

LAND CONSERVATION AND DEVELOPMENT DEPARTMENT

**DIVISION 41
MEASURE 49**

Existing Claim Rules

(Measure 37 Claims, Including Supplemental Review Under Ballot Measure 49)

660-041-0000

Purpose and Applicability

(1) The purpose of OAR 660-041-0000 to 660-041-0150 is to implement Chapter 424, Oregon Laws 2007 (2007 Oregon Ballot Measure 49) by establishing procedures for Supplemental Review of Measure 37 Claims. These rules also contain requirements for notice of applications and decisions regarding Measure 37 Permits, and clarify when a DLCD Measure 37 Waiver was required in addition to a waiver from a city or county. Finally, these rules also explain the effect of Measure 49 on DLCD Measure 37 Waivers.

(2) OAR 660-041-0010 applies to all Claims, Measure 37 Permits and DLCD Measure 37 Waivers that are subject to OAR 660-041-0020 to 660-041-0160, as well as to the Supplemental Review of Measure 37 Claims under OAR 660-041-0080 to 660-041-0160.

(3) OAR 660-041-0020 applies only to Claims that were received by DAS after December 4, 2006 and before December 6, 2007, and that are based on one or more DLCD Regulations.

(4) OAR 660-041-0030 applies to applications for and decisions on a Measure 37 Permit filed or made on or after February 20, 2007.

(5) OAR 660-041-0040 to 660-041-0070 apply to all DLCD Measure 37 Waivers.

(6) OAR 660-041-0080 to 660-041-0160 apply to the Supplemental Review of a Claim by DLCD.

Stat. Auth.: ORS 197.040, 197.065 & Ch. 424, OL 2007

Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065, 197.353 & Ch. 424, OL 2007

660-041-0010

Definitions

The following definitions apply to OAR 660-041-0000 to 660-041-0160:

(1) "Agency" has the meaning provided by ORS 183.310.

(2) "Claim" means a written demand for compensation under ORS 197.352 (2005) that was filed with the State of Oregon before December 6, 2007. If the Claim was filed with the State of Oregon after June 28, 2007, it qualifies as a Claim only if a corresponding Claim for the Measure 37 Claim Property was filed prior to that date with the city or county with land use jurisdiction over the Measure 37 Claim Property.

(3) "Claimant" means a person who submitted a Claim.

(4) "DAS" means the Department of Administrative Services.

(5) "DLCD" means the Department of Land Conservation and Development.

(6) "DLCD Measure 37 Waiver" means a decision by LCDC or DLCD that was made before December 6, 2007 under ORS 197.352 (2005) to modify, remove or not apply one or more DLCD Regulations to allow a Claimant to use the Measure 37 Claim Property for a use that was permitted when the Claimant acquired the Measure 37 Claim Property.

(7) "DLCD Regulation" means a Land Use Regulation that is also a state statute codified in ORS chapter 92, 195, 197, 215 or 227, a Statewide Planning Goal, or an LCDC rule.

1 An "Existing DLCD Regulation" means a DLCD Regulation that was enacted by the
2 State of Oregon or adopted by LCDC with an effective date prior to December 2, 2004. A

3 "New DLCD Regulation" means a DLCD Regulation that was enacted by the State of
4 Oregon or adopted by LCDC with an effective date of on or after December 2, 2004.

5 (8) "Elected" means signed and filed the form provided by DLCD with a box checked.

6 (9) "Land Use Application" means an application for a "land use decision," a "limited
7 land use decision," or an "expedited land division," as those terms are defined by ORS
8 197.015 and 197.360, or an application for a permit or zone change under ORS 227.160
9 to 227.187 or under 215.402 to 215.437.

10 (10) "Land Use Regulation" has the meaning provided by ORS 197.352(11) (2005).

11 (11) "LCDC" means the Land Conservation and Development Commission.

12 (12) "Measure 37 Claim Property" means the private real property described in a
13 Measure 37 Claim.

14 (13) "Measure 37 Permit" means a final decision by a city, a county, or by Metro to
15 authorize the development, division or other use of Measure 37 Claim Property pursuant
16 to a Measure 37 Waiver. A Measure 37 Permit may be a land use decision, a limited land
17 use decision, an expedited land use decision, a permit (as that term is defined in ORS
18 215.402 and 227.160), a zone change, or a comprehensive plan amendment. A Measure
19 37 Permit also includes a final decision by a city, a county, or by Metro that a person has
20 a vested right to complete or continue a use based on a Measure 37 Waiver.

21 (14) "Measure 37 Waiver" means a decision by a city, a county, Metro or the State of
22 Oregon that was made before December 6, 2007 under ORS 197.352 (2005) to modify,
23 remove or not apply one or more Land Use Regulations to allow a Claimant to use the
24 Measure 37 Claim Property for a use that was permitted when the Claimant acquired the
25 Measure 37 Claim Property.

26 (15) "Measure 49" means Chapter 424, Oregon Laws 2007.

27 **(16) "Measure 49 Authorization" means a final order and authorization issued by**
28 **the department under Measure 49 that authorizes a claimant to seek local approval**
29 **of one or more home sites.**

30 (1[6]7) "Supplemental Information" means information needed by DLCD, under section
31 8(3) of Measure 49, to proceed with the Supplemental Review of a Claim.

32 (1[7]8) "Supplemental Review" means review by DLCD of a Claim under either section
33 6 or section 7 of Measure 49.

34 Stat. Auth.: ORS 197.040, 197.065 & Ch. 424, OL 2007

35 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065, 197.353 & Ch.
36 424, OL 2007

37 38 **660-041-0020**

39 **Contents of a Measure 37 Claim Based on a DLCD Regulation**

40 (1) When a Claim was received by DAS after December 4, 2006 and was based on one or
41 more Existing DLCD Regulations, then the Claim must:

42 (a) Demonstrate that a city, county, Metro, or an Agency applied one or more Existing
43 DLCD Regulations, or applied one or more city, county or Metro land use regulations
44 that implement Existing DLCD Regulations, as approval criteria to an application
45 submitted by the Claimant; and

46 (b) Include one of the following:

1 (A) A copy of the final written decision by a city, a county, or Metro on a Land Use
2 Application that included the Measure 37 Claim Property and that requested
3 authorization for the specific use that the Claim is based on, in which the city, county, or
4 Metro determined that one or more Existing DLCD Regulations or city, county or Metro
5 Land Use Regulations that implement Existing DLCD Regulations were approval criteria
6 for the decision; or

7 (B) A copy of the final written action by an Agency on a complete application to the
8 Agency, in which the Agency determined that one or more Existing DLCD Regulations
9 were approval criteria for the application.

10 (2) When a Claim was based on one or more New DLCD Regulations, then the Claim
11 must:

12 (a) Have been received by DAS within two years of:

13 (A) The effective date of the New DLCD Regulation; or

14 (B) Within two years of the date the Claimant submitted a Land Use Application in
15 which the Land Use Regulations were approval criteria, whichever was later; and

16 (b) If the Claim was submitted more than two years after the effective date of the New
17 DLCD Regulation, the Claim must include a copy of the final written decision by a city, a
18 county, or Metro on a Land Use Application that includes the Measure 37 Claim Property
19 and that requested authorization for the specific use that the Claim was based on, in
20 which the city, county, or Metro determined that the New DLCD Regulation or city or
21 county or Metro Land Use Regulation that implemented the New DLCD Regulation were
22 approval criteria for the decision.

23 (3) When a Claim was based on both Existing and New DLCD Regulations, the
24 requirements of section (1) of this rule must be met with respect to the Existing DLCD
25 Regulation, and the requirements of section (2) of this rule must be met with respect to
26 the New DLCD Regulation.

27 (4) A DLCD Regulation was applied as an approval criterion for purposes of this rule and
28 ORS 197.352(5) (2005) when a city, county or Metro made a final written decision on a
29 Land Use Application, or when an Agency took final written action on an application to
30 that Agency, and that final written decision or final written action denied the application
31 or conditioned the approval of the application on the basis (in whole or in part) of the
32 DLCD Regulation.

33 (5) This rule applies only to Claims that were received by DAS after December 4, 2006,
34 and that were based on one or more DLCD Regulations.

35 Stat. Auth.: ORS 197.040, 197.065 & Ch. 424, OL 2007

36 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065, 197.353 & Ch.
37 424, OL 2007

38
39 **660-041-0030**

40 **Notice of Applications and Decisions**

41 (1) Except for a building permit that is not a "land use decision" under ORS
42 197.015(11)(b)(B), cities, counties and Metro must provide written notice to DLCD of all
43 applications for a Measure 37 Permit, and all final written decisions on a Measure 37
44 Permit, filed with or made by the city, county or Metro after February 20, 2007.

45 (2) Notice of an application for a Measure 37 Permit required under section (1) of this
46 rule must be mailed to DLCD's Salem office at least ten (10) calendar days before any

1 deadline for comment on the application for a Measure 37 Permit. If there is no
2 opportunity for comment, then the notice must be sent ten (10) days before the decision
3 becomes final. The notice must include:

- 4 (a) A copy of the applicable Measure 37 Waiver issued by the city, county, or by Metro;
- 5 (b) A copy of any notice provided under ORS 197.195, 197.365, 197.615, 197.763,
6 227.175 or 215.416;
- 7 (c) The claim number of the Measure 37 Waiver issued by the State of Oregon (if any);
- 8 (d) The terms of the State's Measure 37 Waiver as applicable criteria in the subject Land
9 Use Application; and,
- 10 (e) The name of the present owner of the Measure 37 Claim Property.

11 (3) Notice of a final decision on a Measure 37 Permit required under section (1) of this
12 rule must be mailed to DLCD's Salem office within ten (10) calendar days of the date of
13 the final written decision. The notice must include a copy of the final written decision.
14 Stat. Auth.: ORS 197.040 & 197.065, Ch. 424, OL 2007
15 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065, 197.353 & Ch.
16 424, OL 2007

17
18 **660-041-0040**

19 **When a DLCD Measure 37 Waiver Was Required**

20 Before a Claimant could lawfully use Measure 37 Claim Property for a use under a
21 Measure 37 Waiver, the Claimant must have obtained a DLCD Measure 37 Waiver for
22 that use of the Measure 37 Claim Property in all cases where that use was restricted by a
23 DLCD Regulation or by a city, county or Metro Land Use Regulation that implements a
24 DLCD Regulation. These cases include, but are not limited to, all cases where the use is a
25 use of land, and the Measure 37 Claim Property includes:

- 26 (1) Land zoned for farm use under Goal 3;
- 27 (2) Land zoned for forest use under Goal 4; or
- 28 (3) Land outside of an acknowledged urban growth boundary where the Claimant's
29 desired use of the Measure 37 Claim Property was an urban use under Goal 14, or that
30 use included the establishment or extension of a sewer or water system restricted under
31 Goal 11.

32 Stat. Auth.: ORS 197.040, 197.065 & Ch. 424, OL 2007

33 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065, 197.353 & Ch.
34 424, OL 2007

35
36 **660-041-0060**

37 **Effect of 2007 Ballot Measure 49 on DLCD Measure 37 Waivers**

38 Any authorization for a Claimant to use Measure 37 Claim Property without application
39 of a DLCD Regulation provided by a DLCD Measure 37 Waiver expired on December 6,
40 2007, as did the effect of any order of DLCD denying a Claim. A Claimant may continue
41 an existing use of Measure 37 Claim Property that was authorized under ORS 197.352
42 (2005). A Claimant may complete a use of Measure 37 Claim Property that was begun
43 prior to December 6, 2007, only if the Claimant had a common law vested right to
44 complete and continue that use on December 6, 2007, and the use complies with the
45 terms of any applicable DLCD Measure 37 Waiver.

1 Stat. Auth.: ORS 197.040, 197.065 & Ch. 424, OL 2007
2 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065, 197.353 & Ch.
3 424, OL 2007

4
5 **660-041-0070**

6 **State Agency and Special District Land Use Coordination and DLCD Measure 37**
7 **Waivers**

8 After December 5, 2007, when a state agency or a special district is required to take an
9 action in a manner that complies with the Statewide Planning Goals and that is
10 compatible with comprehensive plans and land use regulations under ORS 197.180 (for a
11 state agency), or under ORS 195.020 (for a special district), the state agency or special
12 district must not take that action if it involves a use of Measure 37 Claim Property based
13 on a Measure 37 Waiver. After December 5, 2007, any authorization to not apply a Land
14 Use Regulation based on a DLCD Measure 37 Waiver has expired, and a DLCD Measure
15 37 Waiver may not serve as the basis for a finding required under ORS 197.180 or
16 195.020. This rule does not apply to a use that was lawfully established or vested based
17 on a DLCD Measure 37 Waiver on December 6, 2007.

18 Stat. Auth.: ORS 197.040, 197.065 & Ch. 424, OL 2007

19 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065, 197.353 & Ch.
20 424, OL 2007

21
22 **660-041-0080**

23 **Supplemental Information for Supplemental Review of Measure 37 Claims under**
24 **Measure 49**

25 (1) If the record for the Claim does not include the information needed for DLCD to
26 proceed with the Supplemental Review of the Claim, DLCD will request Supplemental
27 Information from a Claimant or the Claimant's authorized agent.

28 (2) Supplemental Information requested by DLCD must be filed with DLCD within fifty-
29 six (56) days of the date the request is sent and must be filed in the manner described in
30 OAR 660-041-0100.

31 (3) For good cause shown, DLCD may extend the period for filing Supplemental
32 Information beyond fifty-six (56) days.

33 Stat. Auth.: ORS 197.040, 197.065 & Ch. 424, OL 2007

34 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065, 197.353 & Ch.
35 424, OL 2007

36
37 **660-041-0090**

38 **Procedures for Supplemental Review of Measure 37 Claims under Measure 49**

39 (1) If a Claimant files an Election seeking relief under section 6 or section 7 of Measure
40 49, DLCD will review the Claim, as supplemented by the Election and the Supplemental
41 Information, and prepare a Preliminary Evaluation of the relief that the Claimant may be
42 entitled to. The Preliminary Evaluation will be based on and include an initial preliminary
43 assessment of the number of lots, parcels and dwellings, if any, the Claimant lawfully
44 was permitted to establish on the date the Claimant acquired the Measure 37 Claim
45 Property.

1 (2) Prior to the issuance of the Preliminary Evaluation, DLCD will mail written notice of
2 the Supplemental Review and a copy of any materials submitted by the Claimant to the
3 county with land use jurisdiction over the Measure 37 Claim Property, and will provide
4 that county an opportunity to submit written comment on the Supplemental Review.

5 DLCD will consider all comments from the county in its preparation of the Preliminary
6 Evaluation.

7 (3) DLCD will mail Notice of the Preliminary Evaluation to the Claimant, the Claimant's
8 authorized agent, the county with land use jurisdiction over the Measure 37 Claim
9 Property, and to any person who is an owner of record of real property located either
10 within 250 feet of the Measure 37 Claim Property, if the Measure 37 Claim Property is
11 not within a farm or forest zone, or within 750 feet of the Measure 37 Claim Property if it
12 is located in a farm or forest zone, and to any neighborhood or community
13 organization(s) whose boundaries include any portion of the Measure 37 Claim Property
14 or that has made a written request for a copy of the Preliminary Evaluation.

15 (4) Any person may submit written comments, evidence or information in response to the
16 Preliminary Evaluation as provided in OAR 660-041-0100 within twenty-eight (28) days
17 of the date the Preliminary Evaluation is mailed under section (3) of this rule.

18 (5) DLCD will mail copies of any comments, evidence and information concerning the
19 Preliminary Evaluation that are timely received under section (4) of this rule to the
20 Claimant and the Claimant's authorized agent.

21 (6) The Claimant and the Claimant's authorized agent may file written comments,
22 evidence or information in response to any materials filed by a third party or county. To
23 be considered by DLCD, the response must be filed as provided in OAR 660-041-0100
24 within twenty-one (21) days after the date DLCD mailed the comments, evidence and
25 information to the Claimant and the Claimant's authorized agent as provided under
26 section (5) of this rule.

27 (7) Based on the record, DLCD will prepare a Final Decision on the Claim, which either
28 will deny the authorization of home sites or will approve the specific number of home
29 sites under section 6 or section 7 of Measure 49 to which the Claimant is entitled. If
30 approved, the Final Decision will authorize the county with land use jurisdiction over the
31 Measure 37 Claim Property to approve a permit to allow the number of home sites
32 approved.

33 (8) Following issuance of the Final Decision, the owner of the Measure 37 Claim
34 Property may file an application with the county with land use jurisdiction over the
35 Measure 37 Claim Property for a permit to establish home sites authorized under the
36 Final Decision.

37 (9) For good cause shown, DLCD may extend any time period under this rule.

38 Stat. Auth.: ORS 197.040, 197.065 & Ch. 424, OL 2007

39 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065, 197.353 & Ch.
40 424, OL 2007

41
42 **660-041-0100**

43 **Submissions to DLCD Regarding Supplemental Review of a Measure 37 Claim**
44 **under Measure 49**

1 (1) A Claimant may file the form electing how the Claimant wishes to proceed under
2 sections 5 to 11 of Chapter 424, Oregon Laws 2007 (2007 Oregon Ballot Measure 49)
3 only after receiving the notice and form from DLCD.

4 (2) All information filed with DLCD regarding the Supplemental Review of a Claim
5 must be filed at: Supplemental Measure 49 Claim Review, 635 Capitol Street NE, Suite
6 150, Salem, Oregon 97301-2540

7 (3) Submissions regarding a Supplemental Review shall not be submitted by facsimile or
8 electronically.

9 (4) The date information is filed is the date the information is received by DLCD, or the
10 date it is mailed, provided it is mailed by registered or certified mail and the person filing
11 the information has proof from the post office of such mailing date. If the date of mailing
12 is relied upon as the date of filing, acceptable proof from the post office shall consist of a
13 receipt stamped by the United States Postal Service showing the date mailed and the
14 certified or registered number.

15 Stat. Auth.: ORS 197.040, 197.065 & Ch. 424, OL 2007

16 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065, 197.353 & Ch.
17 424, OL 2007

18 19 **660-041-0110**

20 **Determining What Was Lawfully Permitted on the Claimant's Acquisition Date**

21 (1) A Claimant lawfully was permitted to establish one or more lots, parcels or dwellings
22 on the Claimant's acquisition date if DLCD determines that the characteristics of the
23 Measure 37 Claim Property as it existed on that date, including the size, soil quality and
24 location of the Measure 37 Claim Property, would have allowed the Claimant to satisfy
25 the standards and criteria for approval of the lot, parcel or dwelling in effect on that date.

26 (2) Based on the Claimant's acquisition date, as determined under ORS 195.328, DLCD
27 will apply the following standards and criteria to determine the number of lots, parcels or
28 dwellings that were lawfully permitted:

29 (a) If the Claimant's acquisition date is prior to January 25, 1975, DLCD will apply the
30 applicable local land use regulations and comprehensive plan provisions, if any, along
31 with any directly-applicable state statutes;

32 (b) If the Claimant's acquisition date is on or after January 25, 1975 but before the date
33 the county with land use jurisdiction over the Measure 37 Claim Property had its
34 applicable comprehensive plan and land use regulations acknowledged by LCDC for
35 compliance with the Statewide Planning Goals, DLCD will **directly** apply the **Statewide**
36 **Planning Goals, applicable state statutes and LCDC rules.** ~~first applicable~~
37 ~~acknowledged local land use regulations, unless the Claimant establishes that **To**~~
38 **determine** the number of lots, parcels or dwellings that ~~were would have been~~ lawfully
39 permitted under the **Statewide Planning Goals, DLCD will apply** the first applicable
40 acknowledged local land use regulations, **unless the evidence in the record, including**
41 **but not limited to, county Measure 37 waivers or local land use determinations**
42 **issued at the time the property was acquired, establishes that a greater number of**
43 **lots, parcels or dwellings would have been lawfully permitted.** ~~is smaller than the~~
44 ~~number of lots, parcels or dwellings that would have been lawfully permitted under direct~~
45 ~~application of one or more applicable state statutes, Statewide Planning Goals, or LCDC~~
46 ~~rules; and~~

1 (c) If the Claimant's acquisition date is on or after the date the county with land use
2 jurisdiction over the Measure 37 Claim Property had its applicable comprehensive plan
3 and local land use regulations acknowledged by LCDC for compliance with the
4 Statewide Planning Goals, DLCD will apply the applicable local land use regulations and
5 comprehensive plan provisions along with any directly-applicable state statutes,
6 Statewide Planning Goals, or LCDC rules.
7 Stat. Auth.: ORS 197.040, 197.065 & Ch. 424, OL 2007
8 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065, 197.353 & Ch.
9 424, OL 2007

10
11 **660-041-0120**

12 **Evaluation of Measure 37 Contiguous Property in Supplemental Review**

13 (1) For purposes of the Supplemental Review of a Claim, ownership of contiguous
14 property will be determined and evaluated as of the date the Claimant Elected relief under
15 section 6 or section 7 of Measure 49.

16 (2) In determining the relief to which a Claimant is entitled under section 6 or section 7
17 of Measure 49, the number of home site approvals a Claimant is entitled to will be
18 reduced by the number of existing lots, parcels and dwellings contained within the entire
19 property, which includes both the Measure 37 Claim Property and any contiguous
20 property in the same ownership.

21 Stat. Auth.: ORS 197.040, 197.065 & Ch. 424, OL 2007

22 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065, 197.353 & Ch.
23 424, OL 2007

24
25 **660-041-0130**

26 **High-Value Farmland and High-Value Forestland**

27 (1) Measure 37 Claim Property is high-value farmland as described in ORS 195.300(10)
28 if:

29 (a) The Measure 37 Claim Property meets the criteria in ORS 195.300(10)(a) or (b), or
30 both ORS 195.300(10)(a) and (b);

31 (b) All of the Measure 37 Claim Property meets the criteria in ORS 195.300(10)(c);

32 (c) The Measure 37 Claim Property is greater than five acres in size and all of the
33 Measure 37 Claim Property is planted in wine grapes, as provided by ORS
34 195.300(10)(d); or

35 (d) All of the Measure 37 Claim Property meets the criteria in ORS 195.300(10)(e) or (f),
36 or both ORS 195.300(10)(e) and (f).

37 (2) Measure 37 Claim Property is high-value forestland if it meets the criteria in ORS
38 195.300(11).

39 (3) To determine the cubic foot potential of Measure 37 Claim Property and whether it is
40 high-value forestland as described in ORS 195.300(11), DLCD will use soil survey
41 information from the U.S. Department of Agriculture's Natural Resources Conservation
42 Service (NRCS), unless other information or data are made a part of the record for the
43 Supplemental Review, in which case DLCD will consider such information or data along
44 with any pertinent NRCS information.

1 Stat. Auth.: ORS 197.040, 197.065 & Ch. 424, OL 2007
2 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065, 197.353 & Ch.
3 424, OL 2007

4
5 **660-041-0140**

6 **Groundwater Restricted Areas**

7 Measure 37 Claim Property is in a Ground Water Restricted Area if the Measure 37
8 Claim Property is located entirely within the boundaries of a Ground Water Limited Area
9 or Critical Ground Water Area, or both.

10 Stat. Auth.: ORS 197.040, 197.065 & Ch. 424, OL 2007

11 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065, 197.353 & Ch.
12 424, OL 2007

13
14 **660-041-0150**

15 **Combining and Dividing Claims**

16 To evaluate the relief, if any, to which each Claimant is entitled under section 6 or section
17 7 of Measure 49, DLCD will divide a single Claim into two or more claims if the
18 Measure 37 Claim Property contains multiple lots or parcels that are not in the same
19 ownership. In addition, DLCD will combine multiple Claims into one claim if the
20 Measure 37 Claim Property contains multiple contiguous lots or parcels that are in the
21 same ownership.

22 Stat. Auth.: ORS 197.040, 197.065 & Ch. 424, OL 2007

23 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065, 197.353 & Ch.
24 424, OL 2007

25
26 **660-041-0160**

27 **Appraisals Under Section 7 of Measure 49**

28 (1) A Claimant seeking relief under section 7 of Measure 49 must provide an appraisal
29 for the Measure 37 Claim Property showing the fair market value one year before the
30 enactment of the Land Use Regulation(s) that are the basis for the Claim, and the fair
31 market value one year after the enactment of the Land Use Regulation(s).

32 (2) The appraisal provided under this rule must also show the present fair market value of
33 each lot, parcel or dwelling that the Claimant is seeking under section 7(2) of Measure
34 49. The appraisal must comply with all provisions of section 7(7) of Measure 49.

35 (3) For the Claimant to obtain relief under section 7, the appraisal must show that the
36 enactment of one or more Land Use Regulations that are the basis of the Claim, other
37 than land use regulations described in ORS 197.352(3) (2005), caused a reduction in the
38 fair market value of the Measure 37 Claim Property that is equal to or greater than the
39 fair market value of the home site approvals that may be established on the property
40 under section 7(2) of Measure 49. The reduction in fair market value of the Measure 37
41 Claim Property must be measured as set forth in section 7(6) of Measure 49.

42 Stat. Auth.: ORS 197.040, 197.065 & Ch. 424, OL 2007

43 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065, 197.353 & Ch.
44 424, OL 2007

45

1 **660-041-0170**

2 **Notice of County Applications and Decisions Under Measure 49**

3 **(1) The County with land use jurisdiction over property for which a Measure 49**
4 **Authorization has been issued must provide written notice to DLCDC of any land use**
5 **application that seeks approval of one or more home sites under the Measure 49**
6 **Authorization, and all final written decisions on home site approvals based on a**
7 **Measure 49 Authorization.**

8 **(2) Notice of an application for home site approval(s) under a Measure 49**
9 **Authorization, required under section (1) of this rule, must be mailed to DLCDC's**
10 **Salem office at least ten (10) calendar days before any deadline for comment on the**
11 **application for a home site approval. If there is no opportunity for comment, then**
12 **the notice must be sent ten (10) days before the decision becomes final. The notice**
13 **must include:**

14 **(a) A copy of any notice provided under ORS 197.195, 197.365, 197.615, 197.763,**
15 **227.175 or 215.416;**

16 **(b) The claim number of the Measure 49 Authorization issued by the State of**
17 **Oregon;**

18 **(c) The name of the present owner of the Measure 49 Claim Property.**

19
20 **New Claim Rules (Ballot Measure 49)**

21
22 **660-041-0500**

23 **Purpose and Applicability**

24 The purpose of OAR 660-041-0500 to 660-041-0530 is to clarify and implement ORS
25 195.300 to 195.336 (2007 Oregon Ballot Measure 49) in terms of the requirements and
26 procedures for filing and reviewing Measure 49 Claims. These rules apply to Measure 49
27 Claims filed with the State of Oregon.

28 Stat. Auth.: ORS 195.300 - 195.336, 197.040 & 197.065

29 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065 & 197.353

30
31 **660-041-0510**

32 **Definitions**

33 The following definitions apply to OAR 660-041-0500 to 660-041-0530:

34 (1) "Agency" has the meaning provided by ORS 183.310.

35 (2) "Claimant" means an Owner who filed a Measure 49 Claim.

36 (3) "DLCDC" means the Department of Land Conservation and Development.

37 (4) "DLCDC Regulation" has the meaning provided by ORS 195.300(14)(a)-(b) and
38 195.300(14)(g).

39 (5) "Farming Practice" has the meaning provided by ORS 195.300(5).

40 (6) "File" or "Filed" has the meaning provided by ORS 195.300(7). The date a document
41 is Filed is the date that it is received by the Public Entity.

42 (7) "Forest Practice" has the meaning provided by ORS 195.300(8).

43 (8) "Land Use Regulation" has the meaning provided by ORS 195.300(14). A "New
44 Land Use Regulation" means a Land Use Regulation that was enacted by the State of
45 Oregon or adopted by an Agency on or after January 1, 2007.

1 (9) "Lot" means a single unit of land that is created by a subdivision of land as defined in
2 ORS 92.010.

3 (10) "Measure 49 Claim" means:

4 (a) A claim Filed with the State of Oregon under ORS 195.300 to 195.336 after
5 December 5, 2007; and

6 (b) A claim Filed with the State of Oregon under ORS 197.352 (2005) that was Filed
7 between June 29, 2007 and December 5, 2007 if no corresponding claim was filed for the
8 Property with the city or county with land use jurisdiction over the Property prior to June
9 29, 2007.

10 (11) "Owner" has the meaning provided by ORS 195.300(16).

11 (12) "Parcel" means a single unit of land that is created by a partitioning of land as
12 defined in ORS 92.010 and 215.010.

13 (13) "Property" has the meaning provided by ORS 195.300(17).

14 (14) "Regulating Entity" means an Agency that has enacted, or has authority to remove,
15 modify or not apply, the Land Use Regulation(s) identified in the Measure 49 Claim.

16 Stat. Auth.: ORS 197.040, 197.065 & Ch. 424, OL 2007

17 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065, 197.353 & Ch.
18 424, OL 2007

19
20 **660-041-0520**

21 **Procedures for Measure 49 Claims**

22 (1) A Measure 49 Claim must be Filed by the Owner of the Property or an authorized
23 agent of the Owner. A Measure 49 Claim must be Filed on a claim form available from
24 DLCD at the address provided in this rule, or from DLCD's website, and must contain all
25 information required by the form. Claims may not be submitted by facsimile or
26 electronically.

27 (2) A Measure 49 Claim must be Filed with DLCD at: Measure 49 Claims, 635 Capitol
28 St. NE, Suite 150, Salem 97301-2540

29 (3) If the Measure 37 Claim was Filed after June 28, 2007, but before December 6, 2007,
30 and if no corresponding claim was filed for the Property with the city or county with land
31 use jurisdiction over the Property prior to June 29, 2007, the Measure 37 Claim is
32 deemed Filed on December 6, 2007 for purposes of ORS 195.312.

33 (4) DLCD's form for a Measure 49 Claim will require at least the following information:

34 (a) The name and mailing address of each Claimant and each Owner of the Property.

35 (b) Evidence establishing that each Claimant is an Owner of the Property.

36 (c) The consent to the Measure 49 Claim by each Owner of the Property if there are
37 Owners of the Property other than the Claimant, which consent must be notarized.

38 (d) A description of the Claimant's specific desired use of the Property, which use must
39 be a residential use or a Farming Practice or a Forest Practice. The description must be
40 sufficiently specific to establish that each Land Use Regulation listed under paragraph (g)
41 of this rule applies to and restricts the Claimant's desired use.

42 (e) The location of the Property by reference to:

43 (A) The township, range, section and tax lot number for each Lot or Parcel that makes up
44 the Property;

45 (B) The street address of each Lot or Parcel that makes up the Property, if a street address
46 has been assigned;

- 1 (C) The county the Property is located in; and
2 (D) If the Property is located within a city, the name of that city.
3 (f) Evidence of each Claimant's Acquisition Date, as provided in ORS 195.328;
4 (g) A listing of each specific New Land Use Regulation that is alleged to restrict the
5 Claimant's desired use of the Property, and for each New Land Use Regulation listed, a
6 description of how that regulation restricts the Claimant's desired use of the property;
7 (h) An appraisal of the reduction in the fair market value of the Property caused by the
8 enactment of each listed New Land Use Regulation as provided in ORS 195.310.
9 (5) DLCD will review a Measure 49 Claim to determine whether it complies with the
10 requirements of ORS 195.310 to 195.312. If the Measure 49 Claim is incomplete, within
11 sixty (60) days of receiving the Claim, DLCD will notify the person who filed the Claim
12 of the information that is missing. The notification will be in writing. A Measure 49
13 Claim is complete when DLCD receives:
14 (a) The missing information;
15 (b) Part of the missing information and written notice from the Claimant that the
16 remainder of the missing information will not be provided; or
17 (c) Written notice from the Claimant that none of the missing information will be
18 provided.
19 (6) If a Claimant submits a request in writing for additional time to provide missing
20 information, DLCD may for good cause shown agree to provide such additional time,
21 which agreement must be in writing. An agreement to allow additional time has the effect
22 of abating the time requirements under ORS 195.312 and 195.314, until the date specified
23 in the agreement.
24 (7) If DLCD does not notify the Claimant within sixty (60) days after a Measure 49
25 Claim is Filed that information is missing from the Claim, the Claim is deemed complete
26 when Filed.
27 (8) If the Claimant does not respond in writing to the written notification from DLCD
28 under section (5) of this rule within sixty (60) days of the date the written notification
29 was sent, the Claim is deemed withdrawn.
30 (9) DLCD will provide notice of a Measure 49 Claim as provided by ORS 195.314. The
31 notice will describe the Measure 49 Claim and specify a deadline by which written
32 evidence and arguments must be Filed. The Claimant may respond to the written
33 evidence and argument by Filing a written response within fifteen (15) days of the date
34 specified as the deadline for the initial evidence and argument.
35 (10) DLCD will mail a copy of its final determination to the Claimant and to any person
36 who timely filed written evidence or arguments.

37 Stat. Auth.: ORS 195.300 - 195.336, 197.040 & 197.065

38 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065 & 197.353

39
40 **660-041-0530**

41 **Coordinating with Other Regulating Entities**

42 (1) If the Measure 49 Claim is based, in whole or in part, on a New Land Use Regulation
43 that was enacted by an Agency other than DLCD, or the New Land Use Regulation is a
44 state statute that is administered by an Agency other than DLCD, DLCD will forward the
45 Claim to that Agency.

- 1 (2) When a Measure 49 Claim is based, in whole or in part, on a New Land Use
2 Regulation for which there is no Regulating Entity, DLCD will forward the Claim to the
3 Department of Administrative Services.
- 4 (3) When a Regulating Entity other than DLCD is wholly responsible for a Measure 49
5 Claim, that Regulating Entity will process the Claim using the procedures set forth in
6 OAR 660-041-0520 unless that Regulating Entity has adopted its own procedures for
7 review.
- 8 (4) When a Regulating Entity other than DLCD is partially responsible for a Measure 49
9 Claim, DLCD will coordinate the review of the Claim under the procedures set forth in
10 OAR 660-041-0520. However, the other Regulating Entity will decide whether the
11 Claimant is entitled to relief with respect to the New Land Use Regulations that it enacted
12 or that it administers as provided in ORS 195.300 to 195.336 and if so what form of relief
13 to grant under ORS 195.310(5) with respect to those regulations.
- 14 (5) DLCD will issue the final order itself or jointly with one or more other Regulating
15 Entities.
- 16 Stat. Auth.: ORS 195.300 - 195.336, 197.040 & 197.065
17 Stats. Implemented: ORS 195.300 - 195.336, 197.015, 197.040, 197.065 & 197.353

PROPOSED

JUST COMPENSATION FOR LAND USE REGULATION

195.300 Definitions for ORS 195.300 to 195.336. As used in this section and ORS 195.301 and 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007:

- (1) "Acquisition date" means the date described in ORS 195.328.
- (2) "Claim" means a written demand for compensation filed under:
 - (a) ORS 195.305, as in effect immediately before December 6, 2007; or
 - (b) ORS 195.305 and 195.310 to 195.314, as in effect on and after December 6, 2007.
- (3) "Enacted" means enacted, adopted or amended.
- (4) "Fair market value" means the value of property as determined under ORS 195.332.
- (5) "Farming practice" has the meaning given that term in ORS 30.930.
- (6) "Federal law" means:
 - (a) A statute, regulation, order, decree or policy enacted by a federal entity or by a state entity acting under authority delegated by the federal government;
 - (b) A requirement contained in a plan or rule enacted by a compact entity; or
 - (c) A requirement contained in a permit issued by a federal or state agency pursuant to a federal statute or regulation.
- (7) "File" means to submit a document to a public entity.
- (8) "Forest practice" has the meaning given that term in ORS 527.620.
- (9) "Ground water restricted area" means an area designated as a critical ground water area or as a ground water limited area by the Water Resources Department or Water Resources Commission before December 6, 2007.
- (10) "High-value farmland" means:
 - (a) High-value farmland as described in ORS 215.710 that is land in an exclusive farm use zone or a mixed farm and forest zone, except that the dates specified in ORS 215.710 (2), (4) and (6) are December 6, 2007.
 - (b) Land west of U.S. Highway 101 that is composed predominantly of the following soils in Class III or IV or composed predominantly of a combination of the soils described in ORS 215.710 (1) and the following soils:
 - (A) Subclassification IIIw, specifically Ettersburg Silt Loam and Croftland Silty Clay Loam;
 - (B) Subclassification IIIe, specifically Klooqueth Silty Clay Loam and Winchuck Silt Loam;and
 - (C) Subclassification IVw, specifically Huffling Silty Clay Loam.
 - (c) Land that is in an exclusive farm use zone or a mixed farm and forest zone and that on June 28, 2007, is:
 - (A) Within the place of use for a permit, certificate or decree for the use of water for irrigation issued by the Water Resources Department;
 - (B) Within the boundaries of a district, as defined in ORS 540.505; or
 - (C) Within the boundaries of a diking district formed under ORS chapter 551.
 - (d) Land that contains not less than five acres planted in wine grapes.
 - (e) Land that is in an exclusive farm use zone and that is at an elevation between 200 and 1,000 feet above mean sea level, with an aspect between 67.5 and 292.5 degrees and a slope between zero and 15 percent, and that is located within:
 - (A) The Southern Oregon viticultural area as described in 27 C.F.R. 9.179;
 - (B) The Umpqua Valley viticultural area as described in 27 C.F.R. 9.89; or
 - (C) The Willamette Valley viticultural area as described in 27 C.F.R. 9.90.

(f) Land that is in an exclusive farm use zone and that is no more than 3,000 feet above mean sea level, with an aspect between 67.5 and 292.5 degrees and a slope between zero and 15 percent, and that is located within:

(A) The portion of the Columbia Gorge viticultural area as described in 27 C.F.R. 9.178 that is within the State of Oregon;

(B) The Rogue Valley viticultural area as described in 27 C.F.R. 9.132;

(C) The portion of the Columbia Valley viticultural area as described in 27 C.F.R. 9.74 that is within the State of Oregon;

(D) The portion of the Walla Walla Valley viticultural area as described in 27 C.F.R. 9.91 that is within the State of Oregon; or

(E) The portion of the Snake River Valley viticultural area as described in 27 C.F.R. 9.208 that is within the State of Oregon.

(11) "High-value forestland" means land:

(a) That is in a forest zone or a mixed farm and forest zone, that is located in western Oregon and composed predominantly of soils capable of producing more than 120 cubic feet per acre per year of wood fiber and that is capable of producing more than 5,000 cubic feet per year of commercial tree species; or

(b) That is in a forest zone or a mixed farm and forest zone, that is located in eastern Oregon and composed predominantly of soils capable of producing more than 85 cubic feet per acre per year of wood fiber and that is capable of producing more than 4,000 cubic feet per year of commercial tree species.

(12) "Home site approval" means approval of the subdivision or partition of property or approval of the establishment of a dwelling on property.

(13) "Just compensation" means:

(a) Relief under sections 5 to 11, chapter 424, Oregon Laws 2007, for land use regulations enacted on or before January 1, 2007; and

(b) Relief under ORS 195.310 to 195.314 for land use regulations enacted after January 1, 2007.

(14) "Land use regulation" means:

(a) A statute that establishes a minimum lot or parcel size;

(b) A provision in ORS 227.030 to 227.300, 227.350, 227.400, 227.450 or 227.500 or in ORS chapter 215 that restricts the residential use of private real property;

(c) A provision of a city comprehensive plan, zoning ordinance or land division ordinance that restricts the residential use of private real property zoned for residential use;

(d) A provision of a county comprehensive plan, zoning ordinance or land division ordinance that restricts the residential use of private real property;

(e) A provision of the Oregon Forest Practices Act or an administrative rule of the State Board of Forestry that regulates a forest practice and that implements the Oregon Forest Practices Act;

(f) ORS 561.191, a provision of ORS 568.900 to 568.933 or an administrative rule of the State Department of Agriculture that implements ORS 561.191 or 568.900 to 568.933;

(g) An administrative rule or goal of the Land Conservation and Development Commission; or

(h) A provision of a Metro functional plan that restricts the residential use of private real property.

(15) "Measure 37 permit" means a final decision by Metro, a city or a county to authorize the

development, subdivision or partition or other use of property pursuant to a waiver.

(16) "Owner" means:

(a) The owner of fee title to the property as shown in the deed records of the county where the property is located;

(b) The purchaser under a land sale contract, if there is a recorded land sale contract in force for the property; or

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

(17) "Property" means the private real property described in a claim and contiguous private real property that is owned by the same owner, whether or not the contiguous property is described in another claim, and that is not property owned by the federal government, an Indian tribe or a public body, as defined in ORS 192.410.

(18) "Protection of public health and safety" means a law, rule, ordinance, order, policy, permit or other governmental authorization that restricts a use of property in order to reduce the risk or consequence of fire, earthquake, landslide, flood, storm, pollution, disease, crime or other natural or human disaster or threat to persons or property including, but not limited to, building and fire codes, health and sanitation regulations, solid or hazardous waste regulations and pollution control regulations.

(19) "Public entity" means the state, Metro, a county or a city.

(20) "Urban growth boundary" has the meaning given that term in ORS 195.060.

(21) "Waive" or "waiver" means an action or decision of a public entity to modify, remove or not apply one or more land use regulations under ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, or ORS 195.305, as in effect immediately before December 6, 2007, to allow the owner to use property for a use permitted when the owner acquired the property.

(22) "Zoned for residential use" means zoning that has as its primary purpose single-family residential use. [2007 c.424 §2]

195.301 Legislative findings. (1) The Legislative Assembly finds that:

(a) In some situations, land use regulations unfairly burden particular property owners.

(b) To address these situations, it is necessary to amend Oregon's land use statutes to provide just compensation for unfair burdens caused by land use regulations.

(2) The purpose of ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, and the amendments to 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. [2007 c.424 §3]

195.305 Compensation for restriction of use of real property due to land use regulation.

(1) If a public entity enacts one or more land use regulations that restrict the residential use of private real property or a farming or forest practice and that reduce the fair market value of the property, then the owner of the property shall be entitled to just compensation from the public entity that enacted the land use regulation or regulations as provided in ORS 195.310 to 195.314.

(2) Just compensation under ORS 195.310 to 195.314 shall be based on the reduction in the fair market value of the property resulting from the land use regulation.

(3) Subsection (1) of this section shall not apply to land use regulations that were enacted prior to the claimant's acquisition date or to land use regulations:

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

(4)(a) Subsection (3)(a) of this section shall be construed narrowly in favor of granting just compensation under this section. Nothing in subsection (3) of this section is intended to affect or alter rights provided by the Oregon or United States Constitution.

(b) Subsection (3)(b) of this section does not apply to any farming or forest practice regulation that is enacted after January 1, 2007, unless the primary purpose of the regulation is the protection of human health and safety.

(c) Subsection (3)(c) of this section does not apply to any farming or forest practice regulation that is enacted after January 1, 2007, unless the public entity enacting the regulation has no discretion under federal law to decline to enact the regulation.

(5) A public entity may adopt or apply procedures for the processing of claims under ORS 195.310 to 195.336.

(6) The public entity that enacted the land use regulation that gives rise to a claim under subsection (1) of this section shall provide just compensation as required under ORS 195.310 to 195.336.

(7) A decision by a public entity that an owner qualifies for just compensation under ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, and a decision by a public entity on the nature and extent of that compensation are not land use decisions.

(8) The remedies created by ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, are in addition to any other remedy under the Oregon or United States Constitution, and are not intended to modify or replace any constitutional remedy.

(9) If any portion or portions of this section are declared invalid by a court of competent jurisdiction, the remaining portions of this section shall remain in full force and effect. [Formerly 197.352]

(Temporary provisions relating to previously filed claims)

Note: Sections 5, 6, 7, 8, 9, 10 and 11, chapter 424, Oregon Laws 2007, provide:

Sec. 5. A claimant that filed a claim under ORS 197.352 [renumbered 195.305] on or before the date of adjournment sine die of the 2007 regular session of the Seventy-fourth Legislative Assembly [June 28, 2007] is entitled to just compensation as provided in:

(1) Section 6 or 7 of this 2007 Act, at the claimant's election, if the property described in the claim is located entirely outside any urban growth boundary and entirely outside the boundaries of any city;

(2) Section 9 of this 2007 Act if the property described in the claim is located, in whole or in part, within an urban growth boundary; or

(3) A waiver issued before the effective date of this 2007 Act [December 6, 2007] to the extent that the claimant's use of the property complies with the waiver and the claimant has a common law vested right on the effective date of this 2007 Act to complete and continue the use described in the waiver. [2007 c.424 §5]

Sec. 6. (1) A claimant that filed a claim under ORS 197.352 [renumbered 195.305] on or

before the date of adjournment sine die of the 2007 regular session of the Seventy-fourth Legislative Assembly [June 28, 2007] is eligible for three home site approvals on the property if the requirements of this section and sections 8 and 11 of this 2007 Act are met. The procedure for obtaining home site approvals under this section is set forth in section 8 of this 2007 Act.

(2) The number of lots, parcels or dwellings that may be approved for property under this section may not exceed the lesser of:

(a) The number of lots, parcels or dwellings described in a waiver issued by the state before the effective date of this 2007 Act [December 6, 2007] or, if a waiver was not issued, the number of lots, parcels or dwellings described in the claim filed with the state; or

(b) Three, except that if there are existing dwellings on the property or the property contains more than one lot or parcel, the number of lots, parcels or dwellings that may be established is reduced so that the combined number of lots, parcels or dwellings, including existing lots, parcels or dwellings located on or contained within the property, does not exceed three.

(3) Notwithstanding subsection (2) of this section, a claimant that otherwise qualifies for relief under this section may establish at least one additional lot, parcel or dwelling on the property. In addition, if the number of lots, parcels or dwellings described in a waiver issued by the state before the effective date of this 2007 Act or, if a waiver was not issued, the number of lots, parcels or dwellings described in the claim filed with the state is more than three, the claimant may amend the claim to reduce the number to no more than three by filing notice of the amendment with the form required by section 8 of this 2007 Act.

(4) If a claim was for a use other than a subdivision or partition of property, or other than approval for establishing a dwelling on the property, the claimant may amend the claim to seek one or more home site approvals under this section. A person amending a claim under this subsection may not make a claim under section 7 of this 2007 Act.

(5) If multiple claims were filed for the same property, the number of lots, parcels or dwellings that may be established for purposes of subsection (2)(a) of this section is the number of lots, parcels or dwellings in the most recent waiver issued by the state before the effective date of this 2007 Act or, if a waiver was not issued, the most recent claim filed with the state, but not more than three in any case.

(6) To qualify for a home site approval under this section, the claimant must have filed a claim for the property with both the state and the county in which the property is located. In addition, regardless of whether a waiver was issued by the state or the county before the effective date of this 2007 Act, to qualify for a home site approval under this section the claimant must establish that:

(a) The claimant is an owner of the property;

(b) All owners of the property have consented in writing to the claim;

(c) The property is located entirely outside any urban growth boundary and entirely outside the boundaries of any city;

(d) One or more land use regulations prohibit establishing the lot, parcel or dwelling;

(e) The establishment of the lot, parcel or dwelling is not prohibited by a land use regulation described in ORS 197.352 (3) [renumbered 195.305 (3)]; and

(f) On the claimant's acquisition date, the claimant lawfully was permitted to establish at least the number of lots, parcels or dwellings on the property that are authorized under this section.

(7) If the claim was filed after December 4, 2006, to issue a home site approval under this section, the Department of Land Conservation and Development must verify that the claim was

filed in compliance with the applicable rules of the Land Conservation and Development Commission and the Oregon Department of Administrative Services.

(8) Except as provided in section 11 of this 2007 Act, if the Department of Land Conservation and Development has issued a final order with a specific number of home site approvals for a property under this section, the claimant may seek other governmental authorizations required by law for the partition or subdivision of the property or for the development of any dwelling authorized, and a land use regulation enacted by the state or county that has the effect of prohibiting the partition or subdivision, or the dwelling, does not apply to the review of those authorizations. [2007 c.424 §6]

Sec. 7. (1) A claimant that filed a claim under ORS 197.352 [renumbered 195.305] on or before the date of adjournment sine die of the 2007 regular session of the Seventy-fourth Legislative Assembly [June 28, 2007] for property that is not high-value farmland or high-value forestland and that is not in a ground water restricted area is eligible for four to 10 home site approvals for the property if the requirements of this section and sections 8 and 11 of this 2007 Act are met. The procedure for obtaining home site approvals under this section is set forth in section 8 of this 2007 Act.

(2) The number of lots, parcels or dwellings that may be established on the property under this section may not exceed the lesser of:

(a) The number of lots, parcels or dwellings described in a waiver issued by the state before the effective date of this 2007 Act [December 6, 2007] or, if a waiver was not issued, the number of lots, parcels or dwellings described in the claim filed with the state;

(b) 10, except that if there are existing dwellings on the property or the property contains more than one lot or parcel, the number of lots, parcels or dwellings that may be established is reduced, so that the combined number of lots, parcels or dwellings, including existing lots, parcels or dwellings located on or contained within the property, does not exceed 10; or

(c) The number of home site approvals with a total value that represents just compensation for the reduction in fair market value caused by the enactment of one or more land use regulations that were the basis for the claim, as set forth in subsection (6) of this section.

(3) If the number of lots, parcels or dwellings described in a waiver issued by the state before the effective date of this 2007 Act or, if a waiver was not issued, the number of lots, parcels or dwellings described in the claim filed with the state is more than 10, the claimant may amend the claim to reduce the number to no more than 10 by filing notice of the amendment with the form required by section 8 of this 2007 Act.

(4) If multiple claims were filed for the same property, the number of lots, parcels or dwellings that may be established for purposes of subsection (2)(a) of this section is the number of lots, parcels or dwellings in the most recent waiver issued by the state before the effective date of this 2007 Act or, if a waiver was not issued, the most recent claim filed with the state, but not more than 10 in any case.

(5) To qualify for a home site approval under this section, the claimant must have filed a claim for the property with both the state and the county in which the property is located. In addition, regardless of whether a waiver was issued by the state or the county before the effective date of this 2007 Act to qualify for a home site approval under this section, the claimant must establish that:

(a) The claimant is an owner of the property;

(b) All owners of the property have consented in writing to the claim;

(c) The property is located entirely outside any urban growth boundary and entirely outside

the boundaries of any city;

(d) One or more land use regulations prohibit establishing the lot, parcel or dwelling;

(e) The establishment of the lot, parcel or dwelling is not prohibited by a land use regulation described in ORS 197.352 (3) [renumbered 195.305 (3)];

(f) On the claimant's acquisition date, the claimant lawfully was permitted to establish at least the number of lots, parcels and dwellings on the property that are authorized under this section; and

(g) The enactment of one or more land use regulations, other than land use regulations described in ORS 197.352 (3), that are the basis for the claim caused a reduction in the fair market value of the property that is equal to or greater than the fair market value of the home site approvals that may be established on the property under subsection (2) of this section, with the reduction in fair market value measured as set forth in subsection (6) of this section.

(6) The reduction in the fair market value of the property caused by the enactment of one or more land use regulations that were the basis for the claim is equal to the decrease, if any, in the fair market value of the property from the date that is one year before the enactment of the land use regulation to the date that is one year after the enactment, plus interest. If the claim is based on the enactment of more than one land use regulation enacted on different dates, the reduction in the fair market value of the property caused by each regulation shall be determined separately and the values added together to calculate the total reduction in fair market value. The reduction in fair market value shall be adjusted by any ad valorem property taxes not paid as a result of any special assessment of the property under ORS 308A.050 to 308A.128, 321.257 to 321.390, 321.700 to 321.754 or 321.805 to 321.855, plus interest, offset by any severance taxes paid by the claimant and by any recapture of potential additional tax liability that the claimant has paid or will pay for the property if the property is disqualified from special assessment under ORS 308A.703. Interest shall be computed under this subsection using the average interest rate for a one-year United States Government Treasury Bill on December 31 of each year of the period between the date the land use regulation was enacted and the date the claim was filed, compounded annually on January 1 of each year of the period.

(7) For the purposes of subsection (6) of this section, a claimant must provide an appraisal showing the fair market value of the property one year before the enactment of the land use regulation that was the basis for the claim and the fair market value of the property one year after the enactment. The appraisal also must show the fair market value of each home site approval to which the claimant is entitled under section 6 (2) of this 2007 Act, along with evidence of any ad valorem property taxes not paid, any severance taxes paid and any recapture of additional tax liability that the claimant has paid or will pay for the property if the property is disqualified from special assessment under ORS 308A.703. The actual and reasonable cost of preparing the claim, including the cost of the appraisal, not to exceed \$5,000, may be added to the calculation of the reduction in fair market value under subsection (6) of this section. The appraisal must:

(a) Be prepared by a person certified under ORS chapter 674 or a person registered under ORS chapter 308;

(b) Comply with the Uniform Standards of Professional Appraisal Practice, as authorized by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989; and

(c) Expressly determine the highest and best use of the property at the time the land use regulation was enacted.

(8) Relief may not be granted under this section if the highest and best use of the property was not residential use at the time the land use regulation was enacted.

(9) If the claim was filed after December 4, 2006, to issue a home site approval under this section, the Department of Land Conservation and Development must verify that the claim was filed in compliance with the applicable rules of the Land Conservation and Development Commission and the Oregon Department of Administrative Services.

(10) Except as provided in section 11 of this 2007 Act, if the Department of Land Conservation and Development has issued a final order with a specific number of home site approvals for the property under this section, the claimant may seek other governmental authorizations required by law for the subdivision or partition of the property or for the development of any dwelling authorized, and a land use regulation enacted by the state or county that has the effect of prohibiting the subdivision or partition, or the dwelling, does not apply to the review of those authorizations. [2007 c.424 §7]

Sec. 8. (1) No later than 120 days after the effective date of this 2007 Act [December 6, 2007], the Department of Land Conservation and Development shall send notice to all the following claimants that filed a claim for property outside an urban growth boundary:

(a) A claimant whose claim was denied by the state before the effective date of this 2007 Act, but who may become eligible for just compensation because of section 21 (2) of this 2007 Act [195.328 (2)] or any other provision of sections 5 to 22 of this 2007 Act [195.305 to 195.336 and sections 5 to 11 of this 2007 Act];

(b) A claimant whose claim was approved by the state before the effective date of this 2007 Act; and

(c) A claimant whose claim has not been approved or denied by the state before the effective date of this 2007 Act.

(2) The notice required by subsection (1) of this section must:

(a) Explain the claimant's options if the claimant wishes to subdivide, partition or establish a dwelling on the property under sections 5 to 22 of this 2007 Act;

(b) Identify any information that the claimant must file; and

(c) Provide a form for the claimant's use.

(3) A claimant must choose whether to proceed under section 6 or 7 of this 2007 Act by filing the form provided by the department within 90 days after the date the department mails the notice and form required under subsection (1) of this section. In addition, the claimant must file any information required in the notice. If the claimant fails to file the form within 90 days after the date the department mails the notice, the claimant is not entitled to relief under section 6 or 7 of this 2007 Act.

(4) The department shall review the claims in the order in which the department receives the forms required under subsection (3) of this section. In addition to reviewing the claim, the department shall review the department's record on the claim, the form required under subsection (3) of this section, any new material from the claimant and any other information required by sections 5 to 22 of this 2007 Act to ensure that the requirements of this section and section 6 or 7 of this 2007 Act are met. The department shall provide a copy of the material submitted by the claimant to the county where the property is located and consider written comments from the county that are timely filed with the department. If the department determines that the only land use regulations that restrict the claimant's use of the property are regulations that were enacted by the county, the department shall transfer the claim to the county where the property is located and the claim shall be processed by the county in the same manner as prescribed by this section for the processing of claims by the department. The county must consider any written comments from the department that are timely filed with the county.

(5) If the claimant elects to obtain relief under section 7 of this 2007 Act, the claimant must file an appraisal that establishes the reduction in the fair market value of the property as required by section 7 (6) of this 2007 Act. The actual and reasonable cost of preparing the claim, including the cost of the appraisal, not to exceed \$5,000, may be added to the calculation of the reduction in fair market value under section 7 (6) of this 2007 Act. The appraisal must be filed with the department or, if the claim is being processed by the county, with the county within 180 days after the date the claimant files the election to obtain relief under section 7 of this 2007 Act. A claimant that elects to obtain relief under section 7 of this 2007 Act may change that election to obtain relief under section 6 of this 2007 Act, but only if the claimant provides written notice of the change on or before the date the appraisal is filed. If a county is processing the claim, the county may impose a fee for the review of a claim under section 7 of this 2007 Act in an amount that does not exceed the actual and reasonable cost of the review.

(6) The department or the county shall review claims as quickly as possible, consistent with careful review of the claim. The department shall report to the Joint Legislative Audit Committee on or before March 31, 2008, concerning the department's progress and the counties' progress in completing review of claims under sections 6 and 7 of this 2007 Act.

(7) The department's final order and a county's final decision on a claim under section 6 or 7 of this 2007 Act must either deny the claim or approve the claim. If the order or decision approves the claim, the order or decision must state the number of home site approvals issued for the property and may contain other terms that are necessary to ensure that the use of the property is lawful. [2007 c.424 §8]

Sec. 9. (1) A claimant that filed a claim under ORS 197.352 [renumbered 195.305] on or before the date of adjournment sine die of the 2007 regular session of the Seventy-fourth Legislative Assembly [June 28, 2007] for property located, in whole or in part, within an urban growth boundary may establish one to 10 single-family dwellings on the portion of the property located within the urban growth boundary.

(2) The number of single-family dwellings that may be established on the portion of the property located within the urban growth boundary under this section may not exceed the lesser of:

(a) The number of single-family dwellings described in a waiver issued by Metro, a city or a county before the effective date of this 2007 Act [December 6, 2007] or, if a waiver was not issued, the number described in the claim filed with Metro, a city or a county;

(b) 10, except that if there are existing dwellings on the property, the number of single-family dwellings that may be established is reduced so that the maximum number of dwellings, including existing dwellings located on the property, does not exceed 10; or

(c) The number of single-family dwellings the total value of which represents just compensation for the reduction in fair market value caused by the enactment of one or more land use regulations that were the basis for the claim, as set forth in subsection (6) of this section.

(3) If the number of single-family dwellings described in a waiver issued by Metro, a city or a county before the effective date of this 2007 Act or, if a waiver was not issued, the number described in the claim filed with Metro, a city or a county is more than 10, the claimant may amend the claim to reduce the number to no more than 10 by filing notice of the amendment with the information required by section 10 of this 2007 Act.

(4) If multiple claims were filed for the same property, the number of single-family dwellings that may be established for purposes of subsection (2)(a) of this section is the number in the most recent waiver issued by Metro, a city or a county before the effective date of this 2007 Act or, if

a waiver was not issued, the most recent claim filed with Metro, a city or a county, but not more than 10 in any case.

(5) To qualify for the relief provided by this section, the claimant must have filed a claim for the property with the city or county in which the property is located. In addition, regardless of whether a waiver was issued by Metro, a city or a county before the effective date of this 2007 Act, to qualify for relief under this section, the claimant must establish that:

- (a) The claimant is an owner of the property;
- (b) All owners of the property have consented in writing to the claim;
- (c) The property is located, in whole or in part, within an urban growth boundary;
- (d) On the claimant's acquisition date, the claimant lawfully was permitted to establish at least the number of dwellings on the property that are authorized under this section;
- (e) The property is zoned for residential use;
- (f) One or more land use regulations prohibit establishing the single-family dwellings;
- (g) The establishment of the single-family dwellings is not prohibited by a land use regulation described in ORS 197.352 (3) [renumbered 195.305 (3)];
- (h) The land use regulation described in paragraph (f) of this subsection was enacted after the date the property, or any portion of the property, was brought into the urban growth boundary;
- (i) If the property is located within the boundaries of Metro, the land use regulation that is the basis for the claim was enacted after the date the property was included within the boundaries of Metro;
- (j) If the property is located within a city, the land use regulation that is the basis for the claim was enacted after the date the property was annexed to the city; and
- (k) The enactment of one or more land use regulations, other than land use regulations described in ORS 197.352 (3), that are the basis of the claim caused a reduction in the fair market value of the property, as determined under subsection (6) of this section, that is equal to or greater than the fair market value of the single-family dwellings that may be established on the property under subsection (2) of this section.

(6) The reduction in the fair market value of the property caused by the enactment of one or more land use regulations that were the basis for the claim is equal to the decrease, if any, in the fair market value of the property from the date that is one year before the enactment of the land use regulation to the date that is one year after the enactment, plus interest. If the claim is based on the enactment of more than one land use regulation enacted on different dates, the reduction in the fair market value of the property caused by each regulation shall be determined separately and the values added together to calculate the total reduction in fair market value. The reduction in fair market value shall be adjusted by any ad valorem property taxes not paid as a result of any special assessment of the property under ORS 308A.050 to 308A.128, 321.257 to 321.390, 321.700 to 321.754 or 321.805 to 321.855, plus interest, offset by any severance taxes paid by the claimant and by any recapture of potential additional tax liability that the claimant has paid or will pay for the property if the property is disqualified from special assessment under ORS 308A.703. Interest shall be computed under this subsection using the average interest rate for a one-year United States Government Treasury Bill on December 31 of each year of the period between the date the land use regulation was enacted and the date the claim was filed, compounded annually on January 1 of each year of the period.

(7) For the purposes of subsection (6) of this section, a claimant must provide an appraisal showing the fair market value of the property one year before the enactment of the land use regulation that was the basis for the claim and the fair market value of the property one year after

the enactment. The appraisal also must show the fair market value of each single-family dwelling to which the claimant is entitled under subsection (2) of this section, along with evidence of any ad valorem property taxes not paid, any severance taxes paid and any recapture of additional tax liability that the owner has paid or will pay for the property if the property is disqualified from special assessment under ORS 308A.703. The actual and reasonable cost of preparing the claim, including the cost of the appraisal, not to exceed \$5,000, may be added to the calculation of the reduction in fair market value under section 7 (6) of this 2007 Act. The appraisal must:

(a) Be prepared by a person certified under ORS chapter 674 or a person registered under ORS chapter 308;

(b) Comply with the Uniform Standards of Professional Appraisal Practice, as authorized by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989; and

(c) Expressly determine the highest and best use of the property at the time the land use regulation was enacted.

(8) Relief may not be granted under this section if the highest and best use of the property was not residential use at the time the land use regulation was enacted.

(9) When Metro, a city or a county has issued a final decision authorizing one or more single-family dwellings under this section on the portion of the property located within the urban growth boundary, the claimant may seek other governmental authorizations required by law for that use, and a land use regulation enacted by a public entity that has the effect of prohibiting the use does not apply to the review of those authorizations, except as provided in section 11 of this 2007 Act. If Metro is reviewing a claim for a property, and a city or a county is reviewing a claim for the same property, Metro and the city or county shall coordinate the review and decisions and may:

(a) Provide that one of the public entities be principally responsible for the review; and

(b) Provide that the decision of each of the public entities is contingent on the decision of the other public entity.

(10) The only types of land use that are authorized by this section are the subdivision or partition of land for one or more single-family dwellings, or the establishment of one or more single-family dwellings on land on which the dwellings would not otherwise be allowed. [2007 c.424 §9]

Sec. 10. (1) If Metro, a city or a county issued a waiver before the effective date of this 2007 Act [December 6, 2007] for property located, in whole or in part, within an urban growth boundary, the public entity that issued the waiver must review the claim, the record on the claim and the waiver to determine whether the claimant is entitled to relief under section 9 of this 2007 Act. If the public entity that issued the waiver lacks information needed to determine whether the claimant is entitled to relief, the public entity shall issue a written request to the claimant for the required information. The claimant must file the required information within 90 days after receiving the request. If the claimant does not file the information, the public entity shall review the claim based on the information that is available. The public entity shall complete a tentative review no later than 240 days after the effective date of this 2007 Act. The public entity shall provide written notice to the claimant, the Department of Land Conservation and Development and any other person entitled to notice of the tentative determination as to whether the claimant qualifies for relief under section 9 of this 2007 Act and, if so, the specific number of single-family dwellings that the public entity proposes to authorize. The notice must state that the recipient has 15 days to submit evidence or arguments in response to the tentative determination, after which the public entity shall make a final determination. A public entity shall make the

final determination under this subsection within 300 days after the effective date of this 2007 Act.

(2) If Metro, a city or a county has not made a final decision before the effective date of this 2007 Act on a claim filed for property located, in whole or in part, within an urban growth boundary, the public entity with which the claim was filed shall send notice to the claimant within 90 days after the effective date of this 2007 Act. The notice must:

- (a) Explain that the claimant is entitled to seek relief under section 9 of this 2007 Act;
- (b) Identify the information that the claimant must file; and
- (c) Provide a form for the claimant's use.

(3) Within 120 days after the date the public entity mails notice under subsection (2) of this section, a claimant must notify the public entity if the claimant intends to continue the claim and must file the information required in the notice. If the claimant fails to file the notice and required information with the public entity within 120 days after the date the public entity mails the notice, the claimant is not entitled to relief under section 9 of this 2007 Act.

(4) A public entity that receives a notice from a claimant under subsection (3) of this section shall review the claim, the record on the claim, the notice received from the claimant and the information required under subsection (3) of this section to determine whether the claim demonstrates that the requirements of section 9 of this 2007 Act are satisfied. The public entity shall complete a tentative review no later than 120 days after receipt of the notice from the claimant and shall provide written notice to the claimant, the department and any other person entitled to notice of the tentative determination as to whether the claimant qualifies for relief under section 9 of this 2007 Act and, if so, the specific number of single-family dwellings that the public entity proposes to authorize. The notice must state that the recipient has 15 days to submit evidence or arguments in response to the tentative determination, after which the public entity shall make a final determination. A public entity shall make the final determination under this subsection within 180 days after receipt of the notice from the claimant.

(5) If a claimant filed a claim that is subject to this section after December 4, 2006, the claim must have included a copy of a final land use decision by the city or county with land use jurisdiction over the property that denied an application by the claimant for the residential use described in the claim. If the claim was filed after December 4, 2006, and did not include a final land use decision denying the residential use described in the claim, the claimant is not entitled to relief under section 9 of this 2007 Act. [2007 c.424 §10]

Sec. 11. (1) A subdivision or partition of property, or the establishment of a dwelling on property, authorized under sections 5 to 11 of this 2007 Act must comply with all applicable standards governing the siting or development of the dwelling, lot or parcel including, but not limited to, the location, design, construction or size of the dwelling, lot or parcel. However, the standards must not be applied in a manner that has the effect of prohibiting the establishment of the dwelling, lot or parcel authorized under sections 5 to 11 of this 2007 Act unless the standards are reasonably necessary to avoid or abate a nuisance, to protect public health or safety or to carry out federal law.

(2) Before beginning construction of any dwelling authorized under section 6 or 7 of this 2007 Act, the owner must comply with the requirements of ORS 215.293 if the property is in an exclusive farm use zone, a forest zone or a mixed farm and forest zone.

(3)(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.

(4) 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.

(5) An owner is not eligible for more than 20 home site approvals under sections 5 to 11 of this 2007 Act, regardless of how many properties that person owns or how many claims that person has filed.

(6) An authorization to partition or subdivide the property, or to establish dwellings on the property, granted under section 6, 7 or 9 of this 2007 Act runs with the property and may be either transferred with the property or encumbered by another person without affecting the authorization. There is no time limit on when an authorization granted under section 6, 7 or 9 of this 2007 Act 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 the settlor, the subsequent owner of the property must create the lots or parcels and establish the dwellings authorized by a waiver under section 6, 7 or 9 of this 2007 Act within 10 years of the conveyance. In addition:

(a) A lot or parcel lawfully created based on an authorization under section 6, 7 or 9 of this 2007 Act remains a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law; and

(b) A dwelling or other residential use of the property based on an authorization under section 6, 7 or 9 of this 2007 Act is a permitted use and may be established or continued by the claimant or a subsequent owner, except that once the claimant conveys the property to a person other than the claimant's spouse or the trustee of a revocable trust in which the claimant is the settlor, the subsequent owner must establish the dwellings or other residential use authorized under section 6, 7 or 9 of this 2007 Act within 10 years of the conveyance.

(7) When relief has been claimed under sections 5 to 11 of this 2007 Act:

(a) Additional relief is not due; and

(b) An additional claim may not be filed, compensation is not due and a waiver may not be issued with regard to the property under sections 5 to 22 of this 2007 Act [195.305 to 195.336 and sections 5 to 11 of this 2007 Act] or ORS 197.352 [renumbered 195.305] as in effect immediately before the effective date of this 2007 Act [December 6, 2007], except with respect to a land use regulation enacted after January 1, 2007.

(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.

(9) If a claimant is an individual, the entitlement to prosecute the claim under section 6, 7 or 9 of this 2007 Act and an authorization to use the property provided by a waiver under section 6, 7 or 9 of this 2007 Act:

(a) Is not affected by the death of the claimant if the death occurs on or after the effective date of this 2007 Act; and

(b) Passes to the person that acquires the property by devise or by operation of law. [2007 c.424 §11]

195.308 Exception to requirement for compensation. Notwithstanding the requirement to pay just compensation for certain land use regulations under ORS 195.305 (1), compensation is not due for the enforcement or enactment of a land use regulation established in ORS 30.930 to 30.947, 527.310 to 527.370, 561.685, 561.687, 561.689, 561.691, 561.693, 561.695, 561.995, 570.005 to 570.600, 570.650, 570.700 to 570.710, 570.995, 596.095, 596.100, 596.105, 596.393, 596.990 or 596.995 or in administrative rules or statewide plans implementing these statutes. [2007 c.490 §1]

Note: 195.308 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 195 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

195.310 Claim for compensation; calculation of reduction in fair market value; highest and best use of restricted property; status of use authorized. (1) A person may file a claim for just compensation under ORS 195.305 and 195.310 to 195.314 after June 28, 2007, if:

(a) The person is an owner of the property and all owners of the property have consented in writing to the filing of the claim;

(b) The person's desired use of the property is a residential use or a farming or forest practice;

(c) The person's desired use of the property is restricted by one or more land use regulations enacted after January 1, 2007; and

(d) The enactment of one or more land use regulations after January 1, 2007, other than land use regulations described in ORS 195.305 (3), has reduced the fair market value of the property.

(2) For purposes of subsection (1) of this section, the reduction in the fair market value of the property caused by the enactment of one or more land use regulations that are the basis for the claim is equal to the decrease, if any, in the fair market value of the property from the date that is one year before the enactment of the land use regulation to the date that is one year after the enactment, plus interest. If the claim is based on the enactment of more than one land use regulation enacted on different dates, the reduction in the fair market value of the property caused by each regulation shall be determined separately and the values added together to calculate the total reduction in fair market value. Interest shall be computed under this subsection using the average interest rate for a one-year United States Government Treasury Bill on

December 31 of each year of the period between the date the land use regulation was enacted and the date the claim was filed, compounded annually on January 1 of each year of the period. A claimant must provide an appraisal showing the fair market value of the property one year before the enactment of the land use regulation and the fair market value of the property one year after the enactment. The actual and reasonable cost of preparing the claim, including the cost of the appraisal, not to exceed \$5,000, may be added to the calculation of the reduction in fair market value under this subsection. The appraisal must:

(a) Be prepared by a person certified under ORS chapter 674 or a person registered under ORS chapter 308;

(b) Comply with the Uniform Standards of Professional Appraisal Practice, as authorized by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989; and

(c) Expressly determine the highest and best use of the property at the time the land use regulation was enacted.

(3) Relief may not be granted under this section if the highest and best use of the property at the time the land use regulation was enacted was not the use that was restricted by the land use regulation.

(4) If the claimant establishes that the requirements of subsection (1) of this section are satisfied and the land use regulation was enacted by Metro, a city or a county, the public entity must either:

(a) Compensate the claimant for the reduction in the fair market value of the property; or

(b) Authorize the claimant to use the property without application of the land use regulation to the extent necessary to offset the reduction in the fair market value of the property.

(5) If the claimant establishes that the requirements of subsection (1) of this section are satisfied and the land use regulation was enacted by state government, as defined in ORS 174.111, the state agency that is responsible for administering the statute, statewide land use planning goal or rule, or the Oregon Department of Administrative Services if there is no state agency responsible for administering the statute, goal or rule, must:

(a) Compensate the claimant for the reduction in the fair market value of the property; or

(b) Authorize the claimant to use the property without application of the land use regulation to the extent necessary to offset the reduction in the fair market value of the property.

(6) A use authorized by this section has the legal status of a lawful nonconforming use in the same manner as provided by ORS 215.130. The claimant may carry out a use authorized by a public entity under this section except that a public entity may waive only land use regulations that were enacted by the public entity. When a use authorized by this section is lawfully established, the use may be continued lawfully in the same manner as provided by ORS 215.130. [2007 c.424 §12]

195.312 Procedure for processing claims; fees. (1) A person filing a claim under ORS 195.310 shall file the claim in the manner provided by this section. If the property for which the claim is filed has more than one owner, the claim must be signed by all the owners or the claim must include a signed statement of consent from each owner. Only one claim for each property may be filed for each land use regulation.

(2) A claim filed under ORS 195.310 must be filed with the public entity that enacted the land use regulation that is the basis for the claim.

(3) Metro, cities, counties and the Department of Land Conservation and Development may impose a fee for the review of a claim filed under ORS 195.310 in an amount not to exceed the

actual and reasonable cost of reviewing the claim.

(4) A person must file a claim under ORS 195.310 within five years after the date the land use regulation was enacted.

(5) A public entity that receives a claim filed under ORS 195.310 must issue a final determination on the claim within 180 days after the date the claim is complete, as described in subsection (9) of this section.

(6) If a claim under ORS 195.310 is filed with state government, as defined in ORS 174.111, the claim must be filed with the department. If the claim is filed with Metro, a city or a county, the claim must be filed with the chief administrative office of the public entity, or with an individual designated by ordinance, resolution or order of the public entity.

(7) A claim filed under ORS 195.310 must be in writing and must include:

(a) The name and address of each owner;

(b) The address, if any, and tax lot number, township, range and section of the property;

(c) Evidence of the acquisition date of the claimant, including the instrument conveying the property to the claimant and a report from a title company identifying the person in which title is vested and the claimant's acquisition date and describing exceptions and encumbrances to title that are of record;

(d) A citation to the land use regulation that the claimant believes is restricting the claimant's desired use of the property that is adequate to allow the public entity to identify the specific land use regulation that is the basis for the claim;

(e) A description of the specific use of the property that the claimant desires to carry out but cannot because of the land use regulation; and

(f) An appraisal of the property that complies with ORS 195.310 (2).

(8) A claim filed under ORS 195.310 must include the fee, if any, imposed by the public entity with which the claim is filed pursuant to subsection (3) of this section.

(9) The public entity shall review a claim filed under ORS 195.310 to determine whether the claim complies with the requirements of ORS 195.310 to 195.314. If the claim is incomplete, the public entity shall notify the claimant in writing of the information or fee that is missing within 60 days after receiving the claim and allow the claimant to submit the missing information or fee. The claim is complete when the public entity receives any fee required by subsection (8) of this section and:

(a) The missing information;

(b) Part of the missing information and written notice from the claimant that the remainder of the missing information will not be provided; or

(c) Written notice from the claimant that none of the missing information will be provided.

(10) If a public entity does not notify a claimant within 60 days after a claim is filed under ORS 195.310 that information or the fee is missing from the claim, the claim is deemed complete when filed.

(11) A claim filed under ORS 195.310 is deemed withdrawn if the public entity gives notice to the claimant under subsection (9) of this section and the claimant does not comply with the requirements of subsection (9) of this section. [2007 c.424 §13]

195.314 Notice of claim; evidence and argument; record on review; final determination.

(1) A public entity that receives a complete claim as described in ORS 195.312 shall provide notice of the claim at least 30 days before a public hearing on the claim or, if there will not be a public hearing, at least 30 days before the deadline for submission of written comments, to:

- (a) All owners identified in the claim;
 - (b) All persons described in ORS 197.763 (2);
 - (c) The Department of Land Conservation and Development, unless the claim was filed with the department;
 - (d) Metro, if the property is located within the urban growth boundary of Metro;
 - (e) The county in which the property is located, unless the claim was filed with the county;
- and
- (f) The city, if the property is located within the urban growth boundary or adopted urban planning area of the city.
- (2) The notice required under subsection (1) of this section must describe the claim and state:
- (a) Whether a public hearing will be held on the claim, the date, time and location of the hearing, if any, and the final date for submission of written evidence and arguments relating to the claim;
 - (b) That judicial review of the final determination of a public entity on the claim is limited to the written evidence and arguments submitted to the public entity; and
 - (c) That judicial review is available only for issues that are raised with sufficient specificity to afford the public entity an opportunity to respond.
- (3) Except as provided in subsection (4) of this section, written evidence and arguments in proceedings on the claim must be submitted to the public entity not later than:
- (a) The close of the final public hearing on the claim; or
 - (b) If a public hearing is not held, the date that is specified by the public entity in the notice required under subsection (1) of this section.
- (4) The claimant may request additional time to submit written evidence and arguments in response to testimony or submittals. The request must be made before the close of testimony or the deadline for submission of written evidence and arguments.
- (5) A public entity shall make the record on review of a claim, including any staff reports, available to the public before the close of the record as described in subsections (3) and (4) of this section.
- (6) A public entity shall mail a copy of the final determination to the claimant and to any person who submitted written evidence or arguments before the close of the record. The public entity shall forward to the county, and the county shall record, a memorandum of the final determination in the deed records of the county in which the property is located. [2007 c.424 §14]

195.316 Notice of Measure 37 permit. In addition to any other notice required by law, a county must give notice of a Measure 37 permit for property located entirely outside an urban growth boundary to:

- (1) The county assessor for the county in which the property is located;
- (2) A district or municipality that supplies water for domestic, municipal or irrigation uses and has a place of use or well located within one-half mile of the property; and
- (3) The Department of Land Conservation and Development, the State Department of Agriculture, the Water Resources Department and the State Forestry Department. [2007 c.424 §15]

195.318 Judicial review. (1) A person that is adversely affected by a final determination of a public entity under ORS 195.310 to 195.314 or sections 5 to 11, chapter 424, Oregon Laws 2007,

may obtain judicial review of that determination under ORS 34.010 to 34.100, if the determination is made by Metro, a city or a county, or under ORS 183.484, if the determination is one of a state agency. Proceedings for review of a state agency determination under ORS 195.310 to 195.314 or sections 5 to 11, chapter 424, Oregon Laws 2007, must be commenced in the county in which the affected property is located. Upon motion of any party to the proceedings, the proceedings may be transferred to any other county with jurisdiction under ORS 183.484 in the manner provided by law for change of venue. A determination by a public entity under ORS 195.310 to 195.314 or sections 5 to 11, chapter 424, Oregon Laws 2007, is not a land use decision.

(2) A person is adversely affected under subsection (1) of this section if the person:

(a) Is an owner of the property that is the subject of the final determination; or

(b) Is a person who timely submitted written evidence, arguments or comments to a public entity concerning the determination.

(3) Notwithstanding subsection (1) of this section, judicial review of a final determination under ORS 195.305 or 195.310 to 195.314 or sections 5 to 11, chapter 424, Oregon Laws 2007, is:

(a) Limited to the evidence in the record of the public entity at the time of its final determination.

(b) Available only for issues that are raised before the public entity with sufficient specificity to afford the public entity an opportunity to respond. [2007 c.424 §16]

195.320 Ombudsman. (1) The Governor shall appoint an individual to serve, at the pleasure of the Governor, as the Compensation and Conservation Ombudsman.

(2) The ombudsman must be an individual of recognized judgment, objectivity and integrity who is qualified by training and experience to:

(a) Analyze problems of land use planning, real property law and real property valuation; and

(b) Facilitate resolution of complex disputes. [2007 c.424 §17]

195.322 Duties of ombudsman. (1) For the purpose of helping to ensure that a claim is complete, as described in ORS 195.312, the Compensation and Conservation Ombudsman may review a proposed claim if the review is requested by a claimant that intends to file a claim under ORS 195.305 and 195.310 to 195.314.

(2) At the request of the claimant or the public entity reviewing a claim, the ombudsman may facilitate resolution of issues involving a claim under ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007. [2007 c.424 §18]

195.324 Effect of certain applications or petitions on right to relief. (1) If an owner submits an application for a comprehensive plan or zoning amendment, or submits an application for an amendment to the Metro urban growth boundary, and Metro, a city or a county approves the amendment, the owner is not entitled to relief under ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, with respect to a land use regulation enacted before the date the application was filed.

(2) If an owner files a petition to initiate annexation to a city and the city or boundary commission approves the petition, the owner is not entitled to relief under ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, with respect to a land use regulation enacted before the date the petition was filed. [2007 c.424 §19]

195.326 Qualification of appraisers; review of appraisals. An appraiser certified under ORS 674.310 or a person registered under ORS chapter 308 may carry out the appraisals required by ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007. The Department of Land Conservation and Development is authorized to retain persons to review the appraisals. [2007 c.424 §20]

195.328 Acquisition date of claimant. (1) Except as provided in this section, a claimant's acquisition date is the date the claimant became the owner of the property as shown in the deed records of the county in which the property is located. If there is more than one claimant for the same property under the same claim and the claimants have different acquisition dates, the acquisition date is the earliest of those dates.

(2) If the claimant is the surviving spouse of a person who was an owner of the property in fee title, the claimant's acquisition date is the date the claimant was married to the deceased spouse or the date the spouse acquired the property, whichever is later. A claimant or a surviving spouse may disclaim the relief provided under ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, by using the procedure provided in ORS 105.623 to 105.649.

(3) If a claimant conveyed the property to another person and reacquired the property, whether by foreclosure or otherwise, the claimant's acquisition date is the date the claimant reacquired ownership of the property.

(4) A default judgment entered after December 2, 2004, does not alter a claimant's acquisition date unless the claimant's acquisition date is after December 2, 2004. [2007 c.424 §21]

195.330 Filing date of documents. For the purposes of ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, a document is filed on the date the document is received by the public entity. [2007 c.424 §21a]

195.332 Fair market value of property. For the purposes of ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, the fair market value of property is the amount of money, in cash, that the property would bring if the property was offered for sale by a person who desires to sell the property but is not obligated to sell the property, and if the property was bought by a person who was willing to buy the property but not obligated to buy the property. The fair market value is the actual value of property, with all of the property's adaptations to general and special purposes. The fair market value of property does not include any prospective value, speculative value or possible value based upon future expenditures and improvements. [2007 c.424 §21b]

195.334 Effect of invalidity. If any part of ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, is held to be unconstitutional or otherwise invalid, all remaining parts of ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, shall not be affected by the holding and shall remain in full force and effect. [2007 c.424 §21c]

195.336 Compensation and Conservation Fund. (1) The Compensation and Conservation Fund is established in the State Treasury, separate and distinct from the General Fund. Interest earned on moneys in the Compensation and Conservation Fund shall be credited to the fund. The

fund consists of moneys received by the Department of Land Conservation and Development under ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, and other moneys available to the department for the purpose described in subsection (2) of this section.

(2) Moneys in the fund are continuously appropriated to the department for the purpose of paying expenses incurred to review claims under ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, and for the purpose of paying the expenses of the Compensation and Conservation Ombudsman appointed under ORS 195.320. [2007 c.424 §22]

Secretary of State

NOTICE OF PROPOSED RULEMAKING HEARING*

A Statement of Need and Fiscal Impact accompanies this form.

Department of Land Conservation and Development	OAR chapter 660	
Agency and Division	Administrative Rules Chapter Number	
Bryan Cruz González	635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540	503-373-0050 ext. 322
Rules Coordinator	Address	Telephone

RULE CAPTION

Permanent Measure 49 Rules Clarifying Requirements for Measure 49 Authorizations, Including Notice to State

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

March 12, 2009	9:00 a.m.	635 Capitol Street NE, Basement Hearing Room, Salem Oregon	LCDC
Hearing Date	Time	Location	Hearings Officer

Auxiliary aids for persons with disabilities are available upon advance request.

RULEMAKING ACTION

Secure approval of new rule numbers (Adopted or Renumbered rules) with the Administrative Rules Unit prior to filing.

ADOPT: OAR 660-041-0170

AMEND: OAR chapter 660, division 41

REPEAL:

RENUMBER:

AMEND & RENUMBER:

Stat. Auth.: ORS 197.040

Other Auth.: Statewide Land Use Planning Goals 2-4, 11 and 14 (OAR 660-015-000(2)-(4), (11) and (14))

Stats. Implemented: ORS 195.300-195.332

RULE SUMMARY

The proposed permanent rules amend OAR chapter 660, division 41. The purpose of these rules is twofold. First, the rules clarify the requirements and process for evaluating Elections under Section 6 of Measure 49 for home site authorizations. There is uncertainty as to whether certain Measure 37 claimants who sought relief under Measure 49 were lawfully permitted to establish the number of home sites for which Elections have been submitted. These rules clarify how lawfully permitted uses are evaluated and determined. Second, the proposed rules also require local governments to notify DLCD of land use applications and decisions approving home sites authorized under Measure 49. This will ensure that state and local actions on Measure 49 Elections, including county land use approvals based on Measure 49 authorizations, and clustering and 20-homesite limitation requirements under Measure 49, are coordinated and consistent.

The Commission may consider other clarifications to these subjects that may be proposed during the public comment period.

An advisory committee was not used to assist the agency in drafting the proposed rule due to the need to act quickly to clarify requirements for evaluating Measure 49 elections, and the need to put a more formal structure in place quickly to coordinate state and local action on Measure 49 elections.

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing the negative economic impact of the rule on business.

February 23, 2009

Last Day for Public Comment (Last day to submit written comments to the Rules Coordinator)



Richard Whitman, Director

2/14/09

Signature

Printed name

Date

*Hearing Notices published in the Oregon Bulletin must be submitted by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a weekend or legal holiday, upon which the deadline is 5:00 pm the preceding workday. ARC 920-2005

Secretary of State

STATEMENT OF NEED AND FISCAL IMPACT

A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

Department of Land Conservation and Development

OAR chapter 660

Agency and Division

Administrative Rules Chapter Number

Permanent Measure 49 Rules Clarifying Requirements for Measure 49 Authorizations, Including Notice to State

Rule Caption (Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.)

In the Matter of: Permanent Measure 49 Rules Clarifying Requirements for Measure 49 Authorizations, Including Notice to State

Statutory Authority: ORS 197.040

Other Authority: Statewide Land Use Planning Goals 2-4, 11 and 14 (OAR 660-015-0000(2)-(4), (11) and (14))

Stats. Implemented: ORS 195.300-195.332

Need for the Rule(s): The proposed permanent rules amend OAR chapter 660, division 41. The purpose of these rules is twofold. First, the rules clarify the requirements and process for evaluating Elections under Section 6 of Measure 49 for home site authorizations. There is uncertainty as to whether certain Measure 37 claimants who sought relief under Measure 49 were lawfully permitted to establish the number of home sites for which Elections have been submitted. These rules clarify how lawfully permitted uses are evaluated and determined. Second, the proposed rules also require local governments to notify DLCD of land use applications and decisions approving home sites authorized under Measure 49. This will ensure that state and local actions on Measure 49 Elections, including county land use approvals based on Measure 49 authorizations, and clustering and 20-homesite limitation requirements under Measure 49, are coordinated and consistent.

Documents Relied Upon, and where they are available: ORS 195.300-195.332; County acknowledged land use regulations; historic land use statutes and rules. All documents relied on are available at the Oregon Department of Land Conservation & Development website and at 635 Capitol St. NE, Suite 150, Salem, Oregon 97301-2540.

Fiscal and Economic Impact, including Statement of Cost of Compliance:

Part 1: Clarifying the Requirements for Measure 49 Authorizations. Based on available information, adoption of the proposed rules clarifying the requirements for Measure 49 Authorizations will not result in additional fiscal or economic impacts. This rule does not require additional expenses from claimants. Rather, it clarifies the DLCD evaluation process for determining what was lawfully permitted on the date certain claimants acquired their Measure 37 claim property. It is anticipated that the proposed rules will expedite the evaluation of affected claims and, therefore, will not have an adverse fiscal impact to the agency. The proposed rule would apply to all Measure 37 claimants, whether individuals or business, who have elected relief under Section 6 of Measure 49, which allows the department to authorize up to three home sites on the Measure 37 claim property, based on whether those home sites would have been lawfully permitted at the time the claimant acquired the property. It will not otherwise have an impact on business or small business.

Part 2: Requiring Local Government to Notify DLCD of Land Use Applications and Decisions. In most cases, the proposed rule will simply require local government to add DLCD to its notice list for a notice already required by other law. In those instances where notice is already required by other law, the rule should require no more than approximately ten to fifteen minutes of staff time per application to prepare the notice. By requiring notice, the rule will ensure that local decisions carrying our Measure 49 authorizations are consistent with state law, and avoid subsequent disputes and costs. The rule is not expected to have any fiscal or economic effect on business or small business.

Housing cost impact.

The proposed rules are not expected to have an impact on housing costs.

Administrative Rule Advisory Committee consulted?: No.

If not, why?: The proposed rules are necessary to ensure that Measure 49 is implemented in a manner consistent with other aspects of the statewide land use planning system and the Measure itself. The agency is moving quickly to issue Measure 49 authorizations, which counties have already begun to implement. In the judgment of the agency, it is necessary to proceed with these rules quickly in order to expedite the processing of Measure 49 elections, and to ensure efficient coordination between the agency and local government as the counties approve home sites based on Measure 49 authorizations.



Richard Whitman, Director

1/14/09

Signature

Printed name

Date

Administrative Rules Unit, Archives Division, Secretary of State, 800 Summer Street NE, Salem, Oregon 97310. ARC 925-2007

HOUSING COST IMPACT STATEMENT

FOR ESTIMATING THE EFFECT OF A PROPOSED RULE OR ORDINANCE ON THE COST OF DEVELOPING
A *TYPICAL 1,200 SQ FT DETACHED SINGLE FAMILY DWELLING ON A 6,000 SQ FT PARCEL OF LAND.
(ORS 183.534)
FOR ADMINISTRATIVE RULES

AGENCY NAME:
Department of Land Conservation and Development
ADDRESS: 635 Capitol Street NE
CITY/STATE: Salem, Oregon 97301
PHONE: (503) 373-0050

HEARING DATE: March 12, 2009

TEMPORARY: No **EFFECTIVE DATE:** Upon Filing

**BELOW PLEASE PROVIDE A DESCRIPTION OF THE ESTIMATED SAVINGS OR ADDITIONAL COSTS THAT WILL
RESULT FROM THIS PROPOSED CHANGE.**

PROVIDE A BRIEF EXPLANATION OF HOW THE COST OR SAVINGS ESTIMATE WAS DETERMINED.
IDENTIFY HOW CHANGE IMPACTS COSTS IN CATEGORIES SPECIFIED

Description of proposed change: (Please attach any draft or permanent rule or ordinance)

The permanent rules proposed at OAR chapter 660, division 41, will clarify the requirements and process for evaluating Elections under Section 6 of Measure 49 for home site authorizations. The proposed rules would also require local governments to notify DLCD of land use applications and decisions approving home sites authorized under Measure 49.

Description of the need for, and objectives of the rule:

The proposed permanent rules amend OAR chapter 660, division 41. The purpose of these rules is twofold. First, the rules clarify the requirements and process for evaluating Elections under Section 6 of Measure 49 for home site authorizations. There is uncertainty as to whether certain Measure 37 claimants who sought relief under Measure 49 were lawfully permitted to establish the number of home sites for which Elections have been submitted. These rules clarify how lawfully permitted uses are evaluated and determined. Second, the proposed rules also require local governments to notify DLCD of land use applications and decisions approving home sites authorized under Measure 49. This will ensure that state and local actions on Measure 49 Elections, including county land use approvals based on Measure 49 authorizations, and clustering and 20-homesite limitation requirements under Measure 49, are coordinated and consistent.

List of rules adopted or amended: OAR 660-041-0170 (adopted); OAR chapter 660, division 41 (amended)

Materials and labor costs increase or savings: The proposed rules are not intended to or expected to result in increases in materials or labor costs or in savings.

Estimated administrative, construction or other costs increase or savings: The proposed rules may result in some reduction in administrative costs to DLCD by clarifying requirements and process for evaluating Measure 49 elections. The proposed rules should no cost or insignificant cost for Measure 37 claimants who have filed elections for relief under Measure 49. The proposed notice requirements should have no cost or insignificant cost to local government because current statutes already require notices to be prepared and sent to neighboring properties and other parties for most of the applications and decisions described by the proposed rules.

Land costs increase or savings: The proposed rules are not anticipated to affect land costs based on available information.

Other costs increase or savings: None expected based on available information.

*Typical-Single story 3 bedrooms, 1 ½ bathrooms, attached garage (calculated separately) on land with good soil conditions with no unusual geological hazards.

PREPARER'S NAME: Judith Moore, Measure 49 Development Services Division Manager

EMAIL ADDRESS: judith.moore@state.or.us



**Zupancic
Group**
Real Estate Counsel and Developers

February 23, 2009

VIA FIRST CLASS MAIL
and FACSMILE:
1-503-378-5518

Department of Land Conservation and Development
Attn: RULES COORDINATOR
635 Capitol Street NE, Suite 150
Salem, OR 97301-2540

Re: Proposed Amendments to OAR 660-041-0110 and New Rule 660-041-0170

Dear Coordinator,

In response to the proposed amendments, we offer the following comments on behalf of Measure 49 claimants and request that these issues be addressed during the hearing scheduled for March 12.

Under OAR 660-041-0110 ("Rule 0110"), DLCD has taken the position that, in the absence of an acknowledged comprehensive plan, the Statewide Planning Goals applied directly to all property in a county. Typically, this eliminates the opportunity for relief under Measure 49. The proposed rule change would apparently allow DLCD staff to review other information in the record (including previously issued Measure 37 waivers) when determining what development rights a Measure 49 claimant had as of the acquisition date.

We believe Rule 0110 is incorrect for two reasons. First, the interpretation is neither invited nor required by the language of Measure 49, nor is it based on facts as they existed in 1975. Second, even if the premise is correct, it is a violation of due process when interpretive rules that will be used to evaluate a citizen's rights to compensation are promulgated **after** the same citizen has been forced to make his election and without giving opportunity to correct and expand the record.

I. The Interpretational Rule Is Not Consistent with the Law as Settled in 1975.

a. *Alexanderson* Wasn't Decided Until 1980, and the Majority Opinion Acknowledges that the Law Was Unsettled Until Then.

DLCD's underlying assumption that the Statewide Planning Goals applied directly to a parcel at all times on or after January 25, 1975 is not correct. Many parcels in rural Oregon were unzoned at that time, though typically even unzoned ground was subject to county partition or subdivision ordinances. (For example, as indicated in many of the county's Measure 37 decisions, Clackamas County's Subdivision and Partitioning Ordinance would have applied to unzoned

February 23, 2009

DLCD

Re: Comments on Proposed M49 Rule Amendments – February 2009

Page 2 of 7

land.) The authority for these local ordinances was granted through ORS chapter 92, wherein each county or local jurisdiction is granted authority to regulate subdivisions and partitions of land.

The Statewide Planning Goals were adopted on December 27, 1974 and became effective on January 25, 1975. However, the statewide regulatory scheme included a one year period in which counties could bring their planning regulations into conformity with the goals. ORS 215.050(3)(1973 version), ORS 197.250. So, according to the language of the statute itself, existing, local land use regulations continued to apply to subdivision and partition applications within that first year until they were updated. Based on discussions with numerous counties' planning staff, there is no shortage of partition and subdivision approvals on file that were made prior to DLCD's acknowledgement of a Comprehensive Plan, and that would not have been in compliance with the Statewide Planning Goals. The fact that even one partition or subdivision was approved on land that was subsequently zoned EFU or other resource designation proves the invalidity of the DLCD's approach embodied in the current interpretational rule.

This fact does not indicate that the County or the individual developers were making mistakes or acting unlawfully. It merely indicates the status of the law in 1975 – that the question of whether Statewide Planning Goals applied directly to developers and land owners, or if they were to apply to only to new ordinances enacted by local government, was not at issue. Counties across the state continued to make decisions based on the practical, equitable application of local regulations, because those regulations were the only "law" that a developer or landowner could rely upon when making their development decisions. And, it is no coincidence that the "Goal Post Rule" was enacted at the same time the statewide land use legislation was passed – this was necessary to provide clarity for applicants during the land use application process while the local ordinances were being brought into conformance.

The issue of state and local planning hierarchy was not explicit until it became apparent that most local jurisdictions couldn't create or amend their local plans within the one year allowed. In 1977, the DLCD began issuing time extensions for compliance with the Statewide Planning Goals that were conditioned on local jurisdictions acting in accordance with Statewide Planning Goals while their comprehensive plans were being drafted or updated. It is from this time period of 1977 to 1980 that the question of whether state goals or local ordinances controlled local land use actions began coming up through the courts.

The question was not resolved until 1980, when, in *Alexanderson v. Board of Commissioners for Polk County*, 289 Or. 427, *reh'g denied* 290 Or. 137 (1980), the Oregon Supreme Court held that the Statewide Planning Goals would apply directly if the local comprehensive plan was not acknowledged. Thus, until July 23, 1980, the question was unresolved. The majority opinion stated that when the legislature re-examined the land use planning system in 1977, "the question [of] whether the state-wide planning goals did or did not apply directly to individual 'land

February 23, 2009

DLCD

Re: Comments on Proposed M49 Rule Amendments – February 2009

Page 3 of 7

conservation and development actions' was a major point of contention." *Id.* at 433. In fact, the majority opinion stated, "*the issue had not been decided under the existing law.*" *Id.*

Thus, while we recognize that a staff decision by DLCD cannot simply disregard a majority opinion by the Oregon Supreme Court, the DLCD is not correct in asserting that the Statewide Planning Goals applied directly as of January 25, 1975. This assertion can only be made through the benefit of hindsight, and could not have been asserted legally by any county in 1975. In fact, that position was NOT asserted in 1975, since subdivisions and partitions were actually approved on ground subsequently zoned to prohibit such parcelization.

b. Existing State Subdivision Law (ORS Chap. 92) Was Specifically Amended in 1974 To Provide for Local Subdivision and Partition Approval Under Local Ordinances.

Assuming that a county reviewed the "state of the law" in 1975, it would have found that not only was the county within its one-year grace period for bringing its ordinances into compliance with the Statewide Planning Goals under ORS 197.250, but that other substantive state law controlled applications for subdivisions and partitions.

The legislature made specific amendments to ORS 92.044 and 92.046 in 1974 to insure that local ordinances applied to subdivision and partition applications, rather than the counties' comprehensive plans or the Statewide Planning Goals. Specifically, the legislature amended ORS 92.046(5) by striking the words "comprehensive plan," so that tentative partition plans had only to comply with applicable zoning ordinances and regulations, rather than also having to comply with the comprehensive plan. ORS 92.046(5) now reads:

No tentative plan of a proposed partition may be approved unless the tentative plan complies with the applicable zoning ordinances and regulations and the ordinances or regulations adopted under this section that are then in effect for the city or county within which the land described in the tentative plan is situated.

The legislative history of this amendment makes it clear that *only local ordinances* were to apply to partition and subdivision applications. The applicants in *Alexanderson* petitioned for a rehearing based on further evidence brought to light after the original decision and an internal inconsistency found in the majority opinion. The rehearing was denied, but Justice Tongue, joined by Justices Lent and Peterson, filed a dissent to the denial. *Alexanderson v. Board of Commissioners for Polk County*, 290 Or. 137 (1980).

From Justice Tongue's dissent, we have a record of Senator McPherson's comments made during the 1974 legislative special session, as he explained why a minor change was needed to correct an error in SB 487 passed in 1973. SB 487 was a companion bill to SB 100, and it

February 23, 2009

DLCD

Re: Comments on Proposed M49 Rule Amendments – February 2009

Page 4 of 7

originally required counties to regulate partitions and subdivisions in accordance with their comprehensive plans. Just prior to the passage of SB 1011, which included the correction language, Senator McPherson stated, as quoted in the dissenting opinion:

" The second was a very minor change which is actually a drafting error in the original bill [SB 487, 1973] and which you'll find on Page 4. You will find that we have the words 'the comprehensive plan' as deleted where we're talking about whether a tentative plan has to comply with the zoning ordinances. That is, the agreement in the committee, which originally drafted SB 487, was that a developer would have to comply with the ordinances; but in case the ordinances did not comply with the comprehensive plan, he shouldn't be held up for the fact that those two did not agree with one another.

" So we had drafted language which we thought was complete throughout the bill, which said that a developer complied *only* with the applicable ordinances; that is, the zoning ordinance or the subdivision ordinance. And so we wanted to delete the fact that the tentative plan had to comply also with the comprehensive plan.

" Now, elsewhere in law, we have said that the affected counties are to make their ordinances comply with the comprehensive plan. But this certainly should not be brought back onto the developer. (Original emphasis) Senate Floor Proceedings, February 23, 1974, Tape 5, Side 2, Log 435 approximately.'

Alexanderson (rehearing), 290 Or. at 142.

Justice Tongue went on to quote the applicant's brief, stating that he fully agreed with the applicant's conclusions:

"The amendment put minor partitions, major partitions and subdivisions all on equal footing, as originally intended by the 1973 Legislature. **They are governed only by ordinances, even where the plan is in harmony with the goals, but the ordinances are not.**

"**It could not be clearer that the Legislature intended persons in Petitioner's shoes to be allowed to rely upon zoning and subdivision ordinances.** The County's failure to straighten out its affairs was not intended to harm individuals."

February 23, 2009

DLCD

Re: Comments on Proposed M49 Rule Amendments – February 2009

Page 5 of 7

Id. (emphasis added.) Note that if any legislator understood the intended implications of SB 100, it was Senator McPherson, for he was chairman of the ad hoc committee that formulated SB 100 and was a co-sponsor of the bill.

Justice Tongue went further, stating:

“[T]he most reasonable conclusion to be drawn from the stated purpose of the 1974 amendment is that the legislature also did not intend that a property owner seeking to partition his land be ‘held up’ by possible contentions that his application did not comply with vaguely-worded LCDC ‘goals’ when his application fully complied with the existing local ordinance.”

Id. at 145.

From this, it is apparent that the Oregon Supreme Court may have incorrectly decided *Alexanderson*, at least to the extent that the Court’s reasoning was based on an incorrect interpretation of legislative intent. While it would require a legislative act or another Supreme Court decision to change the law set out by *Alexanderson*, nothing precludes DLCD from changing its interpretational rule to comport with the actual law and facts as they existed in 1975, prior to the *Alexanderson* decision.

Therefore, DLCD’s interpretational rule should be modified or not applied in this case, since we have now shown that, in fact, a county did not need to apply the Statewide Planning Goals in 1975 when evaluating a partition or subdivision application. The co-sponsor of the legislation that created the Statewide Planning Goals stated himself that individual applicants were not to be harmed just because a county’s ordinances were not in compliance with the Statewide Planning Goals. So, as of January 25, 1975, county ordinances still controlled subdivision and partition decisions.

II. Rule 0110 Was Promulgated, and Is Now Being Amended, After the Election Forms Were Due.

Original Rule 0110 became effective on May 23, 2008. Arguably, a claimant’s choice as to whether to proceed under the “express”, “conditional”, or “vested” election would have been effected by the claimant’s knowledge of this rule, since this would have been one of the factors that each claimant weighed when making the decision. Because this rule was promulgated after many of the elections were due, it cannot be applied in the evaluation of those claims.

Furthermore, DLCD has continued to issue Preliminary and Final Orders under the original Rule 0110, even after it must have been known that the now proposed

February 23, 2009

DLCD

Re: Comments on Proposed M49 Rule Amendments – February 2009

Page 6 of 7

amendment was likely to be issued. How are existing claimants, who have been denied relief, going to be notified that they may have been successful under the revised rule? This issue is not addressed in the rules, and must be to insure that the Measure 49 process is equitable to all claimants.

III. The Proposed Amendment to Rule 0110 Relies on Analysis of the Record, But Most Claimants Did Not Submit Additional Information Under the “Express” Election.

Proposed Rule 0110 states that the presumption that the Statewide Goals applied directly can be rebutted by evidence in the record. If a claimant in this position was fortunate enough to receive a Measure 37 waiver, it is already part of the DLCD’s record of the claim, and presumably these claimants will be successful. However, many Measure 37 claimants filed late enough in the process that they did not receive waivers from their county. And, Measure 49 claimants who filed “Express” elections typically did so with a bare minimum of paperwork. Will these claimants be allowed to submit additional information, for example, records of subdivision or partition approvals from the pre-acknowledgement era? Will they be allowed to obtain and present “psuedo-waivers” from their counties, which would provide DLCD with a county’s interpretation of Measure 37? Would a waiver from another claimant, on similarly situated property, suffice? After all, a county’s interpretation of a claimant’s rights under Measure 37 should be consistent across the county.

The proposed rules are silent on these issues. To the extent that claimants obtain disparate relief from the DLCD when they are otherwise similarly situated, the proposed amendments are in violation of due process and the equal protection clause.

IV. New Rule 0170 Raises the Specter of Impermissible “Statewide Zoning” Law.

Proposed OAR 660-041-0170 requires all counties to provide notice to DLCD whenever a Measure 49 authorization is invoked as the basis for a development approval. If this notice is used for the State to track and record the use of authorizations, for example, to trigger that 10-year expiration clock, then we have no comment. If this rule is implemented, however, as a method for the DLCD to oversee or regulate the local development approvals worked out between an applicant and an individual county, then this rule violates the authority granted through ORS Chapter 197 to the counties to control local development, provided the county’s land use plan is in accordance with the Statewide Planning Goals.

V. If the Underlying Premise Is Accepted, Then The Proposed Amendments Should At Least Be Expanded To Provide Certainty and Equitable Treatment of All Claimants.

February 23, 2009

DLCD

Re: Comments on Proposed M49 Rule Amendments – February 2009

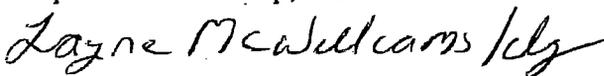
Page 7 of 7

This retroactive rulemaking does not comport with due process, and it calls into question the equity of the entire Measure 49 procedures implemented by DLCD. We have shown that as of January 25, 1975, the premise put forth by DLCD is simply wrong. The Statewide Planning Goals were not intended to replace local ordinances, as directly evidenced by a floor speech by one of the main authors of SB 100. While a majority of the Oregon Supreme Court agreed to ignore this evidence, the legislative history remains a "fact." Finally, the *Alexanderson* decision, upon which DLCD's rule appears to be based, was not written until 1980, and the majority opinion itself states that as of 1977, the law was unsettled. Thus, DLCD's application of *Alexanderson* to a hypothetical 1975 land use decision is unwarranted. The interpretational rule based on *Alexanderson* impermissibly uses "hindsight" to judge prior acts under law that was, in fact, not yet developed at the time of most of the affected claimants' acquisition dates. Finally, to the extent the rules are modified, claimants who have been denied relief based on a pre-acknowledgement acquisition date must be allowed to revive their claims and supplement their records.

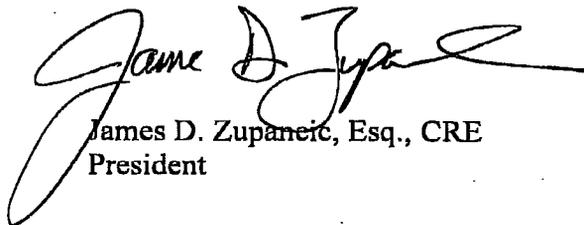
If the underlying premise of the rules is accepted by LCDC, then at the minimum, the rules must be amended to include a "second chance" for those claimants who have been denied relief under the prior rule. Furthermore, a provision for supplementing the record must be included if DLCD staff are now going to use the record to make determinations on appropriate relief. Measure 49 claimants are for the most part elderly, for the most part rural, and not necessarily connected to the internet. The State owes it to these citizens to provide written notice, via U.S. mail, of these rule changes if they are adopted.

Thank you for the opportunity to present these comments.

Sincerely,
Zupancic Law Group, P.C.



Layne McWilliams, P.E., Esq.
Associate



James D. Zupancic, Esq., CRE
President