



# Oregon

Theodore R. Kulongoski, Governor

**Department of Land Conservation and Development**

635 Capitol Street NE, Suite 150

Salem, OR 97301-2540

(503) 373-0050

Fax (503) 378-5518

[www.lcd.state.or.us](http://www.lcd.state.or.us)



DATE: February 26, 2009

TO: Land Conservation and Development Commission (LCDC)

FROM: Michael Morrissey, Policy Analyst

SUBJECT: **Agenda Item 3, March 11-13, 2009, LCDC meeting**

**PUBLIC HEARING AND ADOPTION OF PROPOSED PERMANENT  
ADMINISTRATIVE RULES CONCERNING MEASURE 49**

**I. AGENDA ITEM SUMMARY**

This item is a public hearing regarding the proposed adoption of permanent administrative rules concerning Measure 49 (ORS 195.300 to 195.336, Oregon Laws, chapter 424 Oregon Laws 2007). The Commission will hear public testimony and may adopt the proposed rules (Attachment A) at the conclusion of the hearing. Virginia Gustafson of the Department of Justice drafted the proposed rules, in consultation with the department, and Michael Morrissey will be at the meeting to provide information to the Commission.

Specifically, the proposed rules will be codified in Division 41 under Oregon Administrative Rules (OAR) Chapter 660, and would result in the following actions:

- First, the proposed rules clarify the requirements and process for evaluating Elections under Section 6 of Measure 49 for home site authorizations. A major area of uncertainty in implementing Measure 37 is how to determine what was lawfully permitted at the time claimants acquired their property. The proposed 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, including vested rights determinations. This will ensure that state and local actions on Measure 49 Elections, including county land use approvals based on Measure 49 authorizations, clustering and 20-homesite limitation requirements under Measure 49 are coordinated and consistent.

For more information about this agenda item, contact Michael Morrissey at (503) 373-0050 ext. 320, or by email at [michael.morrissey@state.or.us](mailto:michael.morrissey@state.or.us).

## **II. SUMMARY OF RECOMMENDED ACTION**

The department recommends that the Commission receive testimony on the proposed permanent rules and, at the conclusion of the public hearing, adopt the proposed rules.

## **III. BACKGROUND AND HISTORY**

The proposed rules amend OAR Chapter 660, division 41, which includes rules adopted in 2004 to implement Ballot Measure 37. The Measure 37 rules were initially adopted as temporary rules, but were adopted as permanent rules in January 2007. In June 2008, DLCD converted temporary M49 rules to permanent rules, and also added new M49 permanent rule provisions.

## **IV. PROPOSED RULES**

### **Detailed Explanation of the Proposed Permanent Rules**

The proposed permanent Measure 49 rules will be included in Division 41 of OAR Chapter 660. Division 41 was adopted in 2004 in order to implement 2004 Ballot Measure 37.

### **DIVISION 41**

#### **Existing Claim Rules**

#### **OAR 660-041-0010: Definitions**

A new section 16 is proposed for the definitions clarifying the meaning of a Measure 49 authorization and its relation to local approvals of one or more home sites.

#### **660-041-0110: Determining What Was Lawfully Permitted on the Claimant's Acquisition Date**

This rule establishes the standards by which the department determines the outcomes of M49 Elections in terms of lots, parcels or dwellings. Proposed amendments to subsection 2(b) apply in situations where the claimant acquired the subject property after the effective date of the statewide land use program -- January 25, 1975, but before DLCD's acknowledgement of the county's (in which the property is located) comprehensive plan provisions. The amendment language states that when determining the number of lots, parcels or dwellings DLCD will apply the statewide planning goals, applicable statutes and rules in processing the M49 Election as evidenced by the first acknowledged land use regulations, unless other evidence in the record establishes that a greater number of lots, parcels or dwellings would have been lawfully permitted. Under the current rules, the ability of the department to consider other evidence in the record is unclear, and this change generally would allow some M49 claimants a greater degree of relief than is currently the case.

## **660-041-0170: Notice of County Applications and Decisions Under Measure 49 Authorizations**

This new rule parallels notice required of counties under M37 in OAR 660-041-0030. The proposed notice provisions ensure that state and local actions under M49 are consistent, and allows the department to analyze and report the outcome and impact of Measure 49 Elections and authorizations.

### **V. LCDC RULEMAKING AUTHORITY AND REQUIREMENTS**

The Commission is authorized to adopt administrative rules under ORS 197.040, which indicates certain requirements for rulemaking, including economic impact assessments. These assessments were completed as part of the notices submitted for publication in the Secretary of State Bulletin on February 1, 2009 (See Attachment D). ORS 197.040 states:

*“The Land Conservation and Development Commission shall: . . .*

*(b) In accordance with the provisions of ORS chapter 183, adopt rules that it considers necessary to carry out ORS chapters 195, 196 and 197. . .”. In designing its administrative requirements, the commission shall:*

*(A) Allow for the diverse administrative and planning capabilities of local governments;*

*(B) Assess what economic and property interests will be, or are likely to be, affected by the proposed rule;*

*(C) Assess the likely degree of economic impact on identified property and economic interests; and*

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

Additional sources of authority for the proposed rules are found in ORS 197.045 (LCDC authorized to “perform other functions required to carry out ORS chapters 195, 196 and 197”); 197.090 (coordinating land conservation and development functions with other government entities); 197.175 (comprehensive planning responsibilities of cities and counties); 197.180 (land use planning responsibilities of state agencies); and ORS 197.353(7) (authorizing state agencies to adopt procedures for filing claims under ORS 197.352).

State law at ORS 183.335 provides general authorization for all agencies to adopt rules and provides requirements for notice of such rule adoption:

*“Prior to the adoption, amendment or repeal of any rule, the agency shall give notice of its intended action . . . in the manner established by rule adopted by the agency under ORS 183.341 (4), which provides a reasonable opportunity for interested persons to be notified of the agency's proposed action.”*

The Commission has adopted notice requirements for the adoption of rules, under OAR 660-001-0000(1). Those rules are copied below. The department provided the required notice to interested parties (See Attachment D), in accordance with LCDC's Division 1 rules, which state:

*“(a) In the Secretary of State's Bulletin referred to in ORS 183.360 at least 21 days prior to the effective date of the rule;*

*(b) By mailing a copy of the notice and proposed rule(s) to persons on the Department of Land Conservation and Development's mailing list established pursuant to ORS 183.335(8) at least 28 days before the effective date of the rule;*

*(c) By mailing a copy of the notice to the persons, groups of persons, organizations, and associations who the department considers to be interested in such adoption;*

*(d) By mailing or furnishing a copy of the notice to the Associated Press and Capitol Press Room; [and]*

*(e) By mailing a copy of the notice to the legislators specified in ORS 183.335(15) at least 49 days before the effective date of the rule.”*

#### **Additional LCDC Guidelines for Rule Adoption**

In 2004, the Commission approved Citizen Involvement Guidelines for Policy Development (“the CIG”) intended to guide the Commission and the department in promoting public involvement in the development of Commission policy on land use, including new or amended administrative rules. With regard to this rulemaking, the CIG guidelines provide:

*“[T]he Commission and the Department shall adhere to the following guidelines to the extent practicable:*

*1. Consult with the CIAC on the scope of the proposed process or procedure to be followed in the development of any new or amended goal, rule or policy;*

*2. Prepare a schedule of policy development activities that clearly indicates opportunities for citizen involvement and comment, including tentative dates of meetings, public hearings and other time-related information;*

*3. Post the schedule, and any subsequent meeting or notice announcements of public participation opportunities on the Department's website, and provide copies via paper mail upon request;*

*4. Send notice of the website posting via an e-mail list of interested or potentially affected parties and media outlets statewide, and via paper mail upon request; and*

*5. Provide background information on the policy issues under discussion via posting on the Department's website and, upon request, via paper mail. Such information may, as appropriate, include staff reports, an issue summary, statutory references, administrative rules, case law, or articles of interest relevant to the policy issue.”*

*“ The Commission may waive or modify these guidelines, as necessary and reasonable, including emergency circumstances or when a rulemaking issue is not significant. When the commission chooses to waive or modify these guidelines, it shall explain its reasons for doing so.”*

**VI. OVERALL CONCLUSION AND RECOMMENDATION**

The department recommends that the Commission receive testimony on the proposed permanent rules and adopt the rules.

**ATTACHMENTS**

- A. Proposed Rules
- B. Measure 49 (ORS 195.300)
- C. Rulemaking Notices
- D. Comments Received