

Division X

OREGON MEASURE 49 TRANSFER OF DEVELOPMENT CREDITS PROGRAM

660-x-0000

Purpose

In 2007 the voters approved Measure 49 (M49) which authorized certain property owners to develop additional home sites. The purpose of this division is to enable counties to develop local programs for transferring the development interest as allowed under and subsection 11(8) of chapter 424, Oregon Laws 2007 and ORS 94.531. This will enable landowners to realize the value of their M49 authorizations without developing the property from which the claim arose. These programs will permit landowners, on a voluntary basis, to transfer their development interest under M49 from one property to another property at a more suitable location. These programs will reduce the adverse impact of scattered residential development on farm and forest and other resource land.

660-x-0010

Definitions

For purposes of this division, the definitions contained in ORS 197.015 and the Statewide Land Use Planning Goals (OAR chapter 660, division 15) apply. In addition, the following definitions apply:

- (1) "Conservation easement" has the meaning provided in ORS 271.715.
[Note: For the convenience of the reader, the definition is reprinted below, but will not be adopted as part of the rule:
- (2) "Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open space values of real property, ensuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.]
- (3) "Measure 49 Property" or "M49 property" means a property that has received a "final order and home site authorization" from the Department of Land Conservation and Development under section 6 or 7, chapter 424, Oregon Laws 2007.
- (4) "Receiving area" means a designated area of land to which a holder of development credits generated from a sending property may transfer the development credits and in

which additional residential uses or land divisions, not otherwise allowed, are allowed by reason of the transfer.

- (5) "Sending properties" means a M49 property that qualifies under 0030 from which development credits generated from forgone development are transferable, for residential uses or land divisions not otherwise allowed, to a receiving area.
- (6) "Transferable development credit" or "TDC" means a severable development interest in real property that can be transferred from a sending property to a lot, parcel or tract in a receiving area.

660-x-0020

County Authority to establish a M49 TDC Programs

Counties may establish a program, consistent with this division, to allow for the transfer of development credits from M49 properties. Counties that choose to adopt a M49 TDC program shall:

- (1) Adopt a local M49 TDC ordinance that meets the requirements of this rule and that is substantially similar to the *Model M49 TDC Ordinance* adopted as "Exhibit A;"
- (2) Amend the comprehensive plan and zoning ordinance to:
 - (a) Designate M49 properties that are eligible sending properties consistent with 0030;
 - (b) Establish bonus credits that will apply to certain sending properties consistent with 0040;
 - (c) Designate receiving areas consistent with 0070;
 - (d) Identify any applicable overlay zones or other measures needed to implement the TDC program;
 - (e) Identify approved holders of conservation easements and approved entities for third-party enforcement of deed restrictions to satisfy OAR 660-x-0050; and
 - (f) Determine whether the TDC program will be stand-alone or inter-jurisdictional with other counties in the region, as described at OAR 660-x-0090; and
- (3) Utilize the following instruments to implement the M49 TDC program:
 - (a) *M49 Deed Restriction* adopted as "Exhibit B;"
 - (b) *M49 Conservation Easement* adopted as "Exhibit C", or another easement that is at least as protective; and
 - (c) *M49 TDC Deed* adopted as "Exhibit D."

660-x-0030

Sending Properties

(1) A county may designate sending properties consisting of M49 properties that:

(a) Are located within zones adopted pursuant to the protection of resource lands under Goals 3, 4, 5, 7, 8 and 15 – 18; or

(b) Are identified in OAR 660-x-0040(1)(c)(C) through (F).

(2) Sending properties exclusions. Notwithstanding section (1), a county may designate areas or types of M49 properties that are not eligible as sending properties:

If a county determines that some M49 properties are unbuildable, it shall either:

(a) Include mapping of the extent of such lands in the ordinance establishing the TDC system; or

(b) Adopt clear and objective standards in the ordinance establishing the TDC system for a case-by-case determinations of buildability.

Comment [MC1]: Sample mapping has failed to detect any properties that are 100% in >40% slopes or that are not adjacent to a road.. Recommend leaving the decision to counties.

Comment [BU2]: Must be GIS layer precise enough for DLCD to use in TDC registry.

Comment [MC3]: Provide notice to DLCD or positive and negative determinations.

660-x-0040

Calculation of Transferable Development Credits

(1) The number of development credits that may be transferred from a M49 property must be determined as follows:

(a) One transferable development credit is available for each dwelling authorized in the “final order and home site authorization;” and

(b) A county may grant bonus fractional credits if the M49 property will be subject to a conservation easement or deed restriction (as per 660-X-0050) that prohibits all future dwellings. A bonus of up to 0.2 credits may be awarded for each category of the attributes listed in paragraphs (A) through (X) below for each M49 dwelling authorization, not to exceed a total bonus of 1.0 credit per M49 dwelling authorization:

(A) High-value farmland or high-value forest land as defined in ORS 195.300 ;

(B) Rural Reserve within three miles of an Urban Growth Boundary (UGB);

(C) Scenic, historic, cultural or recreational resources or properties adjacent to such resources, as identified as follows:

- (i) X
- (ii) X
- (iii) X

(D) Natural Areas

- a. Wildlife habitat identified by the Oregon Department of Fish and Wildlife's Conservation Opportunity Areas maps (2006);
- b. Wetlands identified
- c. Within one-half mile of the coast or an estuary as mapped...

(E) Natural hazards as identified by:

- (i) Special Flood Hazard Areas on Flood Insurance Rate maps adopted by counties; and
- (ii) Hazard overlay zones adopted by counties; and
- (iii) Tsunami inundation maps by the Oregon Department of Geology and Mineral Industries (2014)
- (iv) Coastal erosion zones rated high (or moderate?) mapped by NHMP
- (v) Landslide rating of 1 (or 2? Covers a lot of area) mapped by NHMP
- (vi) Wildfire rating of 3 as mapped by NHMP
- (vii) Volcanic (a big area of Hood River, parts of Clackamas, Jefferson, Deschutes, Klamath...too long range to be of concern to us?)
- (viii)

(F) Groundwater-restricted areas as identified by the Oregon Water Resources Department, unless water can be provided by a community or public water system.

- (2) The Department of Land Conservation and Development will maintain an online M49 TDC Registry that calculates available TDC credits for all qualifying M49 properties, based on mapping identified in Subsection (2) and other specific data provided by participating counties.
- (3) When a landowner seeks to transfer M49 development rights from a M49 property for which lots or parcels have been created pursuant to a Measure 49 home site authorization, such lots or parcels must be vacated by the county prior to the severance of development rights. The county will provide notice to DLCD as required by OAR 660-041-0170.

660-x-0050

Protection of Sending Area Properties

- (1) Amended Final Order: When a county approves an application for transfer, the county will request an Amended Final Order from DLCD. DLCD will prepare Amended Final Order documenting that home site authorizations have been severed from the M49 property, the number of development credits have been created, the owner of the development credits, and any M49 home site authorizations remaining on the property. The county will record the Amended Final Order in the deed records.
- (2) If a transfer qualifies for bonus credits under 0040(1)(b) because all future dwellings are prohibited, then the property must be permanently restricted from future development by either a deed restriction or a conservation easement.
 - (a) A deed restriction or a conservation easement may be applied to any M49 property under 20 acres.
 - (b) A conservation easement must be applied to all M49 properties of 20 acres or more.
- (3) A deed restriction must:
 - (a) Permanently restrict the land from future development or land division authorized under M49;
 - (b) Not affect the ability of a landowner to partition or develop the property under the existing zoning;
 - (c) Designate the following entities as having separate and independent enforcement rights with respect to the deed restriction:
 - (A) An entity described in ORS 271.715(3) that is acceptable to the county;
 - (B) All future owners of the subject M49 property; and
 - (d) Be approved by the county and recorded with the county clerk.
- (4) A conservation easement must:
 - (a) Permanently restrict the land from future development or land division for any purpose other than agricultural use, forest use, public parkland devoted to passive, low intensity uses, conservation areas or similar nonstructural uses;
 - (b) Be accompanied by a title search and a legal description of the property sufficient to determine all owners of the property and all lienholders;

- (c) Designate an entity described in ORS 271.715(3) as having a third party right of enforcement of the conservation easement; and
- (d) Be recorded with the county clerk.

660-x-0060

Subsequent Transfers of Development Credits

- (1)

660-x-0070

Receiving Areas

A county may designate receiving areas based on criteria in Subsections (1), (2) and (3):

- (1) Receiving areas may include lands that are:
 - (a) Within Rural Residential exceptions areas zoned for 5- and 10-acre minimum lot sizes that are selected based on criteria in Subsection (2). Within these areas, transferred development credits may be used to permit a higher density of residential development that would otherwise be allowable in the underlying zone. Counties may utilize one of two approaches in determining allowable densities, including:
 - (A) The application of an overlay zone that permits either 5-acre or 2-acre minimum parcel sizes with the use of transferred development credits; or
 - (B) The assignment of a maximum number of transferred development credits that may be used for a given identified receiving area.
 - (b) Within substantially developed subdivisions in resource zones that are selected based on criteria in Subsection (2). Within these areas, transferred development credits may be used to permit development that would not otherwise be allowable in the underlying zone, if:
 - (A) The subdivision was approved prior to January 1, 1985;
 - (B) All lots are five acres or smaller in western Oregon or 10 acres or smaller in eastern Oregon;
 - (C) The subdivision is at least 50% built-out and at least 50% of the undeveloped lots are adjacent to a developed lot; and
 - (D) One dwelling per lot is permitted, with no new land divisions allowed.

(c) In EFU zones, for the purpose of allowing a lot or parcel with two dwellings to be partitioned if:

- (A) The dwellings existed as of December 6, 2007 and meet the standards in OAR 660-033-0130(8);
- (B) Neither dwelling was approved as an accessory farm dwelling, a family farm help dwelling or a temporary hardship dwelling;
- (C) If high-value farmland or forest land, at least one parcel is no larger than two acres;
- (D) If non high-value farmland or forest land, at least one parcel is no larger than five acres; and
- (E) Deed restrictions are recorded for both parcels that prohibit subsequent property line adjustments or the approval of accessory farm dwellings or family farm help dwellings.

(2) Receiving areas identified in paragraphs (1)(a) and (b) must be selected to minimize conflicts with nearby commercial agricultural and forest operations.

(3) Additional Credits. Within a rural reserve designated under ORS ###, establishment of each new dwelling under a TDC program requires two development credits.

Receiving areas under paragraphs (1)(a) or (b) may not include lands that are identified in OAR 660-x-0040(1)(c)(C) through (F).

660-x-0080

Utilization of Transferable Development Credits

(1) Any person may purchase M49 development credits, may accept ownership of development credits through transfer by gift, or may accept land in fee simple for the purpose of severing development rights. All resulting development credits may be used, resold, held for future use or sale, or permanently retired.

Comment [MC4]: Do we need this?

(2) A person who proposes to use transferable development credits on a property in a designated receiving area shall submit an application to the county for the use of such credits as part of an application for a Type II development permit. In addition to any other information required for the development permit, the application must be accompanied by:

(a) A copy of the Amended Final Order(s), and any deed restriction or conservation easement on the M49 property required by 0050,

- (b) The Deed or Deeds of Transferable Development Credits showing ownership of sufficient;
 - (c) A copy of the, if applicable, on the M49 property that meets the requirements of OAR 660-x-0050; and
 - (d) The total number of dwelling units proposed on the receiving area site, the development that could be built not using TDCs, and the incremental difference between the two.
- (3) The county shall notify DLCDC of the utilization of development credits within 30 days of approval of their use, including the jurisdiction of origin of the credits.

660-x-0090 Interjurisdictional Transfer of Development Credits

- (1) A county may allow the transfer of development interests from a sending area within one jurisdiction to a receiving area within another jurisdiction in the same region, as set forth in Section (2).
- (2) The regions within which counties may transfer development interests are as follows:
 - (a) Metro, to include Clackamas, Multnomah and Washington counties;
 - (b) Willamette Valley, to include Lane, Linn, Marion, Polk and Yamhill counties;
 - (c) Coastal, to include Clatsop, Columbia, Coos, Curry, Lincoln and Tillamook counties;
 - (d) Southern, to include Douglas, Jackson and Josephine counties;
 - (e) Central, to include Crook, Deschutes, Hood River, Jefferson, Klamath and Wasco counties; and
 - (f) Eastern, to include Baker, Gilliam, Grant, Harney, Lake, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa and Wheeler counties.
- (3) When development credits that are transferred from one jurisdiction to another cause a potential shift of ad valorem tax revenues between jurisdictions, the local governments may enter into an intergovernmental agreement under ORS 190.003 to 190.130 that provides for sharing between the local governments of the prospective ad valorem tax revenues derived from new development in the receiving areas.

660-x-0100 TDC Record Keeping

660-x-0110 TDC Bank Option

660-x-0120 Amendment