



# Oregon

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January 8, 2015

TO: Land Conservation and Development Commission

FROM: Katherine Daniels, Farm and Forest Lands Specialist  
Sarah Marvin, Measure 49 Specialist  
Matt Crall, Planning Services Division Manager

SUBJECT: **Agenda Item 6, January 22-23, 2015 LCDC Meeting**

**PUBLIC HEARING AND PROPOSED ADOPTION OF ADMINISTRATIVE RULES  
REGARDING TRANSFER OF DEVELOPMENT CREDITS FOR DWELLINGS  
AUTHORIZED BY MEASURE 49**

**I. AGENDA ITEM SUMMARY**

The Land Conservation and Development Commission (LCDC and/or commission) will hold a hearing to consider adopting new administrative rules (division 29) and amending existing administrative rules (divisions 4 and 27). These rules would create a framework that counties may use to establish systems for the transfer of development credits (TDC) for dwellings authorized by Measure 49.

The department recommends that the commission adopt the new rules and rule amendments.

For additional information about this report and about the rulemaking process, please contact Katherine Daniels, Farm and Forest Specialist, at 503-934-0069 or by email at [katherine.daniels@state.or.us](mailto:katherine.daniels@state.or.us).

**II. BACKGROUND**

In 2007 Oregon voters approved Measure 49 (M49) which authorized certain property owners to develop additional home sites. M49, in conjunction with Oregon Revised Statutes (ORS) 94.531, authorizes counties to establish a system for transferring these home site authorizations so that the development could occur in a different location. The proposed administrative rules would provide a framework for counties to adopt local ordinances to establish these systems. These systems will enable landowners to realize the value of their M49 authorizations without developing the property from which the claims arose. Landowners will be able, on a voluntary basis, to transfer their development interests under M49 from one property to another property that is more suitable for development. These systems will reduce the adverse impact of scattered M49 residential development on farm, forest and other resource land.

### **III. RECOMMENDED RULE LANGUAGE**

The complete text of the proposed rules is in Attachment A. Key provisions are described below, and other elements are summarized.

#### **A. Key Policy Elements of a Transfer System**

The three most important elements of a transfer system are:

- Sending properties – The source of transferable development credits.
- Bonus Credits – Some sending properties are higher priority for protection, and so bonus credits can be awarded to increase the incentive for transferring.
- Receiving properties – Where and how credits can be used.

##### 1. Sending Areas

A county would designate sending properties using the provision in OAR 660-029-0030.

Most properties that were approved for new dwellings under M49 will be eligible as sending properties. Some M49 authorizations gave the right to partition parcels that already had multiple existing dwellings, but did not authorize any new dwellings. Those M49 authorizations would not be eligible as sending properties. Development rights may be transferred from eligible properties for residential purposes on a 1:1 basis.

To be eligible, a property would need to have lawful access and be zoned for one of the following:

- Farmland pursuant to Goal 3
- Forest land pursuant to Goal 4
- Natural areas pursuant to Goals 5 or 8
- Willamette River Greenway pursuant to Goal 15
- Estuary pursuant to Goal 16
- Coastal shoreland pursuant to Goal 17

If a M49 property is not zoned for any of the purposes listed above, it would still be eligible if it falls into one of the categories that qualify for a bonus; however, these properties would not actually receive the bonus.

##### 2. Bonus Credits

OAR 660-029-0040 would authorize counties to award bonus credits for properties that are a high priority for conservation. The bonuses would be 0.2 credits for each of the five categories of attributes listed below, as applicable, and would apply to each M49 dwelling that is transferred (typically three dwellings per M49 claim).

- High-value farmland or forestland
- Recreational or cultural features
- Environmentally-sensitive features
- Natural hazards

- Groundwater-limited areas

Example 1: A M49 final order authorizes three new dwellings. The property is on high-value farmland along a Wild and Scenic River and in a flood hazard area. It qualifies in three categories, resulting in a bonus of 0.6 credits each. The total bonus would be 1.8 credits (0.6 x 3). Combined with the initial three credits for moving three dwellings, the owner would have 4.8 credits to transfer to receiving areas.

Example 2: The M49 property already had one dwelling when the owner applied for a claim, so the final order authorizes two new dwellings. The property is on high value forest land, is within a Conservation Opportunity Area designated by the Oregon Department of Fish and Wildlife, and includes a significant wetland designated on the county comprehensive plan. Because the Conservation Opportunity Area and the wetland are both part of the “Environmentally Sensitive” category, the property only qualifies in two categories, providing a bonus of 0.4 credits. The total bonus would be 0.8 credits (0.4 x 2). Combined with the initial two credits for moving two dwellings, the owner would have 2.8 credits to transfer to receiving areas.

Counties may award a further bonus to protect large properties. Properties of 240 acres or greater would receive a bonus of 1.0 credit, with pro-rated bonuses for properties between 80 and 240 acres.

To receive any bonus credits, the owner must agree to restrict virtually all future development on the M49 property. The owner could not transfer some credits and retain some M49 authorizations to be used on the M49 property. The owner could not transfer all of the M49 authorizations and then develop other dwellings allowed by the zoning on the property. This will require a permanent restrictive covenant or conservation easement on the property which extinguishes all remaining development rights under the existing zoning except for a narrow range of farm, forest and natural-resource uses. The conservation easement would most likely be held by a land trust, but counties and the department will both have the authority to independently enforce the restrictive covenant.

### 3. Receiving Areas

A county would designate receiving areas using the provisions in OAR 660-029-0080. The most common type of receiving area would be existing rural residential exception areas, which are typically zoned for 10-acre or 5-acre parcels. A property owner in a receiving area could use a TDC to divide their property to create 5-acre lots (in a 10-acre zone), and potentially create lots as small as 2 acres (in a 5-acre or 10-acre zone) if that is consistent with nearby parcels.

Another type of receiving area would be substantially-developed subdivisions in resource zones. The county would use the new rules to take an exception to Goals 3 or 4 under the “reasons” provisions. DLCD staff will propose the necessary amendments to OAR 660 division 4 to accomplish this for consideration by the commission at the March 12-13, 2015 meeting.

All receiving areas must be selected to be compatible with nearby farm and forest operations. Receiving areas may not include lands that are within urban reserves. Receiving areas could

include rural residential zones within rural reserves; however, these areas could only accept credits from sending properties also within the rural reserve. Any area that would qualify as a sending area cannot be a receiving area. There are additional types of land that must be excluded from receiving areas based on natural resource attributes and natural hazards. Designating an area as a receiving area is a voluntary decision by the county, so a county may decline to designate any area that would not be appropriate for further development.

## **B. Other Elements of a Transfer System**

### **1. Transfers Between Counties**

Counties may choose to enter into agreements with other counties to allow credits to be moved between counties. The rules would establish specific regions within which credits can be transferred. Transfers between regions would not be allowed.

### **2. Additional Transfers**

TDCs may be used, resold or held for future use or sale. Transfer of ownership must be reported to DLCD. When a M49 property is conveyed from the original claimant to a new owner, the new owner has ten years to use the dwelling authorization. This same ten-year deadline applies if a M49 credit is conveyed from the M49 claimant to a new owner.

### **3. Process and Roles**

OAR 660-029-0050 and -0090 define the process for how the county and DLCD would interact to process applications to create TDCs and to use TDCs.

If the county gives preliminary approval to create TDCs, then the county would request that DLCD issue an Amended Final Order for the M49 claim. TDCs may not be released by a county until the Amended Final Order and any applicable restrictive covenant or conservation easement are recorded. Counties will keep a permanent record of all documents and provide copies of these documents to the department.

### **4. Online Mapping and Tracking**

The department intends to prepare an online map and database showing the M49 properties that are eligible to create TDCs and the bonus credits that would apply; however the website would only give a preliminary indication because it would be up to the county to make the actual decisions. The department will track the TDCs that have been issued in all participating counties, and maintain a registry of ownership.

## **C. Conforming Amendments in Other rules**

In addition to the proposed rules in a new division 29, amendments are need to divisions 4 and 27 to allow Rural Residential receiving areas to accommodate infill development at parcel sizes as small as two acres.

1. Amend OAR 660-004-0040

This would create an exemption to the requirement for an exception to Goal 14 for the creation of a new lot or parcel below 10 acres in an exception area that is a receiving area for M49 TDCs.

2. Amend OAR 660-027-0070

This would create an exemption to the prohibition on changes to zoning of exception areas within rural reserves to allow smaller lot or parcel sizes than was allowed under the original exception for a receiving area for M49 TDCs.

3. New Rule in Division 4

Amendments are needed to OAR division 4 to allow for infill in substantially-developed subdivisions that are receiving areas, through a reasons exception process. This provision would be contained in a new rule to minimize confusion and not increase the complexity of OAR 660-004-0020 and 0022. This rule cannot, however, be created at the January LCDC meeting because the initial notice specified changes to OAR 660-004-0020 and 0022, and did not mention a potential new rule. The new rule can be adopted as a follow-up action at the March 12-13, 2015t commission meeting.

#### **IV. RULEMAKING ADVISORY COMMITTEE**

Chair Macpherson and department staff met with the Rules advisory committee (RAC) seven times between April and December, 2014. The diversity of background and experience of RAC members and willingness to work hard provided critical expertise and creativity in the crafting of rule language. The affiliations listed below are only for identification purposes, and participation does not necessarily constitute an endorsement by the local government or organization.

- Kelley Beamer & Mike Running – Oregon Coalition of Land Trusts
- Joe Fennimore – Marion County
- Jim Johnson – Oregon Department of Agriculture
- Mike McCallister – Clackamas County
- Steve McCoy – 1000 Friends of Oregon
- Dan O'Connor - Attorney with Huycke O'Connor Jarvis, LLP in Medford
- Gordon Root – Stafford Land Company, Inc. in Portland

At the final meeting on December 10, 2014, the RAC reach a general consensus on the rules; however, department staff was directed to make several changes and the members requested an opportunity to review the revised draft before committing to support the rules. The revised version was sent December 31, 2014 and responses are anticipated by January 12, 2015.

#### **V. COMMENTS RECEIVED**

No comments have been received as of December 31, 2014.

**VI. DEPARTMENT RECOMMENDATION AND DRAFT MOTIONS**

DLCD staff recommends that the commission adopt the new proposed division 29 and amendments to OAR 660, divisions 4 and 27. Three possible alternatives and draft motions are provided below.

1. The commission may adopt the proposed rule amendments as drafted.  
*I move to adopt new administrative rules to create division 29, and to adopt amendments to administrative rules in divisions 4 and 27 as presented in Attachment A to the staff report.*
  
2. The commission may adopt the proposed rules with amendments by the commission, by motion, at the January 22-23, 2015 meeting.  
*I move to adopt new administrative rules to create division 29, and to adopt amendments to administrative rules in divisions 4 and 27 as presented in Attachment A to the staff report, with the following revisions...*
  
3. The commission may direct department staff to prepare amendments to the proposed rule for the commission to consider at its March 12-13, 2015 meeting. If the commission chooses this option, the appropriate motion would be:  
*I move to direct staff to prepare amendments to the proposed rules to address the following issues...*

**VII. ATTACHMENTS**

- A. OAR 660 division 29
- B. OAR 660 division 4 and 27 amendments
- C. Step-by-Step Guide to Transferring Development Rights Granted Under Measure 49
- D. Maps: M49 Dwellings Statewide; Clackamas County; Washington County
- E. Measure 49, section 11, subsection (8)
- F. ORS 94.531

Oregon Administrative Rules  
Department of Land Conservation and Development

**DIVISION 29**

**MEASURE 49 TRANSFER OF DEVELOPMENT CREDITS SYSTEMS**

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**660-029-0000**

**Purpose**

In 2007 Oregon voters approved Measure 49 (M49), which authorized certain property owners to develop additional home sites. M49 also authorized counties to establish a system for the purchase and sale of severable development interests (known as transferable development credits or TDCs) for the purpose of allowing development to occur in a location that is different from the location in which the M49 development interest arises (subsection 11(8) of chapter 424, Oregon Laws 2007 and ORS 94.531). The purpose of this division is to provide a framework for counties to adopt local ordinances to establish these systems. These systems will enable landowners to realize the value of their M49 authorizations without developing the property from which the claims arose. These systems will allow landowners, on a voluntary basis, to transfer

their development interests under M49 from one property to another property at a more suitable location, reducing the adverse impact of scattered M49 residential development on farm, forest and other resource land.

## **660-029-0010**

### **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.
- (2) “Measure 49” or “M49” means 2007 Oregon Laws Chapter 424 (Ballot Measure 49); 2009 Oregon Laws Chapter 855 (also known as House Bill 3225); 2010 Oregon Laws Chapter 8 (also known as Senate Bill 1049); 2011 Oregon Laws Chapter 612 (also known as House Bill 3620) and OAR 660-041-0000-0180.
- (3) “Measure 49 Property” or “M49 property” means the entire property authorized for home site development as described either:
  - (a) In the final order issued by the Department of Land Conservation and Development (department) for the supplemental review of Measure 37 claims pursuant to Measure 49;  
or
  - (b) In a court order issued upon judicial review of a department M49 order described in subsection (a).
- (4) “Receiving area” means a county-designated area of land to which a holder of development credits generated from a sending property may transfer the development credits and within which additional residential uses not otherwise allowed are allowed by reason of the transfer.
- (5) “Sending property” means a M49 property that qualifies under OAR 660-029-0030, from which development credits generated from forgone M49 home site development are transferable, for residential uses not otherwise allowed, to a receiving area.
- (6) “Substantially-developed subdivision” means a legal subdivision created prior to acknowledgment of the county comprehensive plan under ORS 197.251 in which more than 50 percent of the lots are developed with a dwelling and at least 50 percent of the undeveloped lots are adjacent to a developed lot.
- (7) “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.

## **660-029-0020**

### **County Authority to Establish a M49 TDC System**

Counties may establish a system, consistent with this division, to allow for the creation and transfer of TDCs from M49 properties. Counties that choose to adopt a M49 TDC system shall:

- (1) Adopt a local ordinance that meets the requirements of this rule; and
- (2) Amend the comprehensive plan and implementing ordinances to:
  - (a) Designate M49 properties that are eligible sending properties as provided in OAR 660-029-0030;
  - (b) Establish bonus credits, if any, that will apply to certain sending properties as provided in OAR 660-029-0040;
  - (c) Designate receiving areas or create a process for property owners to apply for designation of lands as receiving areas, as provided in OAR 660-029-0080;
  - (d) Adopt any applicable overlay zones or other measures necessary to implement the TDC system;
  - (e) Approve the use of the M49 Restrictive Covenant adopted as “Exhibit A” to this division; and
  - (f) Determine whether the TDC system will provide for transfer to other counties in the region, as provided in OAR 660-029-0100.

## **660-029-0030**

### **Sending Properties**

- (1) A county may only designate sending properties consisting of M49 properties:
  - (a) For which new dwellings have been authorized by a M49 final determination;
  - (b) That have lawful access; and
  - (c) That are located:
    - (A) Within a zone or overlay zone adopted pursuant to Goal 3, 4, 15, 16, 17 or 18;
    - (B) Within a zone or overlay zone explicitly adopted for conservation or preservation of natural areas pursuant to Goals 5 or 8; or
    - (C) In an area identified in OAR 660-029-0040(3)(b) through (e).

(2) Sending properties exclusions: Notwithstanding section (1), a county may designate areas or types of M49 properties that are not eligible as sending properties because the M49 property is not buildable or for other reasons. If a county excludes some M49 properties, it shall either:

- (a) Include mapping of such excluded lands in the ordinance establishing the TDC system; or
- (b) Adopt clear and objective standards in the ordinance for case-by-case determinations of sending area exclusions through a ministerial review.

#### **660-029-0040**

#### **Calculation and Types of Transferable Development Credits**

When an applicant submits an application to a county under OAR 660-029-0050, the county shall determine the number of credits that may be transferred from the applicable M49 property consistent with this rule.

- (1) One credit is available for each new dwelling authorized in the M49 final order issued by the department, subject to the conditions of approval or court order.
- (2) A county may grant bonus credits as provided in section (3) as an additional incentive to relocate potential development from M49 properties that are a high priority for conservation. Bonus credits may only be granted if the M49 property meets all of the requirements in subsections (a) through (c) below.
  - (a) The M49 property is within a zone or overlay zone described in OAR 660-029-0030(1)(c)(A) or (B);
  - (b) No dwellings authorized by M49 have been developed on the M49 property. A M49 property with one existing permanent dwelling as of January 1, 2005, may qualify for bonus credits; and
  - (c) The M49 property in its entirety is subject to a conservation easement or restrictive covenant that prohibits future development in accordance with OAR 660-029-0060.
- (3) A county may grant a bonus of up to 0.2 credits for each subsection (a) through (e) for which the M49 property qualifies, regardless of the number of specific attributes listed under each subsection. Bonus credits may be applied to each M49 dwelling authorization transferred. The bonus allowed in this section may not exceed an additional 1.0 credit per dwelling.
  - (a) The M49 property is high-value farmland or high-value forestland as defined in ORS 195.300 and OAR 660-041-0130.

(b) Recreational and Cultural Areas:

- (A) Any portion of the M49 property is within a scenic, historic, cultural or recreational resource identified as significant on a local inventory as part of an acknowledged comprehensive plan or land use regulation.
- (B) Any portion of the M49 property is within or shares a boundary with a National Park, National Monument, National Recreation Area, National Seashore, National Scenic Area, Federal Wild and Scenic River and associated corridor established by the federal government, State Scenic Waterway or State Park.

(c) Environmentally Sensitive Areas:

- (A) Any portion of the M49 property is within an area designated as Willamette River Greenway, estuarine resources, coastal shoreland, or beaches and dunes designated in an acknowledged comprehensive plan or land use regulation implementing Goals 15-18.
- (B) Any portion of the M49 property is within or shares a boundary with a National Wilderness Area, National Area of Critical Environmental Concern, National Wildlife Refuge or Area, Federal Research Natural Area, National Outstanding Natural Area, State Wilderness Area, State Natural Area or Site, private conservation land designated for habitat or species conservation under a conservation easement, or a natural area or open space identified as significant on a local inventory as part of an acknowledged comprehensive plan or land use regulation as specified in OAR 660-023-0160 and -0220.
- (C) Any portion of the M49 property is within an area designated by the Oregon Department of Fish and Wildlife (ODFW) as a Conservation Opportunity Area as mapped in 2006.
- (D) Any portion of the M49 property is within or shares a boundary with a riparian corridor as defined in OAR 660-023-0090.
- (E) Any portion of the M49 property is within a wetland listed on the statewide wetland inventory or a local inventory of significant wetlands adopted as part of an acknowledged comprehensive plan or land use regulation or wetland conservation plan as defined in OAR 660-023-0100.

(d) Natural Hazard Areas:

- (A) The M49 property is predominantly within the “XXL 1 Tsunami Inundation” zone delineated on the Tsunami Inundation Maps published by the Oregon Department of Geology and Mineral Industries in 2014.

- (B) Any portion of the M49 property is within a Special Flood Hazard Area or floodway on the Flood Insurance Rate Maps adopted by a county or on a preliminary map with a Letter of Final Determination (LFD) issued by the Federal Emergency Management Agency, whichever is most recent.
- (C) Any portion of the M49 property has:
  - (i) A fire hazard rating of “Very High: 2.2+” on the “Community at Risk: Hazard Rating” map published by the Oregon Department of Forestry (ODF) on October 1, 2006; or
  - (ii) A fire hazard rating of “High: 1.9-2.1” on the “Community at Risk: Hazard Rating” map published by ODF on October 1, 2006 and that is outside of a local public fire protection district or agency.
- (D) The M49 property is predominantly within an area identified as, or within the path of, a landslide or debris flow hazard or in which a geotechnical report would be required to site a dwelling as specified in the acknowledged comprehensive plan or land use regulation or an adopted Natural Hazard Mitigation Plan.
- (E) The M49 property is predominantly within an area designated in an acknowledged comprehensive plan or land use regulation or an adopted Natural Hazard Mitigation Plan as a significant natural hazard pursuant to Goal 7.
- (e) Any portion of the M49 property is within an area designated as a critical ground water area or as a ground water limited area by the Oregon Water Resources Department or Water Resources Commission before January 1, 2015, unless water can be provided by an existing community or public water system.
- (4) If a M49 property qualifies for bonus credits under sections (2) and (3), a county may also grant bonus credits based on the size of the property protected from development as follows:
  - (a) Fewer than 80 acres: No additional credit
  - (b) 80 acres or more, and fewer than 120 acres: 0.2 credits
  - (c) 120 acres or more, and fewer than 160 acres: 0.4 credits
  - (d) 160 acres or more, and fewer than 200 acres: 0.6 credits
  - (e) 200 acres or more, and fewer than 240 acres: 0.8 credits
  - (f) 240 acres or more: 1.0 credit

- (5) A TDC system adopted by Clackamas, Multnomah, or Washington County must establish two types of credits.
  - (a) TDCs from sending properties within a rural reserve designated under OAR 660-027-0020(2) shall be known as type A credits and may be used in any receiving area; and
  - (b) TDCs from sending properties outside rural reserves designated under OAR 660-027-0020(2) shall be known as type B credits and may only be used in receiving areas outside of rural reserves.
  
- (6) A TDC system adopted by Douglas or Lane County must establish two types of credits.
  - (a) TDCs from sending properties within the Oregon Coastal Zone as defined in OAR 660-035-0010(1) shall be known as type A credits and may be used in any receiving area.
  - (b) TDCs from sending properties outside of the Oregon Coastal Zone shall be known as type B credits and may only be used in receiving areas outside of the Oregon Coastal Zone.

**660-029-0050**

**Process for Creating Transferable Development Credits**

- (1) An applicant may apply to a county that has established a M49 TDC system under OAR 660-029-0020 to convert dwelling authorizations under M49 into TDCs. The county shall evaluate the application based on the locally-adopted M49 TDC ordinance and this division to determine whether the dwelling authorizations under M49 are eligible for conversion to TDCs, and how many credits will be created, including any bonus credits.
  
- (2) When a county preliminarily approves an application, the county will:
  - (a) Send notice to the department, including the application, the preliminary approval, any proposed restrictive covenant and any proposed conservation easement; and
  - (b) Request an Amended Final Order and TDC certificates from the department.
  
- (3) The department will review the county request and determine its consistency with this division. If consistent, the department will:
  - (a) Issue an Amended Final Order documenting the number of dwelling authorizations under M49 that have been converted to TDCs and the number that remain; and
  - (b) Issue the applicable number of TDC certificates to the county.

- (4) If an applicant applies to convert dwelling authorizations under M49 to TDCs from a property that has already been divided pursuant to M49, then the partition or subdivision must be vacated by the county prior to final approval.
- (5) If an applicant receives preliminary approval for bonus credits under OAR 660-029-0040, the applicant must convey a conservation easement or place a restrictive covenant on the property that meets the requirements of OAR 660-029-0060, record it with the county clerk and provide a copy to the county, prior to final approval.
- (6) The Amended Final Order must be recorded in the deed records of the county.
- (7) When all of the requirements of this rule have been met, the county shall give final approval, issue the TDC certificates to the applicant and provide the complete record of the decision to the department.
- (8) The county will keep a permanent record of amended final orders, vacations, restrictive covenants and conservation easements that apply to M49 sending properties to ensure that unauthorized development does not occur.

#### **660-029-0060**

##### **Protection of Sending Properties**

- (1) To qualify for bonus credits under OAR 660-029-0040, the M49 property must be permanently restricted from future development or land division for any purpose other than:
  - (a) Farm use as defined in ORS 215.203;
  - (b) Agricultural buildings as defined in ORS 455.315;
  - (c) Replacement dwellings as provided in OAR 660-033-0130(8) and OAR 660-006-0025(3)(p);
  - (d) Farm stands as provided in OAR 660-033-0130(23);
  - (e) Forest operations as defined in OAR 660-006-0005;
  - (f) Uses to conserve soil, air and water quality and to provide for wildlife and fisheries resources;
  - (g) Conservation areas or natural resource uses that do not require a land use decision; and; and
  - (h) Home occupations as provided in OAR 660-033-0120, OAR 660-006-0025(4)(s) and local regulations.

- (2) If the M49 property is fewer than 20 acres, then the restriction required by section (1) may be accomplished by either a restrictive covenant or a conservation easement.
- (3) If the M49 property is 20 acres or more, then the restriction required in section (1) must be accomplished by a conservation easement conveyed to a willing holder identified in ORS 271.715(3). Exception: The restriction required by section (1) on a M49 property 20 acres or more may be accomplished with a restrictive covenant if the county provides notice to the department 60 days prior to final approval, and no eligible holder has accepted a conservation easement.
- (4) A restrictive covenant must:
  - (a) Meet the requirements of OAR 660-029-0020(2)(e);
  - (b) Authorize the county and the department to independently enforce the restrictive covenant;
  - (c) Be accompanied by a title search and a legal description of the property sufficient to determine all owners of the property and all lienholders; and
  - (d) Be recorded in the deed records for the county in which the M49 property is located.
- (5) A conservation easement must:
  - (a) Be reviewed by the department for compliance with this rule prior to recording;
  - (b) Authorize the department to independently enforce the conservation easement;
  - (c) Be accompanied by a title search and a legal description of the property sufficient to determine all owners of the property and all lienholders; and
  - (d) Be recorded in the deed records for the county in which the M49 property is located.

#### **660-029-0070**

##### **Conveyance of TDC Ownership**

- (1) Prior to conveying ownership of a TDC, the owner of the TDC must submit notice of the conveyance to the department, using an online form provided by the department.
- (2) On receipt of a notice of conveyance, the department shall acquire verification of the conveyance from the previous owner.
- (3) Conveyance of a TDC is a conveyance for the purposes of subsection 11(6) of chapter 424, Oregon Laws 2007. Upon transfer of the TDC to a person other than the spouse of the owner who obtained the authorization or the trustee of a revocable trust in which the owner who

obtained the authorization is the settlor, the person receiving the TDC must use the TDC within 10 years of the conveyance. If the M49 property was conveyed prior to creation of the TDCs, the owner must use the TDCs within 10 years of the first conveyance.

## **660-029-0080**

### **Designation of Receiving Areas**

A county may only designate receiving areas as provided in sections (1) and (2) of this rule, subject to the limitations of sections (3) and (4).

- (1) Rural Residential exceptions areas may be designated as receiving areas. A local TDC system may authorize a higher density of residential development on all or portions of such areas than is allowable by OAR 660-004-0040, as provided in OAR 660-029-0090(2).
- (2) Substantially-developed subdivisions in areas that are planned and zoned for farm or forest use outside rural reserves may be designated as receiving areas. A local TDC system may authorize residential development not otherwise allowable in the underlying farm or forest zone, provided:
  - (a) The subdivision was approved prior to January 1, 1985;
  - (b) All existing lots in the subdivision are five acres or smaller if the property is in western Oregon as defined in ORS 321.257 or 10 acres or smaller if the property is in eastern Oregon as defined in ORS 321.805;
  - (c) At least 50% of the lots in the subdivision are developed with a dwelling and at least 50 percent of the undeveloped lots are adjacent to a developed lot;
  - (d) One dwelling per lot is permitted, with no new land divisions allowed; and
  - (e) The county approves a reasons exception pursuant to OAR 660, division 4.
- (3) Receiving areas must:
  - (a) Meet the requirements of ORS 215.296; and
  - (b) Be selected so as to minimize conflicts with nearby commercial agricultural and forest operations. Methods for the county to minimize conflicts may include but are not limited to:
    - (A) Minimizing the selection of receiving areas that are adjacent to high-value farmland; and
    - (B) Restricting increases in allowed density to the interior of applicable exceptions areas.

(4) Receiving areas may not include any land:

- (a) That meets the conditions in OAR 660-029-0040(3)(b) through (e), except that the term “M49 property” is replaced with “land”;
- (b) That is a sending property designated as provided in OAR 660-029-0010;
- (c) Within urban reserves designated under OAR 660, divisions 21 or 27;
- (d) Within 100 feet of a riparian corridor as defined in OAR 660-023-0090;
- (e) Within 100 feet of a wetland listed on the statewide wetland inventory or a local inventory of significant wetlands adopted as part of a comprehensive plan or land use regulation as defined in OAR 660-023-0100;
- (f) Within any significant Goal 5 resource site documented and adopted by a local government as a part of a comprehensive plan or land use regulation as defined in OAR 660-023-0010(9);
- (g) Within one mile of the “XXL 1 Tsunami Inundation” zone delineated on the Tsunami Inundation Maps published by the Oregon Department of Geology and Mineral Industries in 2014;
- (h) Within a Special Flood Hazard Area or within an area mapped as “shaded X” or designated “500 year flood plain” on the Flood Insurance Rate Maps adopted by a county or on a preliminary map with a Letter of Final Determination (LFD) issued by the Federal Emergency Management Agency, whichever is most recent;
- (i) Within an area with a fire hazard rating of “High: 1.9-2.1” or “Very High: 2.2+” as designated on the “Community at Risk: Hazard Rating” map published by the Oregon Department of Forestry on October 1, 2006;
- (j) Within an area identified as, or within the path of, a landslide or debris flow hazard or in which a geotechnical report would be required to site a dwelling as specified in the acknowledged comprehensive plan or land use regulation or an adopted Natural Hazard Mitigation Plan; or
- (k) Within an area designated in an acknowledged comprehensive plan or land use regulation or an adopted Natural Hazard Mitigation Plan as a natural hazard pursuant to Goal 7.

(5) A county may exclude any additional land from receiving areas.

## **660-029-0090**

### **Process for Using Transferable Development Credits**

- (1) A person who proposes to use TDCs on property in a receiving area shall submit an application to the county accompanied by TDC certificates sufficient to permit the proposed development.
- (2) If TDCs are used in a rural residential receiving area under the provisions of OAR 660-029-0080(1), then the property may be divided to site the additional dwelling or dwellings. New lots or parcels may be as small as five acres in all cases. New lots or parcel may be smaller than five acres if the proposed size is equal to or greater than the average size of lots and parcels within exception areas within one-half mile of the edge of the subject property. The new lots or parcels may not be smaller than two acres in any case.
- (3) If an applicant proposes to use a TDC on a lot or parcel that is partially within the receiving area and partially outside of the receiving area, then the dwelling and all supporting infrastructure authorized by the TDC must be located entirely within the receiving area.
- (4) The county shall evaluate the application based on the locally-adopted TDC ordinance and the provisions of this division in order to determine the type and number of credits that are required to be submitted. Based on this evaluation, the county may preliminarily approve the application and shall request verification from the department of the type and number of credits that belong to the applicant, using an online form provided by the department.
- (5) The department shall verify the type and number of credits that belong to the applicant.
- (6) Following department verification, the county may approve the application and shall notify the department within 30 days of any approval.

## **660-029-0100**

### **Interjurisdictional Transfer of Development Credits**

- (1) Counties may enter into cooperative agreements under ORS chapter 195 to establish a system for the transfer of TDCs between the counties that are parties to the agreement, subject to the limitations in section (2).
- (2) TDCs may only be transferred within the regions described below:
  - (a) Metro, including Clackamas, Multnomah and Washington counties;
  - (b) Willamette Valley, including Benton, Linn, Marion, Polk and Yamhill counties, and that portion of Lane County outside of the Coastal Zone defined in OAR 660-035-0010(1).

- (c) Coastal, including Clatsop, Columbia, Coos, Curry, Lincoln and Tillamook counties and those portions of Douglas and Lane counties in the Coastal Zone defined in OAR 660-035-0010(1).
  - (d) Southern, including Jackson and Josephine counties, and that portion of Douglas County outside the Coastal Zone defined in OAR 660-035-0010(1).
  - (e) Central, including Crook, Deschutes, Hood River, Jefferson, Klamath and Wasco counties.
  - (f) Eastern, including Baker, Gilliam, Grant, Harney, Lake, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa and Wheeler counties.
- (3) Interjurisdictional TDC programs that involve two types of credits may authorize the transfer of credits to another jurisdiction within the same region, in accordance with this rule and the provisions of OAR 660-029-0040(5) and (6).

**660-029-0110**

**TDC Bank Option**

A county or regional or state agency may establish a TDC bank to facilitate:

- (1) Buying TDCs from M49 sending properties;
- (2) Selling TDCs for potential use in receiving areas;
- (3) Managing funds available for the purchase and sale of TDCs;
- (4) Serving as a clearinghouse and information source for buyers and sellers of TDCs; and
- (5) Accepting donations of TDCs from M49 sending properties.

**660-029-0120**

**Amending or Abolishing a TDC System**

If a county amends or abolishes a TDC system, the county shall notify the owners of all TDCs that have not been used. The county must allow at least 12 months for an owner of TDCs to use them under the prior system.

Oregon Administrative Rules  
Department of Land Conservation and Development

**AMENDMENTS TO DIVISIONS 4 AND 27**

Within OAR 660-027-0070 *Planning of Urban and Rural Reserves*, amend section (5) as follows:

- (5) Notwithstanding the prohibition in sections (2) through (4) of this rule a county may amend its comprehensive plan or land use regulations as they apply to land in an urban or rural reserve that is subject to an exception to Goals 3 or 4, or both, acknowledged prior to designation of the subject property as urban or rural reserves, in order to authorize an alteration or expansion of uses **or lot or parcel sizes** allowed on the land under the exception provided:
- (a) The alteration or expansion would comply with the requirements described in ORS 215.296, applied whether the land is zoned for farm use, forest use, or mixed farm and forest use;
  - (b) The alteration or expansion conforms to applicable requirements for exceptions and amendments to exceptions under OAR chapter 660, division 4, and all other applicable laws; [~~and~~]
  - (c) The alteration or expansion would not expand the boundaries of the exception area unless such alteration or expansion is necessary in response to a failing on-site wastewater disposal system[~~;~~]; **and**
  - (d) **An alteration to allow creation of smaller lots or parcels than was allowed on the land under the exception complies with the requirements of OAR chapter 660, division 29.**

Within OAR 660-004-0040 *Application of Goal 14 to Rural Residential Areas*, add a new subsection to section (8) as follows:

- (h) Notwithstanding the provisions of subsection (g), a county may allow the creation of lots or parcels as small as two acres without an exception to Goal 14 in an existing rural residential exception area as a designated receiving area for the transfer of Measure 49 development interests, as provided in OAR 660-029-0080 and 660-029-0090.**

# Step-by-Step Guide to Transferring Measure 49 Dwelling Authorizations

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The process has three elements that can occur in parallel or sequentially:

- Convert
- Transfer
- Use

## **Convert**

A Measure 49 (M49) property owner or a potential buyer of transferable development credits (TDCs) may consult a database and maps on the website of the Oregon Department of Land Conservation and Development (DLCD) for a preliminary determination of whether their M49 home site authorizations are eligible to be converted into TDCs and a preliminary estimate of the number of credits that would result.

1. The M49 property owner applies to the county to convert their M49 authorizations into TDCs. The application indicates how many authorizations will be converted, whether bonus credits are sought, whether any prior partitions were based on the M49 authorizations, and whether the application is linked to another land use application to immediately use the credits.
2. The county evaluates the application based on the locally-adopted ordinance and the statewide administrative rules to determine whether the M49 authorizations are eligible for conversion, whether any prior partitions will need to be vacated, and how many credits will be created, including any bonus credits.
3. If the county gives preliminary approval to the application, including the vacation of any prior partitions, it then requests an Amended Final Order (AFO) and TDC certificates from DLCD.

*(Steps 4 and 5 can be done in parallel)*

4. If the applicant is requesting bonus credits, the applicant signs a conservation easement or a restrictive covenant acceptable to DLCD, records it with the county clerk, and provides a copy to the county.
5. DLCD reviews the county request and then:
  - a) issues an AFO documenting the number of dwellings authorized under M49 that have been converted to TDCs and the number that remain for use on the M49 property;
  - b) issues the applicable number of TDC certificates with unique serial numbers to the county; and
  - c) enters the new TDCs into the DLCD database.

6. The county gives final approval and then:
  - a) records the AFO in the deed records maintained by the county clerk;
  - b) provides a copy of the recorded AFO and any applicable restrictive covenant or conservation easement to DLCD; and
  - c) provides the TDC certificates to the applicant.

If the credits are not being immediately used in a linked land use application, then the owner has the option to:

- Transfer the credits (by sale or otherwise) to a new owner.
- Hold onto the credits for future transfer or use.

## **Transfer**

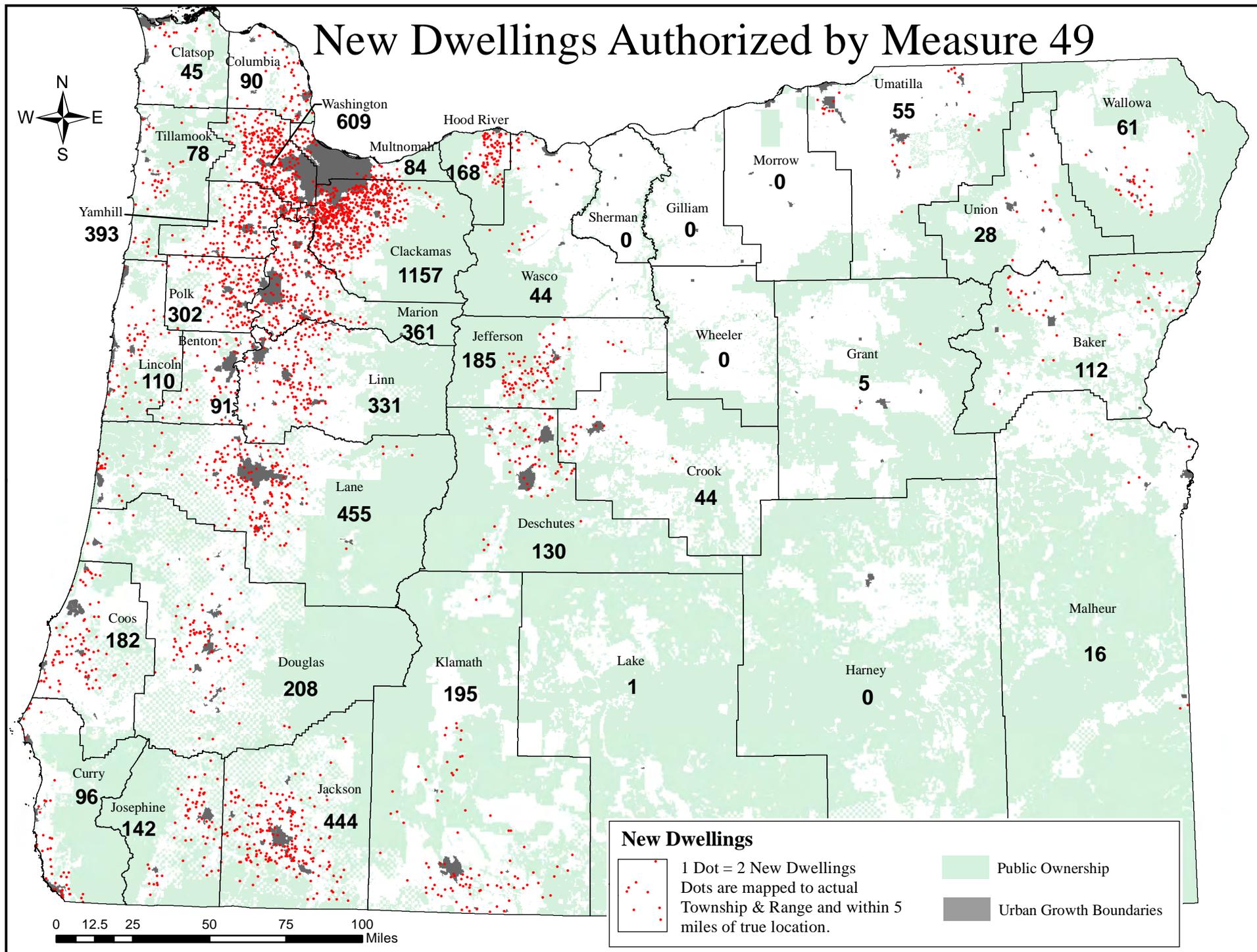
1. The current owner of a credit uses the DLCD website to submit notice of a transfer of ownership.
2. DLCD sends a confirmation to the owner on file to prevent fraudulent transfers.
3. DLCD updates the database to reflect the new owner.

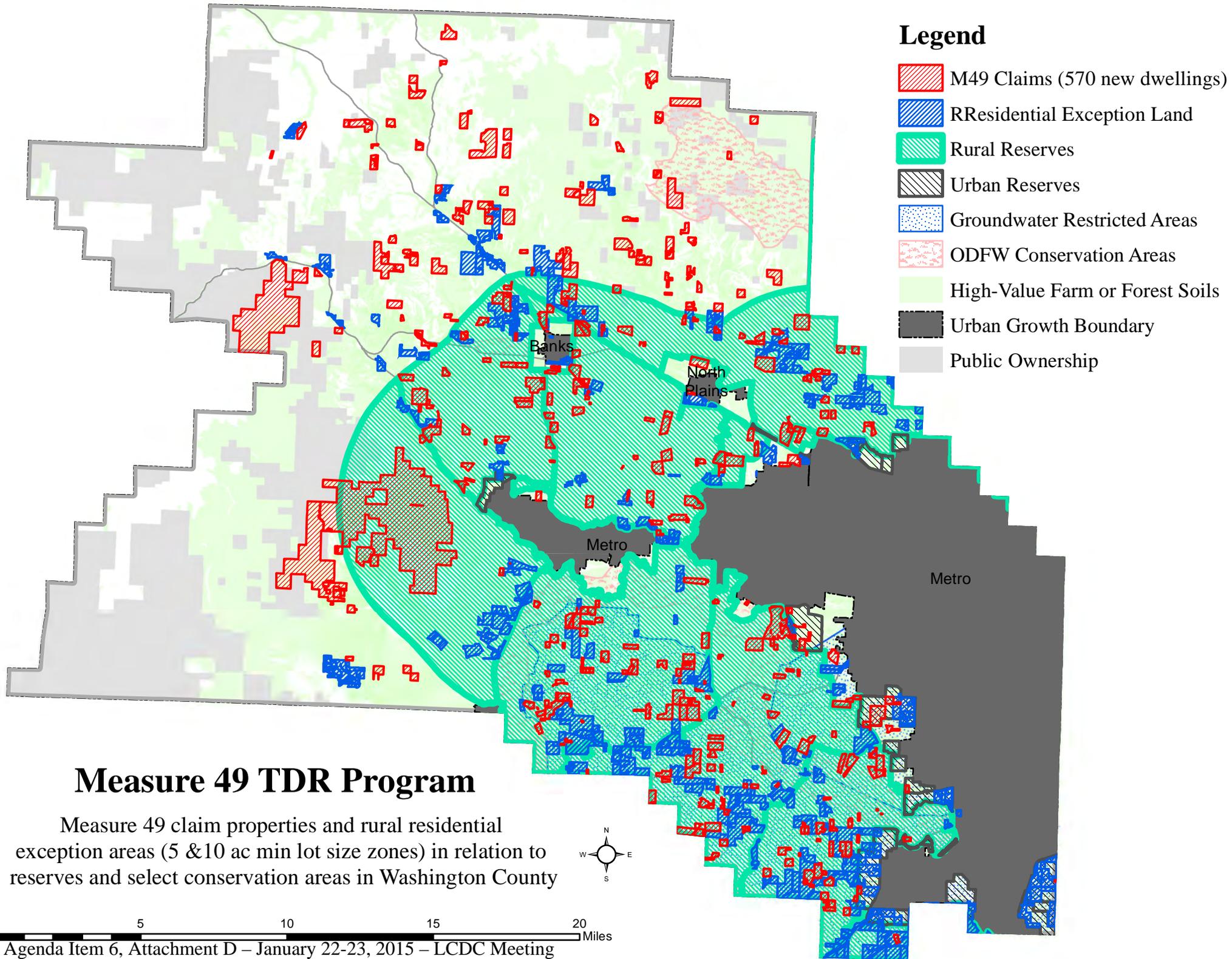
The new owner of a credit has the same options: transfer, use, or hold.

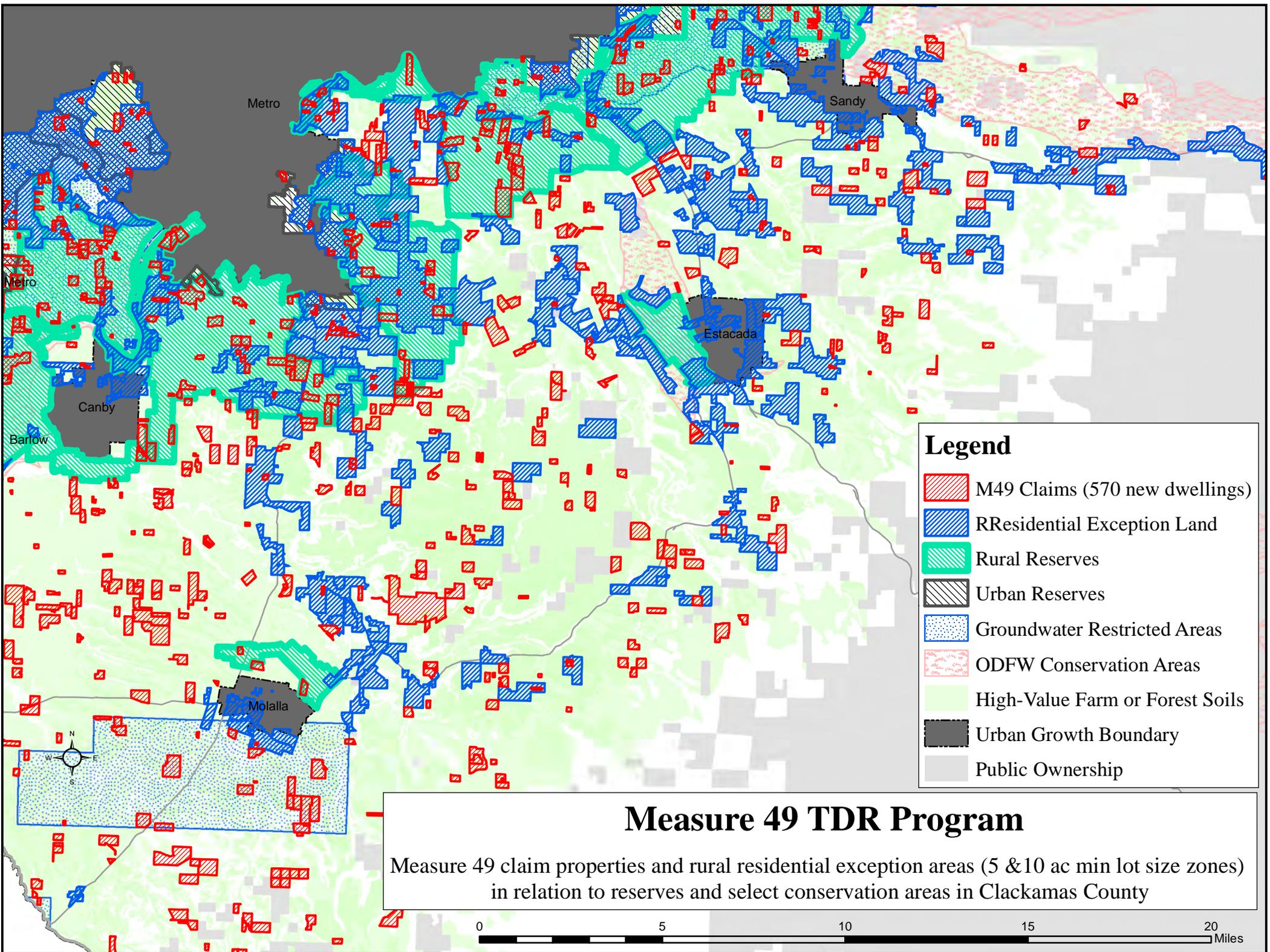
The DLCD database will make information available on the internet to help connect buyers and sellers of credits, and to authenticate who owns credits.

## **Use**

1. A person who is using TDCs applies to the county for a permit. The application indicates the proposed development that would not otherwise be allowed, how many credits are required, and whether the application is linked to an application that is creating the TDCs or is using previously created TDCs.
2. The county provides notice of the application to DLCD and requests verification that the credits are available and belong to the applicant.
3. DLCD consults the database to verify the credits and their ownership, and provides the results to the county.
4. The county evaluates the application based on the locally-adopted ordinance and the statewide administrative rules to determine whether the proposed development can be authorized.
5. If the county approves the application, it issues preliminary plat approval, building permit, or other appropriate permits to the applicant, and provides notice to DLCD, including all supporting documents.
6. DLCD updates the database to record that the credits have been used.
7. The applicant proceeds with the development through the county's current processes, in compliance with current siting and development standards.







**Legend**

-  M49 Claims (570 new dwellings)
-  R Residential Exception Land
-  Rural Reserves
-  Urban Reserves
-  Groundwater Restricted Areas
-  ODFW Conservation Areas
-  High-Value Farm or Forest Soils
-  Urban Growth Boundary
-  Public Ownership

**Measure 49 TDR Program**

Measure 49 claim properties and rural residential exception areas (5 & 10 ac min lot size zones) in relation to reserves and select conservation areas in Clackamas County



“Measure 49”  
Chapter 424 Oregon Laws 2007

**SECTION 11.**  
**(Development Standards; Transferability)**

...

(8) A person that is eligible to be a holder as defined in ORS 271.715 may acquire the rights to carry out a use of land authorized under sections 5 to 11 of this 2007 Act from a willing seller in the manner provided by ORS 271.715 to 271.795. Metro, cities and counties may enter into cooperative agreements under ORS chapter 195 to establish a system for the purchase and sale of severable development interests as described in ORS 94.531. A system established under this subsection may provide for the transfer of severable development interests between the jurisdictions of the public entities that are parties to the agreement for the purpose of allowing development to occur in a location that is different from the location in which the development interest arises.

The complete text of Measure 49 is available online

[https://www.oregonlegislature.gov/bills\\_laws/lawsstatutes/2007orLaw0424.html](https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2007orLaw0424.html)

Oregon Revised Statutes  
Chapter 94 — Real Property Development  
2013 Edition

TRANSFERABLE DEVELOPMENT CREDITS

**94.531 Severable development interest in real property; transferable development credit.**

- (1) The governing body of a city or county is authorized to recognize a severable development interest in real property. The governing body of the city or county may establish a system for the purchase and sale of development interests. The interest transferred shall be known as a transferable development credit. A transferable development credit shall include the ability to establish in a location in the city or county a specified amount of residential or nonresidential development that is different from development types or exceeds development limitations provided in the applicable land use regulations for the location. All development authorized or approved using transferable development credits shall comply with the land use planning goals adopted under ORS 197.225 and the acknowledged comprehensive plan.
- (2) The ability to develop land from which credits are transferred shall be reduced by the amount of the development credits transferred, and development on the land to which credits are transferred may be increased in accordance with a transfer system formally adopted by the governing body of the city or county.
- (3) The holder of a recorded mortgage encumbering land from which credits are transferred shall be given prior written notice of the proposed conveyance by the record owner of the property and must consent to the conveyance before any development credits may be transferred from the property.
- (4) A city or county with a transferable development credit system shall maintain a registry of all lots or parcels from which credits have been transferred, the lots or parcels to which credits have been transferred and the allowable development level for each lot or parcel following transfer.
- (5) A city or county, or an elected official, appointed official, employee or agent of a city or county, shall not be found liable for damages resulting from any error made in:
  - (a) Allowing the use of a transferable development credit that complies with an adopted transferable development credit system and the acknowledged comprehensive plan; or
  - (b) Maintaining the registry required under subsection (4) of this section. [1999 c.573 §1]

*Note: 94.531 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 94 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.*

Available online:

[https://www.oregonlegislature.gov/bills\\_laws/ors/ors094.html](https://www.oregonlegislature.gov/bills_laws/ors/ors094.html)