



Department of Land
Conservation and Development
635 Capitol Street NE, Suite 150
Salem, Oregon 97301-2540
(503) 373-0050
www.oregon.gov/LCD

Senate Bill 1049 Information Guide

Part 1: Overview

This information is to assist Measure 37 claimants who may seek relief under Senate Bill (SB) 1049 (2010) in deciding whether to submit an election to the Department of Land Conservation and Development (DLCD) for review of their claim(s). The relief available is limited to one additional dwelling. If a vacant lot or parcel is currently not available to site the dwelling, the relief will include a division to create a lot or parcel. This election for review requires that the claimant pay a non-refundable \$2,500 processing fee. Given this processing fee requirement, DLCD urges claimants to carefully consider the information included in this packet before submitting an election.

Part 2: Claims Described by Senate Bill 1049

Only two categories of claimants qualify for DLCD review under SB 1049.

1. Claimants who filed a valid county Measure 37 claim that was not withdrawn, but did not file a corresponding claim with the state. SB 1049 required that counties identify these claims and provide copies of the claims to DLCD no later than June 30, 2010. **If DLCD did not receive a certified copy of a claim from a county by June 30, 2010, that claim is not eligible for SB 1049 review.**
2. Claimants who in 2008 elected to have DLCD review their state Measure 37 claims under section 7 of Measure 49 but then did not meet the appraisal requirements set forth in section 7 review and also did not change their election within the time allotted in the statute to have their claims reviewed under section 6.

If a claimant does not fit into either category described above, the claimant is not eligible for relief and there is no need to consider electing under SB 1049. The following information assists claimants who do fit into one of the two categories in deciding whether to submit an election under SB 1049.

Part 3: Election Deadline and Filing Fee

SB 1049 requires a claimant to pay a non-refundable processing fee of \$2,500 for review of a claim. This fee covers the approximate average cost to DLCD for the supplemental review of a claim under Measure 49 and is not refundable, regardless of the outcome of DLCD's review of the claim. A claimant will have 56 days after DLCD mails the claimant an election form and payment form to elect and to make the full \$2,500 payment. Because of the timeline for completion of claim review under SB 1049, DLCD will not grant extensions for making an election or paying the required fee.

In cases of claim combination or division (see Part 5 for explanation), each resulting claim addressing a single claim property may qualify for one additional dwelling and, if necessary, one lot or parcel for that dwelling. If a single claim is divided, DLCD will require an election and fee for every claim that results. If multiple claims are combined into one claim, DLCD will refund extra fee payments so that the claimant pays only one fee.

Part 4: Relief Available under Senate Bill 1049

Relief under SB 1049 is limited to one dwelling on the Measure 37 claim property and, unless the property currently includes a vacant lot or parcel, a division to create a lot or parcel for that dwelling. The Measure 37 claim property is the property described in the Measure 37 claim filed with the County. That property cannot be changed. If the property already contains a vacant lot or parcel, the additional dwelling authorized must be sited on that lot or parcel, and the relief will not include authorization of an additional lot or parcel.

The Measure 37 claim property is entitled to relief under Measure 49, as amended, only once. If relief was already granted for the Measure 37 claim property under Measure 49, the property is not eligible for additional relief under SB 1049, even if the claimant was not a claimant for that Measure 37 claim.

The relief under SB 1049 is unlike the home site approvals previously available under Measure 49 in several ways. First, SB 1049 relief is limited to one additional dwelling, regardless of the amount of development existing on the property. If the claim property includes a vacant lot or parcel, SB 1049 relief will include only an authorization to establish a dwelling on that vacant lot or parcel. If the claim property does not include a vacant lot or parcel, then SB 1049 relief will include authorization of a division of the property in order to create a new lot or parcel for that dwelling. Also, under SB 1049 existing development on contiguous non-claim property in the same ownership does not factor into a claimant's relief. So long as a claimant qualifies under the criteria in section 6(6) of Measure 49 for an additional dwelling, and a lot or parcel if necessary for that dwelling, the claimant will be authorized to establish that additional dwelling and lot or parcel. This does not mean, however, that existing development on the Measure 37

claim property is irrelevant to the analysis. As explained in Part 6(5) below, the question of whether a claimant was lawfully permitted to establish an additional dwelling on the claimant's acquisition date under section 6(6)(f) of Measure 49, requires assessment of the existing development on the claim property.

Part 5: Dividing and Combining Claims

In some cases DLCD must divide a single claim into more than one claim or combine a claim with other claims based on the ownership and contiguity of claim property on the date of the Measure 37 claim(s). DLCD will divide a single claim if the property subject to that claim is either not contiguous or is not in the same ownership. DLCD will combine multiple claims when the property subject to those claims is contiguous and in the same ownership. Each resulting claim will be eligible for a maximum of one additional dwelling and a lot or parcel when necessary to site that dwelling.

If a claimant elects and pays a fee for more than one claim and DLCD combines those claims, DLCD will refund any extra fees paid. If a claimant elects and pays a fee for one claim and DLCD subsequently divides the claim into two or more claims, DLCD will notify the claimant of the division and the claimant will have another 56 days to determine whether to submit an election on and to pay any additional required fees for any resulting claim(s).

Part 6: Eligibility Criteria under Section 6(6) Of Measure 49

Following a claimant's election, DLCD will evaluate whether a claimant is eligible for a dwelling, and a division to create a lot or parcel for that dwelling when necessary, based on the six criteria in section 6(6) of Measure 49. Those six criteria are as follows:

1. The claimant is an owner of the property.

Only Measure 37 claimants who also are current owners of claim property are eligible for relief. If a current owner was not a claimant on the original Measure 37 claim, that owner cannot be added as a claimant under Measure 49 and does not qualify for relief under SB 1049. A claimant who is not currently an owner also does not qualify for any relief, even if that claimant was an owner at the time of the Measure 37 claim.

"Owner" is a defined term in Measure 49:

- (a) The owner of fee title to the property as shown in the deed records of the county where the property is located;
- (b) The purchaser under a land sale contract, if there is a recorded land sale contract in force for the property; or

- (c) If the property is owned by the trustee of a revocable trust, the settlor of a revocable trust, except that when the trust becomes irrevocable only the trustee is the owner.

Following are some commonly misunderstood points about who qualifies as an owner for purposes of Measure 49:

- Ownership interests such as life estates, leaseholds, or a seller's interest under a land sale contract, are not ownership interests under this definition.
- In order to qualify as an owner, the claimant's ownership must be reflected in the county deed records. Unrecorded documents, including unrecorded contracts or deeds, do not establish ownership.
- If the owner in the deed records is an entity such as a family LLC or a partnership, the individual members of the entity are not owners.
- If the property is held in a trust, the nature of the trust determines the ownership. If the trust is revocable, the settlor of the trust is the owner. Sometimes the settlor and the trustee may be the same person, but it is the interest as settlor that qualifies that person as an owner under Measure 49, not the interest as a trustee. If the trust is irrevocable, the trustee of the trust is the owner.

2. All owners of the property must consent in writing to the claim.

All current owners of the claim property must consent to the claim. If the claimant does not submit consent of all current owners, or establish that owners shown in the deed records are no longer owners, the claimant is not eligible for relief.

3. One or more land use regulations prohibit establishing the dwelling.

Relief is available under SB 1049 only if a claimant cannot currently obtain approval to establish one additional dwelling, and a separate lot or parcel if necessary for that dwelling, on the property. Generally, this means that if a claimant has sufficient acreage under current zoning to create one additional lot or parcel for a dwelling or to establish a dwelling on an existing lot or parcel, the claimant is not eligible for any relief. Provisions that limit or prohibit a particular placement of a dwelling or place other controls on how or where a dwelling may be established, but do not prohibit the establishment of a dwelling, do not qualify a claimant for relief. Claimants whose property is currently subject to rural residential zoning should pay particularly close attention to this requirement.

4. The establishment of the lot parcel or dwelling is not prohibited by a land use regulation described in ORS 197.305(3).

ORS 195.305(3) exempts from claims under Measure 49 land use regulations:

- (a) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law;
- (b) Restricting or prohibiting activities for the protection of public health and safety;
- (c) To the extent the land use regulation is required to comply with federal law; or
- (d) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing.

If the establishment of a dwelling on the claimant's property is prohibited by one of these regulations, the claimant does not qualify for relief under SB 1049.

5. On the claimant's acquisition date the claimant lawfully was permitted to establish the dwelling.

- **Lawfully permitted**

To qualify for a dwelling under SB 1049, when the claimant acquired the claim property the claimant must have been lawfully permitted to establish the dwelling in addition to any development existing on the Measure 37 claim property. Generally, this means that a claimant had to have sufficient acreage to meet the minimum acreage standard in the then-applicable zone to allow a dwelling as a permitted use on a separate lot or parcel, or meet the requirements in effect at that time for establishing a dwelling on an existing vacant lot or parcel. If discretionary review processes existed under which a claimant could have applied for approval of a dwelling, that does not necessarily mean the claimant was lawfully permitted to establish the dwelling. DLCDC will consider evidence in the record in cases where a claimant believes that there is sufficient proof that on the claimant's acquisition date a dwelling was lawfully permitted. However, the most reliable way for claimants to demonstrate that they were lawfully permitted to establish an additional dwelling is to demonstrate that they had sufficient acreage to create an additional lot or parcel for a dwelling or that the dwelling was an out-right permitted use on an existing vacant lot or parcel.

Note that if a claimant acquired the property after the statewide planning goals came into effect (January 25, 1975) but before the county's comprehensive plan and land use ordinances were acknowledged by the Land Conservation and Development Commission (LCDC), applicants for land use approvals were required to comply not only with local zoning, but also with the goals. This means that local zoning alone did not determine whether a use would have been lawfully permitted. In addition to establishing compliance with any local zoning, a claimant

would have to establish that the use would have satisfied each of the applicable goals.

Because of the uncertainty during that time period, the Legislature included provisions in SB 1049 that specify the acreage required to qualify for a dwelling for property acquired during this period unless local zoning was more restrictive or the record for the claim demonstrates otherwise. These provisions mean that for property acquired during this time period, if the claimant's property is vacant, the claimant lawfully was permitted to establish one dwelling. If a claimant already has one dwelling, SB 1049 requires the property to be at least 20 acres to qualify for one new dwelling. If the property already includes two dwellings, the property must be at least 40 acres to qualify for a new dwelling. Again, SB 1049 also provides that if the local zoning was more restrictive than these standards, the local standard would control. Therefore, some claimants may need larger acreages to qualify for a dwelling.

In some counties, even after the county's comprehensive plan and ordinances were acknowledged by LCDC to comply with the goals, those acknowledged zones did not include a minimum acreage standard. Rather, the county evaluated applications for land division and development on a case-by-case basis to ensure compliance with the county's resource policies, the goals and the applicable requirements of ORS chapter 215. Because of the resulting uncertainty, SB 1049 specifies that property that was subject to an acknowledged resource zone without a minimum acreage standard when the claimant acquired it, the claimant needs 40 acres to qualify for one dwelling unless the record for the claim demonstrates otherwise.

- **The analysis includes existing development on the Measure 37 claim property**

It is important to note that DLCD's analysis of whether a dwelling, and a division when necessary to create a lot or parcel for that dwelling, would have been lawfully permitted on a claimant's acquisition date takes into account development that currently exists on the Measure 37 claim property. For example, if a claimant has two parcels with dwellings on the Measure 37 claim property, DLCD will determine whether the claimant was lawfully permitted to establish one parcel with a dwelling in addition to the two existing parcels with dwellings, i.e. a third parcel and dwelling. Additionally, the property that was described in the Measure 37 claim is what constitutes Measure 37 claim property. This means that even if a claimant changes the ownership of a portion of property that was in the same ownership when the property was described in a Measure 37 claim that property remains subject to the lawfully permitted analysis.

- **Acquisition date**

Measure 49 is specific about the factors that DLCD must consider in determining a claimant's date of acquisition. Section 21(1) of Measure 49 requires that a claimant's date of acquisition is the date the claimant became an owner (see Part 5 (1) above) as shown in the deed records for the county where the property is located. The following are some additional factors that determine a claimant's acquisition date under Measure 49:

- If there are multiple claimants, the earliest acquisition date(s) among them provides the date for the lawfully permitted analysis for all the claimants.
- If a deceased owner of the property passed an ownership interest in the property to a surviving spouse and the surviving spouse is now a claimant, the surviving spouse is entitled to the deceased owner's acquisition date or the couple's date of marriage whichever is later.
- If a claimant at any point conveyed away and subsequently reacquired ownership, the reacquisition date is the acquisition date for purposes of Measure 49, regardless of the reason for the conveyance and reacquisition. This might include "strawman" transactions and lot line adjustments accomplished by deed and deeds that were intended solely for security purposes.
- A judgment entered after December 2, 2004 that is meant to clear up a pre-December 2, 2004 acquisition date, has no effect on the acquisition date for purposes of Measure 49.
- Finally, a transfer into an irrevocable trust causes a new form of ownership that triggers a new acquisition date even if the same individuals were owners of the property prior to the transfer.

Part 7: Additional Eligibility Considerations

1. Claimant Death

If the Measure 37 claimant is deceased there is still a possibility that the claimant's claim can continue if heirs or devisees who received the property upon the claimant's death are the current owners and choose to elect on the claim. If the claimant died after Measure 49 went into effect on December 6, 2007 the claim may continue. If the claimant died before that date, the Measure 37 claim had to have been filed on or after November 1, 2006 for the claim to be able to continue. This means that if a claimant filed a Measure 37 claim before

November 1, 2006 and then passed away before December 6, 2007 the claim is not eligible for review or relief under Measure 49 and SB 1049.

2. House Bill 3225 (2009)

The above requirements describe the unamended criteria in Measure 49. However, in addition to the amendments in Senate Bill 1049 (2010) the legislature also amended Measure 49 with House Bill (HB) 3225 (2009). Some of the amendments in HB 3225 may affect claims described in SB 1049. Those amendments address state claims that were filed after December 4, 2006; claims that involve property that is either partially inside an urban growth boundary (UGB) or inside a city but not inside a UGB; and claimants who only filed state claims and did not file corresponding county claims. Claimants who intend to apply for relief under SB 1049 and may fall into one of these four categories should review the criteria in House Bill 3225 prior to making an election under SB 1049.

Part 8: Common Reasons a Claim under SB 1049 Would Be Denied

1. The claimant currently can establish one home site under current law.

If a claimant can currently establish one home site on the Measure 37 claim property, the claimant is not eligible for relief under SB 1049. Measure 49 requires that the claimant must be currently prohibited from establishing the home site requested.

2. The claim property was transferred to a different owner and then reacquired by the claimant, resulting in a later acquisition date. The reasons for the transfer or who the property was transferred to are not relevant.

Measure 49 states that if a claimant transfers the property to a different owner and then reacquires the property the claimant's acquisition date is the date the property was reacquired.

3. The claimant filed the claim under the impression that the date a family member acquired the property would be considered their acquisition date for purposes of Measure 49. It is only the claimant's acquisition date, and not a family acquisition date, that determines the date of acquisition for purposes of determining eligibility under Measure 49.

Section 6(6)(f) of Measure 49 requires that "on the claimant's acquisition date, the claimant was lawfully permitted to establish at least the number of lots, parcels or dwellings authorized..." That a non-claimant family member may have owned the Measure 37 property at

an earlier date does not affect a claimant's eligibility for relief under Measure 49.

4. On the claimant's acquisition date the claimant could not have lawfully established the home site requested.

Under the county zoning code that applied to the claim property the claimant must have been allowed to establish the home site requested when the claimant acquired the property. Also, if the claimant acquired the property after the adoption of the Statewide Land Use planning Goals in 1975 but before the county's plan and land use ordinances were acknowledged for compliance with those, those goals, the provisions of SB 1049, in addition to county zoning, determine whether a claimant was lawfully permitted to establish the requested home site.

5. The claimant is not a current owner of the property.

Measure 49 does not consider sellers in a land sale contract, holders of life estate interests, or trustees of revocable trusts to be owners of claim property. If a claimant holds only one of these interests in the claim property the claimant is not eligible for relief because Measure 49 does not recognize the claimant as a current owner of the property. In addition, if an individual transfers property to an LLC or other legal entity, the individual is no longer an owner, even if the individual is a member or owner of the LLC or other legal entity.