



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

October 16, 2012

Sarah Marvin, Land Owner Compensation Specialist
Oregon Department of Land Conservation and Development
635 Capitol Street NE Suite 150
Salem, Oregon 97301-2540

RE: Oregon Ballot Measure 49

Dear Ms. Marvin:

You have asked that we address a question regarding 2007 Oregon Ballot Measure 49. The question concerns section 11(3)(a) of the measure, which limits the size of new parcels created under the law in exclusive farm use zones, forest zones and mixed farm and forest zones to five-acres, or two acres if the lot or parcel is located on high-value farmland, high-value forestland or within a ground water restricted area. DLCD has become aware that some claimants have sought to increase the size of the home site(s) established under a Measure 49 final order through the lot line adjustment process established under existing county code.¹ Under these lot line adjustments, the claimant will use land from a larger parcel remaining after the Measure 49 home sites are partitioned to increase the size of the Measure 49 home site beyond the two-acre or five-acre maximum, as the case may be. At least one county has indicated the intent to authorize such lot line adjustments.

Whether or not these lot line adjustments are contrary to law requires us to determine whether Measure 49 and the provisions of the Measure 49 final order continue to apply to the claim property following establishment of the home sites authorized in the Measure 49 final

¹ A lot line adjustment would be applied for under ORS 92.192 which provides:

Property line adjustment; zoning ordinances; lot or parcel size.

(1) Except as provided in this section, a unit of land that is reduced in size by a property line adjustment approved by a city or county must comply with applicable zoning ordinances after the adjustment.

(2) Subject to subsection (3) of this section, for properties located entirely outside the corporate limits of a city, a county may approve a property line adjustment in which:

(a) One or both of the abutting properties are smaller than the minimum lot or parcel size for the applicable zone before the property line adjustment and, after the adjustment, one is as large as or larger than the minimum lot or parcel size for the applicable zone; or

(b) Both abutting properties are smaller than the minimum lot or parcel size for the applicable zone before and after the property line adjustment.

order. If the provisions of Measure 49 and the final order apply to the property following establishment of the authorized homes sites, the lot line adjustments are contrary to law and are prohibited. If the legal effect of Measure 49 and of the final order terminated as to the property on implementation of the final order, the lot line adjustments are lawful. For the reasons set forth below, I conclude that Measure 49 and the Measure 49 final order and its conditions apply to the property even after establishment of the home site(s) authorized in the final order. As a result, lot line adjustments that would increase the size of the parcel beyond the limitations in section 11(3) are not permitted on Measure 49 parcels where section 11(3) applied.

Analysis

The full text of the section 11(3) provides:

“(a) A city or county may approve the creation of a lot or parcel to contain a dwelling authorized under sections 5 to 11 of this 2007 Act. However, a new lot or parcel located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone may not exceed:

(A) Two acres if the lot or parcel is located on high-value farmland, on high-value forestland or on land within a ground water restricted area; or

(B) Five acres if the lot or parcel is not located on high-value farmland, on high-value forestland or on land within a ground water restricted area.

(b) If the property is in an exclusive farm use zone, a forest zone or a mixed farm and forest zone, the new lots or parcels created must be clustered so as to maximize suitability of the remnant lot or parcel for farm or forest use.

When interpreting a statutory provision adopted through the initiative process, we look to the text, context, and legislative history of the measure. *State v. Gaines*, 346 Or 160, 171-72, (2009). The objective is to determine the intent of the voters who adopted the measure. “The best evidence of the voters’ intent is the text of the provision itself.” *Roseburg School Dist. V. City of Roseburg*, 316 Or 374, 378, (1993). The context of the statutory provision at issue includes other provisions of the same statute and other related statutes. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993).

The first sentence of section 11(3)(a) authorizes a local government to implement home site approvals by creation of lots or parcels. The second sentence imposes a limitation on the size of “a new lot or parcel,” that is, the resultant lot or parcel created by city or county approval. By restricting the size of lot or parcel, the plain language of section 11(3)(a) also restricts the city or county’s authority to approve its creation. Therefore, based on the text of the statute, both the size of any new lot or parcel and the authority of a city or a county to approve its creation are conditioned on the parcel size being limited if the parcel is located on the kinds of lands described in Section 11(3)(a). The lot size restriction continues to apply after creation.

Therefore, the condition on approval must also continue to apply. The text of the statute indicates that the size restriction is ongoing and the authorization is dependent on the restriction.

The remainder of section 11(3) in (b) is the requirement that new lots or parcels be clustered to “maximize the suitability of the remnant lot or parcel for farm or forest use.” This provision provides context for interpreting section 11(3)(a). Section 11(3)(b) addresses the purpose and intent of this entire section, stating that clustering is necessary so that the remaining areas can have maximum use as they are currently zoned. Subsequent action to un-cluster home sites, would clearly frustrate the stated purpose of maximizing the remnant lot or parcel for farm or forest use. Similarly, allowing subsequent lot line adjustments contradicts the stated purpose in that it would decrease the size of the remnant parcel. The stated and ongoing purpose of 11(3)(b) provides evidence that remainder of the section was intended to apply to the home site on a long term basis.

Additionally section 11(6) provides for the transferability of an authorization and states that an authorization granted under section 6, 7 or 9 of Measure 49 “runs with the property and may be transferred with the property or encumbered by another person without affecting the authorization.” This is a clear statement that the authorization was intended to apply to the property long term. Because the authorization runs with the land the conditions included in the authorization run with the land and continue to apply.

Measure 49 also includes a purpose statement in section 3 that provides additional context for interpreting section 11. Section 3(2) of the measure states:

“The purpose of sections 5 to 22 of this 2007 Act and the amendments to the Ballot Measure 37 (2004) is to modify Ballot Measure 37 (2004) to ensure that Oregon law provides just compensation for unfair burdens while retaining Oregon’s protections for farm and forest uses and the state’s water resources.”

Section 11(3) gives effect to this purpose by granting cities and counties authority to approve partitions so long as lot sizes are limited to protect farm and forest uses. The lot size restrictions in section 11 have to apply to the property long term in order for the authorization granted to be consistent with this stated purpose.

A statutory change made in conjunction with the passage of Measure 49 also provides context for these sections, also suggesting that the provisions of Measure 49 and the conditions in the Measure 49 final orders were intended to bind the claim property after implementation of the relief authorized in the final orders. This change was to the recording statute, ORS 205.246, which was amended to allow Measure 49 final orders to be recorded.² There is a requirement in

² ORS 205.246: (1) The county clerk shall record the following instruments required or permitted by law to be recorded and entered in the office of the county clerk: ***

ORS 195.314 for claims made under ORS 195.310, the statutory provision allowing for new Measure 49 claims, that final determinations be forwarded to the county and be recorded. This requirement was not included in the sections of Measure 49 dealing with review of claims originally made under Measure 37, but that the recording statute was amended to specifically include Measure 49 orders indicates that they were intended to apply to the property long term and that future owners should be put on notice of them.

Consistent with the text and context of the provision at issue; DLCD rules indicate that this restriction applies to Measure 49 homes site on an ongoing basis where applicable. DLCD's Measure 49 rules addressed county implementation of Measure 49 authorizations and require that the county "determine and find" that these lot size limitations are met.³ By adopting this provision in rule and requiring that the county "determine and find that" these requirements are met, DLCD further underscored that limited parcels sizes are a fundamental component of Measure 49 development. Subsequent lot line adjustments that circumvent this requirement are in conflict with the statute and rule.

The Measure 49 final orders themselves are consistent with the statute and rule, also making it clear that the final order and the conditions on the establishment of the home sites authorized contained therein were intended to bind the claim property following establishment of the home sites authorized in the final order. For farm or forestlands, one such condition provides:

"Because the property is located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone, the home site approval will not authorize new lots or parcels that exceed five acres. Before beginning construction in one of these zones, the owner must comply with the requirements of ORS 215.293. Further, the home site approval will not authorize new lots or parcels that exceed two acres if the new lots or parcels are located on high-value farmland, on high-value forestland or on land within a ground water restricted area."

(aa) An order or decision under section 8 (7), chapter 424, Oregon Laws 2007, or section 6, chapter 855, Oregon Laws 2009, that is final by operation of law or on appeal.

³ OAR 660-041-0180, requires in (2) that

" If the Measure 37 Claim Property is zoned for farm, forest or mixed farm and forest use, the county must also determine and find:

(a) if the property is located on high-value farm or forest land, or on land within a ground water restricted area, as defined in these rules, each new lot or parcel does not exceed two acres; or

(b) if the property is not located on high-value farm or forest land, and is not on land within a groundwater restricted area, as defined in these rules, each new lot or parcel does not exceed five acres; and

(c) all new lots or parcels are located on the property in a manner that maximizes suitability of the remnant lot or parcel for farm or forest use."

As can be seen, this condition has no temporal limitation and therefore would continue to apply to the property after implementation of the relief authorized in the final order. Other conditions in the final orders, intended to implement other development restrictions contained in Measure 49, also are clearly intended to apply to the property after development of the home site(s) that are the subject of the order. For example, the final orders contain a condition relative to the twenty home sites per claimant limitation found in section 11(5) of Measure 49. Because each final order can authorize no more than three home sites, in order for the twenty home sites per claimant limitation condition to have any efficacy as to an individual claimant the condition must survive the creation of the home sites authorized in a single final order. Each final order also contains the requirement that new lots or parcels be clustered to "maximize the suitability of the remnant lot or parcel for farm or forest use." As discussed above, the clustering requirement in section 11(3) and incorporated into the conditions of the final orders must apply to the property long term in order to accomplish the stated purpose of maximizing the remnant's use for farm and forestland.

In conclusion, Measure 49, Section 11(3), contains a clear limitation on parcel sizes for home sites on farm and forestland and provides that cities and counties may only grant home site partitions if this limitation is met. The remainder of Section 11 states that this limitation was included to maximize the suitability of the remnant parcel for farm or forest use and that the authorization runs with the land. The requirement in section 11(3) was also incorporated into the Measure 49 final orders which continue to apply to the property after the home site authorization is exercised, and can be recorded to create awareness of this limitation long term. For these reasons, subsequent lot line adjustments inconsistent with the Measure 49 authorizations that created the parcels may not be granted.

If you have any questions about this advice, please do not hesitate to contact me.

Sincerely,



Diane Lloyd
Assistant Attorney General
Natural Resources Section

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