



# Oregon

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TO: Land Conservation and Development Commission

FROM: Judith Moore, Division Manager, Measure 49 Development Services  
Dave Gulledge, Operations Manager, Measure 49 Development Services

SUBJECT: **Agenda Item 14, June 2-4, 2010 LCDC Meeting**

## **UPDATE ON MEASURE 49 IMPLEMENTATION & REQUEST TO INITIATE PERMANENT RULEMAKING REGARDING POST MEASURE 49 FINAL ORDER AUTHORIZATIONS AND SENATE BILL 1049 (2010)**

### **I. AGENDA ITEM SUMMARY**

This item is a regular informational briefing regarding Measure 49 implementation. This report typically summarizes current trends for issuing preliminary evaluations and final orders; however, this update on Measure 49 does not provide the claims processing statistical detail because of the nearness to completion of reviewing the Measure 49 claims that do not receive supplemental review under House Bill (HB) 3225 or Senate Bill (SB) 1049. An end-of-project report will be presented to the commission at its July 22-23, 2010 meeting. This report also includes a request to initiate permanent rulemaking for SB 1049.

House Bill 3225 acknowledged the need to expedite Measure 49 supplemental reviews of Measure 37 claims and mandated a deadline for final review of claims by June 30, 2010. The department "shall issue a final order on or before June 30, 2010, for claims reviewed under [sections] 6 or 7" of Measure 49 (Section 8, HB 3225). The department will complete final processing of Measure 49 claims by June 30, 2010.

The second part of this agenda item is for the commission to hold a public hearing to initiate permanent rulemaking regarding implementation of Section 11 of Measure 49 (post Measure 49 final order authorizations) and rule amendments to implement SB 1049 (2010). If the commission moves to initiate rulemaking, then consideration and possible adoption of the rules would occur at its July 22-23, 2010 meeting.

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[dave.gulledge@state.or.us](mailto:dave.gulledge@state.or.us). Additional information regarding Measure 49 is available on the DLCD Website at <http://www.oregon.gov/LCD/MEASURE49/index.shtml>.

## **II. RECOMMENDED ACTION**

The department recommends the commission initiate rulemaking and authorize the department to develop proposed permanent rules in response to 2010 legislation (SB 1049) for commission adoption at its July 22-23, 2010 meeting. These rules would make the temporary rules adopted in April 2010 permanent, and may also address some post-authorization issues described in more detail, below.

## **III. HOUSE BILL 3225 (2009) – STATUS UPDATE**

The department began processing HB 3225 claims, although it was initially anticipated that work on HB 3225 claims would not begin until July 2010. The Department of Justice (DOJ) has completed initial ownership reviews and Measure 49 Development Services Division has completed completeness reviews for all 220 HB 3225 claims. Team leads have assigned 216 claims to the program analysts, who have drafted 207 preliminary evaluations that the analysts have forwarded to DOJ for review. Department of Justice has returned 178 draft preliminary evaluations for completion and issuance. The department has issued 14 preliminary evaluations and 10 final orders for HB 3225 claims.

## **IV. SENATE BILL 1049 (2010)**

### **A. Section 7 (Conditional) of Measure 49 Claims**

In May 2010, the department mailed information packets which included election forms and payment forms (\$2,500 fee required) to Measure 49 Section 7 claimants who failed to submit the requisite appraisal or their appraisal submitted did not meet statutory requirements. Compensation for Section 7 claimants is limited to authorization of one dwelling. Supplemental review of Section 7 claimants eligible under SB 1049 must be completed by June 30, 2011.

### **B. County-Only Claims**

Approximately 700 claims were filed with counties but not with the state. Senate Bill 1049 provides limited compensation for Measure 37 claimants who filed claims only with a county. The compensation is limited because the authorization would be for a dwelling and not for up to three home sites. Also, the claimant must pay a fee of \$2,500 to cover the costs of processing the claim. Supplemental review of county-only claimants eligible under SB 1049 must be completed by June 30, 2011. Senate Bill 1049 requires counties to provide on or before June 30, 2010 certified copies of the Measure 37 claims filed with the counties and not the state. As of May 18, 2010, the department has received complete, county information from five counties. The

department mailed a letter to counties on May 17, 2010 to remind them of the June 30, 2010 deadline.

Once the county information is received and reviewed, the department will then notify the county-only claimants that may be eligible for relief under SB 1049. Their notification will include information on the process for review of their county-only claim by the department, an election form, and a payment form.

## **V. CLAIMS PROCESSING**

The Department of Justice completed initial ownership reviews, Measure 49 Development Services Division completeness specialists completed completeness reviews, and claims (program) analysts have drafted preliminary evaluations for which DOJ completed their review for all of the 4,650 Measure 49 claims being reviewed. All preliminary evaluations have been issued, and as of May 17, 2010, the department has mailed 4,388 final orders. A report on the cumulative processing of Measure 49 claims will be provided at the commission's July 22-23, 2010 meeting.

## **VI. LITIGATION**

Pending litigation concerning Ballot Measures 37 and 49, including litigation challenging Measure 49 orders, will be discussed in executive session with DOJ representatives (Agenda Item 15) at the commission's June 2-4, 2010 meeting.

## **VII. POST MEASURE 49 FINAL ORDER AUTHORIZATIONS – REQUIREMENTS FOR DEVELOPMENT**

Amendments to Measure 49 rules adopted in April 2009 require counties to submit to the department notices of proposed land use actions that are a result of Measure 49 authorizations (final orders). The Measure 49 Development Services Division reviews the notices received and provides comments to the counties when there may be question as to whether the proposed partition complies with the authorization issued in the department's final order. If the proposed land use action does not comply with the Measure 49 authorization, then the department contacts the county to discuss possible concerns. There are two main concerns from claimants and counties concerning post-waiver authorizations – clustering requirements and time limits to place dwellings on claim properties.

### **A. Time Limit on Authorizations Granted**

There is no time limit on when an authorization granted under Measure 49 must be carried out, except that once the owner who obtained the authorization conveys the property to a person other than the owner's spouse or the trustee of a revocable trust in which the owner is a settlor, the

subsequent owner of the property must create the lots or parcels and establish the dwellings authorized by a waiver within ten years of the conveyance. Section 11(6) of Measure 49.

Senate Bill 1049 (2010) provides further clarification of the ten-year time limit for post-authorization action i.e, land divisions and placing dwellings on Measure 37 claim property. In summary, Section 3 of SB 1049 provides that a claimant who conveys property to a family member does not trigger the ten-year clock if the claimant retains an undivided interest in the property. The ‘Frequently Asked Questions’ (FAQ) Measure 49 webpage will be updated to reflect the clarification provided by Section 3 of SB 1049.

There are three basic questions the department receives concerning the time limit:

- (1) When does the clock start – the date the final order is issued or the date the claim property is sold?
- (2) Does the clock continue ticking if claim property is sold a second time?
- (3) Once the clock is ticking, what needs to be completed within ten years in order to protect the authorization?

And brief answers to the three questions:

- (1) The on-line FAQ explains that the answer depends on whether the only claimant(s) died before the final order is issued.
  - If no claimant is alive to receive the final order, then the ten-year clock begins on the final order issuance date because a transfer has already occurred (at the claimant’s death).
  - If a claimant is alive to receive the final order, then the clock would not begin until the claimant who received the final order made a triggering transfer.
- (2) There is one, ten-year clock and it continues ticking once triggered. Measure 49 provides that after a triggering transfer the “subsequent owner” must develop within ten years. “Subsequent owner” does not have to mean immediately subsequent.
- (3) Measure 49 states that the owner “must create the lots or parcels and establish the dwellings authorized...within ten years of the conveyance.”

Section 11 of Measure 49 also requires before beginning construction based on a home site authorization in an exclusive farm use zone, forest zone, or mixed farm and forest zone the owner must comply with ORS 215.293. However, other state law requirements regarding the establishment of dwellings on rural lands do not apply to development based on a Measure 49 home site authorization. To the extent that state law requirements for the establishment of a dwelling on rural lands have been incorporated into county ordinances, it is up to an individual county as to whether to apply those ordinances, but a county cannot apply those local standards in a manner that would prohibit development based on a Measure 49 home site authorization.

## **B. Clustering of Lots, Parcels or Dwellings Authorized Under Measure 49**

Counties are beginning to implement the “clustering” provision of Section 11 of Measure 49, which is discussed below in section VIII.

**VIII. REQUEST TO INITIATE PERMANENT RULEMAKING REGARDING POST MEASURE 49 AUTHORIZATIONS AND RULE AMENDMENTS TO IMPLEMENT SENATE BILL 1049 (2010)**

Counties are beginning to implement the “clustering” provision of Section 11 of Measure 49. It is important that the department is consistent when counties ask for guidance about clustering of home sites. The commission adopted temporary rules pertaining to SB 1049 (2010) at its April 2010 meeting. Certain provisions in the temporary rules require continuation into permanent rules.

**A. Background**

The relevant language concerning clustering is in Section 11(4), which provides:

“If an owner is authorized to subdivide or partition more than one property, or to establish dwellings on more than one property, under Sections 5 to 11 of this 2007 Act and the properties are in an exclusive farm use zone, a forest zone or a mixed farm and forest zone, the owner may cluster some or all of the dwellings, lots or parcels on one of the properties if that property is less suitable than the other properties for farm or forest use. If one of the properties is zoned for residential use, the owner may cluster some or all of the dwellings, lots or parcels that would have been located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone on the property zoned for residential use.”

Measure 49, Section 11 generally addresses the county’s implementation of authorizations granted under Measure 49. It allows counties to “approve” the creation of lots, parcels, and dwellings, but does not prescribe the exact manner in which a county must review and approve subdivisions, partitions, or dwelling approvals. It also requires the counties to locate development on no more than two- or five-acre lots or parcels, depending on whether the property is on high-value farm or forestland or in a groundwater restricted area. It does not, however, describe how the “clustering” described in Section 11(4) is to be accomplished.

Section 11(4) of Measure 49 does not explain how the clustered approvals must be documented. However, to the extent the residential use authorized under the recorded Measure 49 authorization is impacted i.e., the authorization will prohibit development on one parcel in order to cluster the development onto another parcel, recorded documentation is necessary. A standardized form to implement OAR 660-033-0135 would provide certainty and consistency. A requirement that county planning directors track and map the clustering decisions, similar to the requirement under OAR 660-033-0135(9), would also provide authority to require that sort of tracking.

Clarification through rules is necessary to ensure the clustering provisions are consistently implemented statewide in a manner that complies with the language and intent of Measure 49. Implementation of Section 11(4) could be clarified by rules to:

1. Require counties to make findings and to outline the analysis for those findings (i.e., parameters for when one property is less suitable for farm/forest use) when approving a clustered development pursuant to a Measure 49 authorization.
2. Provide a form for recording to document a clustered approval.
3. If the statute justifies the authority, establish a tracking mechanism for clustered approvals.

There are other ambiguities in the language of Section 11, and particularly Section 11(4) that also could be clarified through rulemaking. For example:

1. Which claim properties can be clustered? Do they need to be contiguous properties?
2. If not, can they be in different counties?
3. Are the properties subject to clustering limited to the same claimant(s)?

The proposed permanent rules for implementation of SB 1049 would amend definitions to reflect the passage of SB 1049, amend procedures for supplemental review to include authorization for a dwelling as allowed by SB 1049, update the department's explanation of the lawfully permitted analyses that were affected by SB 1049 as they pertain to pre-acknowledgement and post-acknowledgement claims with no minimum lot sizes, and amend language concerning notice of county applications to include providing notice of an application for a "dwelling, and lot or parcel when applicable" as provided by SB 1049.

## **B. Description of Proposed Rulemaking**

The department proposes rules that will assist the counties in their implementation of Measure 49 authorizations and make permanent certain temporary rules to implement SB 1049. No rulemaking work group is necessary because this rulemaking will establish procedures and guidance consistent with the statutory provisions of Measure 49.

## **C. Commission Rulemaking Authority and Requirements**

The commission's procedures for rulemaking derive from ORS Chapter 183 and are specified in the commission's procedural rules at OAR 660-001-0000. The commission generally does not appoint a rules advisory committee, or "work group" for projects that involve simple rulemaking to carry out clear legislative provisions, such as for the proposed rules described in this report.

The commission is also guided by ORS 197.040, as follows:

- "The Land Conservation and Development Commission shall...adopt rules that it considers necessary to carry out ORS chapters 195, 196 and 197, [and] shall:
- (A) Allow for the diverse administrative and planning capabilities of local governments;
  - (B) Assess what economic and property interests will be, or are likely to be, affected by the proposed rule;
  - (C) Assess the likely degree of economic impact on identified property and economic interests; and

(D) Assess whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.”

The commission also approved its own “Citizen Involvement Guidelines for Policy Development” (CIG) “...to provide and promote clear procedures for public involvement in the development of commission policy on land use,” which LCDC has committed to follow “to the extent practicable in the development of new or amended statewide planning goals and related administrative rules.”

The CIG also recommends that, as part of a rulemaking process, the department “shall, to the extent practicable:

- Prepare a schedule that clearly indicates opportunities for citizen involvement and comment, including tentative dates of meetings, public hearings and other time-related information;
- Post the schedule, and any subsequent meeting or notice announcements of public participation opportunities on the department’s website, and provide copies via paper mail upon request; and
- Send notice of the website posting via an e-mail list of interested or potentially affected parties and media outlets statewide, and via paper mail upon request;
- Provide background information on the policy issues under discussion via posting on the department’s website and, upon request, via paper mail. Such information may, as appropriate, include staff reports, an issue summary, statutory references, administrative rules, case law, or articles of interest relevant to the policy issue.”

The CIG also authorizes the commission to:

“Choose to not establish an advisory committee or workgroup, provided LCDC and the department shall explain its reasons for not doing so, either in the public notice advertising the start of a goal, rule, or other policy making project or by means of commission minutes.”

**D. Recommendation**

The department recommends that the commission initiate rulemaking and authorize the department to submit proposed rules for commission adoption to implement Section 11(4) of Measure 49 at its July 22-23, 2010 meeting.