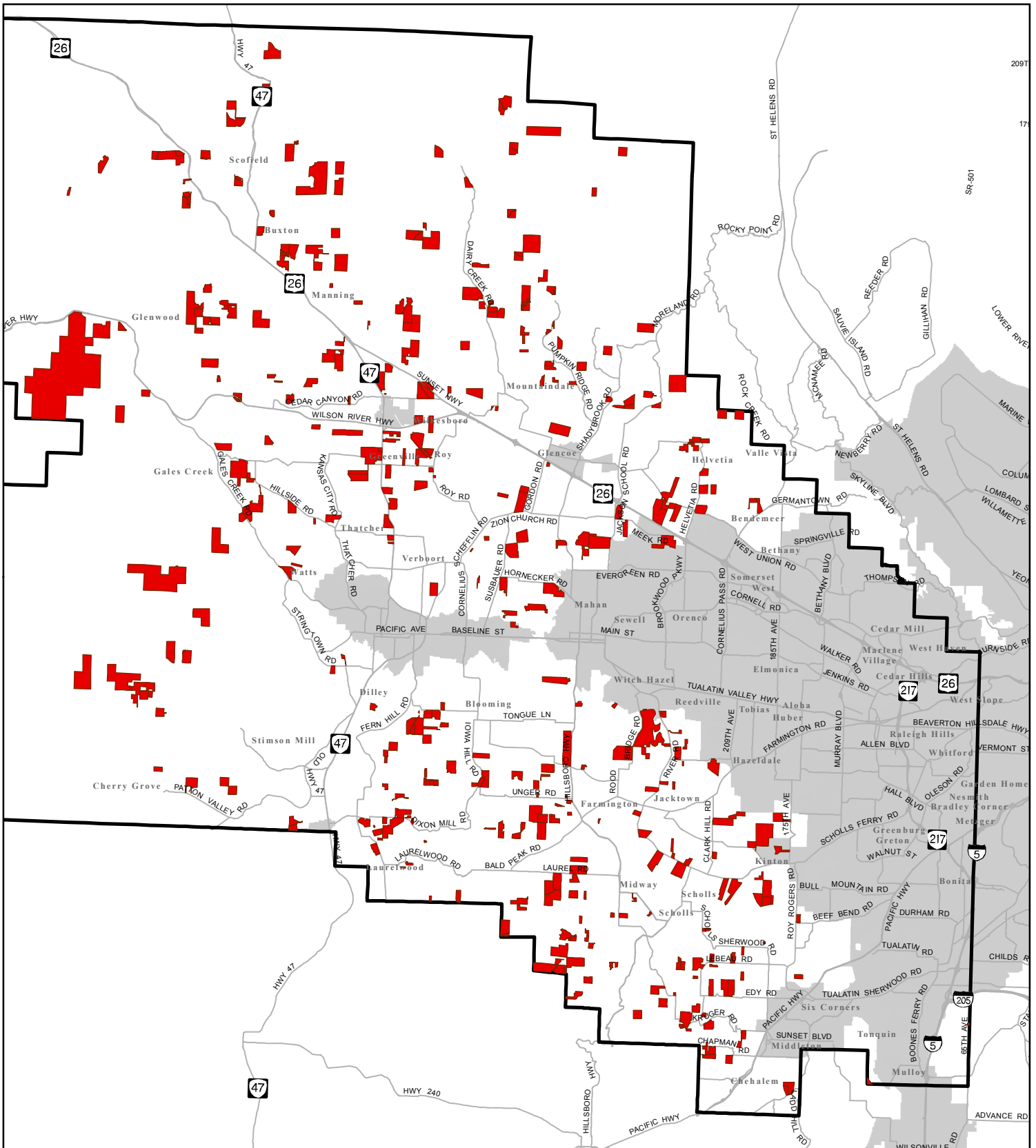
- small subset of landowners. This could require the involvement of multiple staff and possible outside consultants over the course of one or more years.
- No other Oregon county has adopted a M49 TDC program, and none appear likely to do so in the near future. The County would have to develop land use standards without a precedent to follow.
 - DLCDC may amend state rules to reduce barriers to implementation (i.e., revisit minimum lot sizes).
 - Avoids potential impacts to receiving areas, particularly in denser clusters of potentially eligible lots in places such as Helvetia, Cherry Grove, Glenwood and Manning. An increase in density has the potential to alter community character, and burden roads and other infrastructure.
2. If the Board desires staff to prepare an ordinance for adoption of a M49 TDC program, additional analysis will be needed. This analysis would further explore the general interest in and feasibility of a M49 program, including factors such as the following:
- Analysis of the number of lots or parcels that have a sufficient amount of receiving area within their boundaries to create a five or two acre lot, as permitted in OAR 660-029-0090 (2).
 - Analysis of the number of receiving properties able to qualify for lots less than five acres, and no greater than two acres, based on the average size of lots and parcels within one-half mile of the subject property, as permitted in OAR 660-029-0090 (2).
 - Analysis of potential infrastructure and service impacts.
 - Consultation with DLCDC regarding methods to comply with compatibility standards set forth in OAR 660-029-0080(3), and potential implications for the number and distribution of receiving areas.
 - Determining public interest in a M49 TDC program.

Attachments:

Attachment A: Measure 49 Potential Sending Properties

Attachment B: Measure 49 Potential Receiving Properties

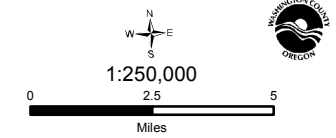
Attachment C: Measure 49 Potential Receiving Properties - Not Located on High Value Soils



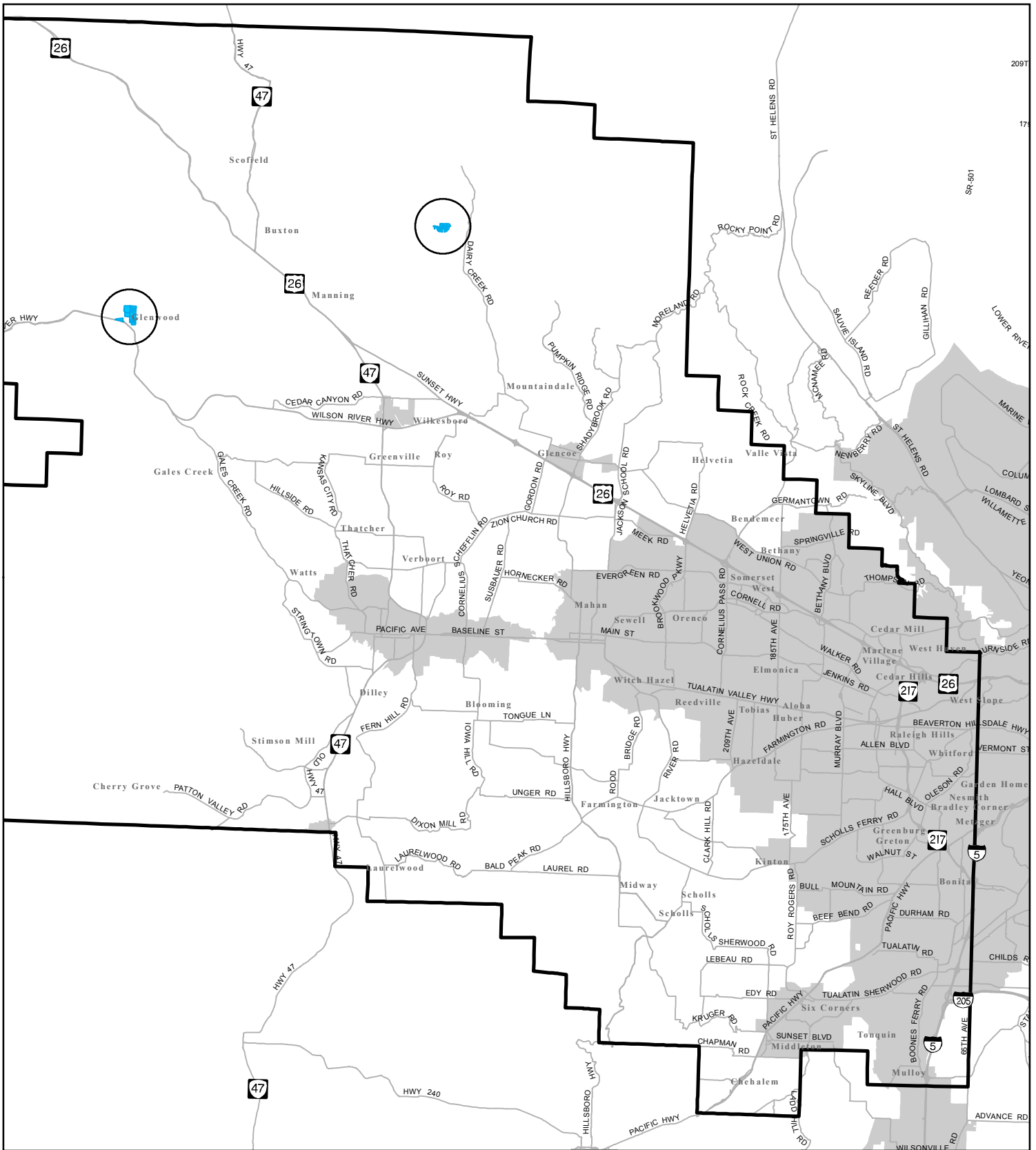
Washington County- Planning and Development Services

Measure 49 Potential Sending Properties

- Potential Sending Properties
- County Line
- Urban Unincorporated
- Major Road



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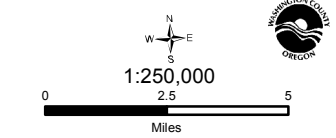


Washington County- Planning and Development Services

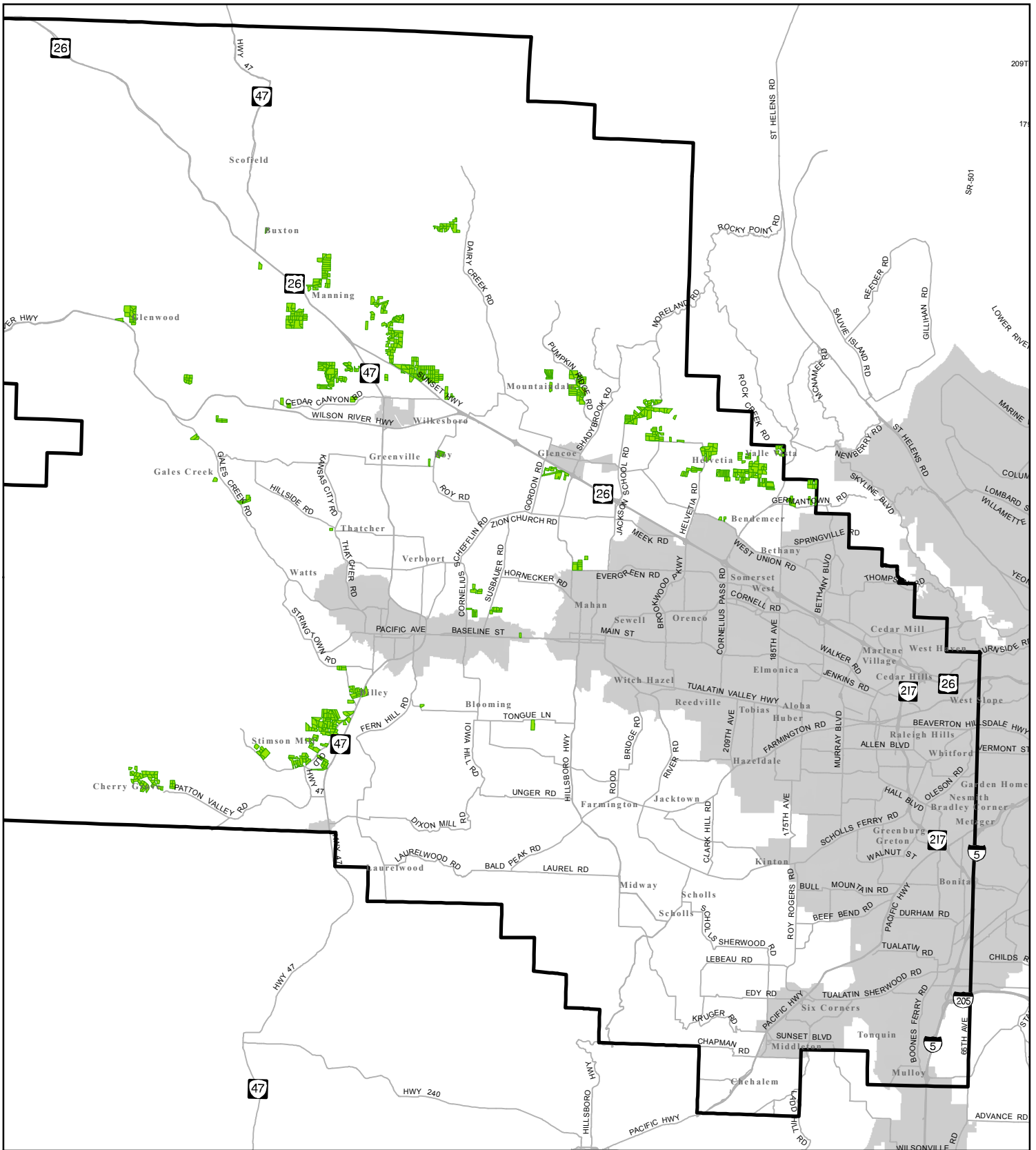
Measure 49 Potential Receiving Properties

Not Located on High Value Soils

- Potential Receiving Properties
- County Line
- Urban Unincorporated
- Major Road



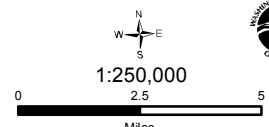
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Washington County- Planning and Development Services

Measure 49 Potential Receiving Properties

- Potential Receiving Properties
- County Line
- Urban Area
- Major Road



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