



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2540

Phone: (503) 373-0050

First Floor/Coastal Fax: (503) 378-6033

Second Floor/Director's Office Fax: (503) 378-5518

Third Floor Fax: (503) 378-5318

<http://www.oregon.gov/LCD>



April 8, 2010

TO: Land Conservation and Development Commission

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

SUBJECT: **Agenda Item 7, April 21-23, 2010 LCDC Meeting**

UPDATE ON MEASURE 49 IMPLEMENTATION

I. AGENDA ITEM SUMMARY

This item is a regular informational briefing regarding Measure 49 implementation. This report summarizes current trends for issuing preliminary evaluations and final orders; and provides information on House Bill (HB) 3225 (2009) and Senate Bill (SB) 1049 (2010) implementation.

For information regarding this agenda item, contact: Judith Moore, Measure 49 Development Services Division Manager, 503-373-0050 ext. 373; judith.moore@state.or.us, or Dave Gulledge, Measure 49 Development Services Operations Manager, 503-373-0050 ext. 247; dave.gulledge@state.or.us.

Additional information regarding Measure 49 is available on the DLCD Website at <http://www.oregon.gov/LCD/MEASURE49/index.shtml>

II. RECOMMENDED ACTION

This is an information-only report.

III. BACKGROUND

Ballot Measure 49 (2007) amended Ballot Measure 37 (2004) to provide clear, but more limited relief to property owners affected by land use regulations adopted after they acquired their property. Ballot Measure 37 was designed to relieve property owners from land use restrictions enacted after they acquired their property or to pay them for the lost value of their land. Measure 49 authorizes eligible claimants to establish up to three home sites on their property (Section 6 claims) without having to prove a loss of value to their property due to development restrictions passed by local and state government after the claimants acquired the property.

Measure 49 also authorized eligible claimants to establish up to ten home sites (Section 7 claims) if the claimant was able to demonstrate that land use regulations reduced the value of the property by an amount equivalent to the value the claimant would now receive by being able to develop additional homes. In order to apply for more than three home sites, claimants had to have submitted an appraisal that shows 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 each home site approval to which the claimant is entitled. The claimant had to have been able to document that subsequent land use regulations had the effect of reducing the value of their property by at least as much as the value of the homes they now seek to develop.

IV. SENATE BILL (SB) 1049 (2010)

Senate Bill 1049 took effect on February 25, 2010, and included amendments to Measure 49. Attachment A provides a summary of SB 1049. The commission will hold a hearing to consider adoption of proposed temporary administrative rules and rule amendments to implement SB1049 at its April 2010 meeting. Agenda item 8 provides the report concerning the proposed temporary rules and rule amendments for SB 1049.

A. Pre-Acknowledgement Claims

There are approximately 600 claimants who acquired their Measure 37 claim property after the statewide land use planning goals were adopted in 1975, but before their respective counties' comprehensive plan and land use regulations were acknowledged to be in compliance with those goals as was required by state law. If these claimants had applied to develop their property when they acquired it, the county would have applied both local land use regulations and the statewide planning goals to determine whether the claimants' requested use was allowed.

Determining what uses would have complied with statewide planning goals during this period of time is difficult and time consuming; and most counties have limited information on what was lawfully permitted during this time. To determine what was lawfully permitted during this time, the department relied primarily on the first acknowledged local land use regulations and, if available, the department also considered decisions made by counties following Measure 37 waivers where the counties actually applied the statewide planning goals or local land use determinations issued during that time period where the counties applied the goals.

Due to the difficulty in determining what was lawfully permitted on claim properties acquired prior to the state's acknowledgement of county land use regulations, the department worked with the legislature to clarify how these claims should be evaluated. Section 2 of Senate Bill 1049 simplifies the processing of the approximately 600 Measure 49 claims. The pre-acknowledgement claims would still have to comply with the local zoning in place at the date of acquisition if the zoning was more restrictive than the relief otherwise provided in Section 2 of SB 1049. All of the 600 claims must receive final review by June 30, 2010; and based on claims

processing as of April 6, 2010, all final orders for the pre-acknowledgement claims will be issued by that time.

B. Section 7 (Conditional) of Measure 49 Claims

Section 5 of SB 1049 provides that a claimant who made a timely Measure 49 election under Section 7 but who is not eligible for Measure 49 relief because the claimant either did not file an appraisal or filed an appraisal that did not satisfy the requirements of Measure 49 may be eligible for the approval of one dwelling. Generally, to be eligible for a dwelling under SB 1049, Section 5, the claim must meet the requirements for approval under Section 6 of Measure 49 and the claimant must pay a fee of \$2,500 to cover the costs of processing the claim. All final orders of denial for these claimants included a cover letter explaining relief available to them under SB 1049. Claimants in this situation will be mailed letters from the department regarding their option to pursue relief under SB 1049 in two to three months, which will include a payment form and deadlines for requesting relief under SB 1049. Supplemental review of Section 7 claimants eligible under SB 1049 must be completed by June 30, 2011.

C. County-Only Claims

Approximately 700 claims were filed with counties but not with the state. As stated in the ombudsman update for the commission's January 2010 meeting, the general reason for county-only claims was a misunderstanding by claimants of the Measure 37 process. For example, claimants usually did not file a Measure 37 claim with the state for claims that were withdrawn by the claimant or denied by the county. Senate Bill 1049 provides limited compensation for Measure 37 claimants who filed claims only with a county. The compensation is limited because the authorization would be for a dwelling and not for up to three home sites. Also, the claimant must pay a fee of \$2,500 to cover the costs of processing the claim. Supplemental review of county-only claimants eligible under SB 1049 must be completed by June 30, 2011.

V. HOUSE BILL 3225 (2009) – STATUS UPDATE

The commission adopted permanent administrative rules at the January 20-22, 2010 meeting that facilitated additional review under HB 3225 and Measure 49 for approximately 400 Measure 37 claims. Eight categories of claimants received notification from the department that they may be eligible for additional review under HB 3225. The department mailed 455 letters, and as of April 6, 2010, the department has received 213 responses within the 56-day deadline (204 responded with full payment, one response included only partial payment, and eight responses did not include a payment). The department is issuing final orders this month for claimants who did not respond regarding supplemental review under HB 3225.

House Bill 3225 acknowledges the need to expedite Measure 49 supplemental reviews of Measure 37 claims and mandated a deadline for final review of claims by June 30, 2010. The department “shall issue a final order on or before June 30, 2010, for claims reviewed under [sections] 6 or 7” of Measure 49 (Section 8, HB 3225), and “shall issue a final order on or before December 31, 2010,” for the category of claims receiving additional review (Section 6, HB 3225). Based on the division’s progress shown in the next section of this report, the mandated deadline for final review will be met.

VI. CLAIMS PROCESSING

The Department of Justice (DOJ) completed initial ownership reviews for all of the 4,611 Measure 37/49 claims being reviewed in December 2009. Measure 49 Development Services Division completeness specialists completed 4,607 completeness reviews for Measure 49 Elections (claims).¹ Measure 49 team leads have assigned 4,607 claims to the division’s planning claims analysts. The claims analysts have drafted 4,607 draft preliminary evaluations which have been forwarded to DOJ for review. The Department of Justice has returned to the department 4,607 draft preliminary evaluations for completion and issuance. The department has issued 4,606 preliminary evaluations, and 3,601 final orders.

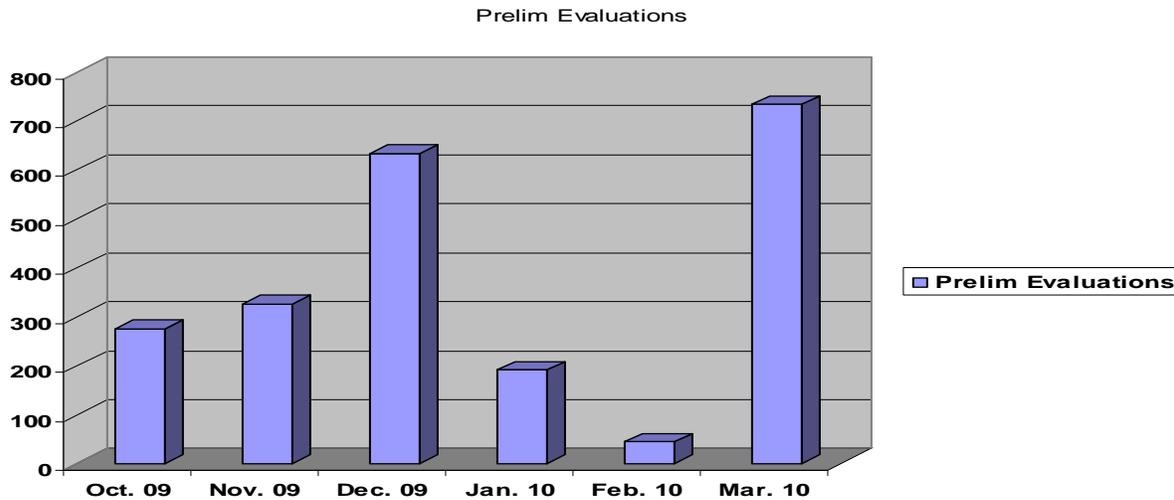
The following table provides a summary of Measure 49 implementation status and tasks:

Measure 49 Implementation Status and Tasks

Step	Task	Percent Complete
1	Confirm current owners of property and determine property acquisition date	100%
2	Determine ownership of surrounding property and confirm claim completeness	99%
3	Evaluate number of lots/dwellings permitted and draft preliminary evaluation	99%
4	Mail preliminary evaluation to claimant, county, and neighbors for comment	99%
5	Draft and mail final order	78%

Over the last six months (October 2009 through March 2010), there has been an average of 368 preliminary evaluations mailed, with a high of 734 preliminary evaluations mailed in March. The bar graph below shows the trend in completion of preliminary evaluations over the last six months. Data are incomplete for April 2010, but the commission will be provided an update at their April 21-23 meeting.

¹ The discrepancy is due to the division waiting for information concerning four claims from one county.



VII. LITIGATION

The following is a summary of pending litigation concerning Ballot Measures 37 and 49, including litigation challenging Measure 49 orders. The department plans to provide the commission with a full report on pending Measure 49 litigation at the June commission meeting in executive session (with Department of Justice representatives).

Measure 37 Cases: Almost all litigation involving judicial review of Measure 37 waiver orders has been dismissed as moot (as a result of Measure 49). The last few cases in circuit courts are expected to be dismissed.

Challenges to Measure 49: The Ninth Circuit Court of Appeals will hear oral argument in the Citizens for Constitutional Fairness case on May 5th in Portland. At issue is whether Measure 37 waivers were contracts that Jackson County must honor, and whether the county's waivers are judicial decisions that are not affected by Measure 49. There are several state court cases involving the same or similar issues. In all cases, the state circuit courts have ruled in favor of the state. Several of these cases are now pending in the Oregon Court of Appeals. There are also two cases pending in federal district court alleging that Measure 49 violates the federal and state constitutions.

Common Law Vesting: There are now a number of circuit court decisions on whether a particular property owner has a common law vested right to complete development authorized under Measure 37 pending in the Oregon Court of Appeals. The state is actively involved in some, but not all, of these cases.

Petitions for Review of Measure 49 Orders: There are approximately 28 pending cases challenging DLCD Measure 49 orders. A few cases have been decided at the trial court level, but most are in early stages. One (consolidated) case was recently decided adversely to the department in Washington County circuit court. A full report on this case and other pending cases will be provided at the June commission meeting in executive session.

**VIII. POST MEASURE 49 AUTHORIZATION LAND USE ACTIONS –
ISSUES/STATUS**

Amendments to Measure 49 rules adopted in April 2009 require counties to submit to the department notices of proposed land use actions that are a result of Measure 49 authorizations (final orders). The Measure 49 Development Services Division reviews the notices received and provides comments to the counties in support of the proposed land use action when it complies with the authorization issued in the department's final order. Conversely, if the proposed land use action does not comply with the Measure 49 authorization, then the department contacts the county to discuss possible concerns. The Measure 49 Division strives to effectively work with counties in situations where it is unclear whether the proposed land use action complies with the terms of the final order and further clarification of the action is needed, and when modification of the proposal is necessary in order for the proposed land use action to comply with the final order.

The department has received over 125 county land use applications regarding development resulting from Measure 49 final orders. Approximately one-half of the land use applications received are from Washington and Clackamas Counties; however, the department has also received a good number of land use applications from Yamhill and Jackson Counties.

ATTACHMENTS

A. Analysis of SB 1049



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street, Suite 150

Salem, OR 97301-2540

(503) 373-0050

FAX (503) 378-5518

Web Address: <http://www.oregon.gov/LCD>

March 12, 2010

Legislature Enacts Senate Bill 1049

Senate Bill 1049, which Governor Kulongoski signed into law on February 25, 2010, amends 2007 Ballot Measure 49, and has three main purposes:

- (1) To provide limited "compensation" (in the form of authorization for a home) for Measure 37 claimants who filed claims only with a county (estimated to be approximately 800 claims);
- (2) To provide limited "compensation" (in the form of authorization for a home) for Measure 37 claimants who sought approval under Measure 49 to build up to ten homes, but who failed to prove that the value of their property was reduced by land use regulations (estimated to be approximately 85 claims); and
- (3) To provide more consistent relief for approximately 700 Measure 37 claimants who acquired their property between 1975 and the date their county's land use regulations were approved by the state.

Section-by-Section Analysis of SB 1049 (2010):

Section 1: This bill amends certain sections of 2007 Ballot Measure 49 and HB 3225 (2009). Measure 49 amended 2005 Ballot Measure 37, which concerns compensation for certain land use regulations that restrict the use of private real property.

Section 2: Under Measure 49 (and Measure 37) a person is entitled to compensation – now in the form of homesite authorizations – only if the development they wish to carry out was permitted when they acquired the property in question. However, during the period from 1975 until the time each county's land use regulations were approved by the state as complying with the state land use planning goals, property owners had to comply with *both* local zoning requirements *and* the state goals.

The state goals (during this period) set subjective standards that are difficult to apply consistently and that require substantial time and expense to analyze. Section 2 of SB 1049 simplifies the processing of approximately 700 Measure 37/49 claims that fall in this "pre-acknowledgement" category. The pre-acknowledgement claims would still have to comply with

the local zoning in place at the date of acquisition, if that zoning was more restrictive than the relief otherwise provided in this section. Absent more restrictive local zoning, section 2 would generally allow claimants one homesite if they own up to 20 acres of land; two homesites if they own more than 20 but less than 40 acres; and 3 homesites if they own more than 40 acres.

Section 3: Measure 49 provides that the homesite authorizations it provides are transferable. However, once the original claimant conveys the property, the authorization must be carried out within the next ten years. This section clarifies that if the original claimant retains an undivided interest in the property and the remaining interest is held by a family member, then the ten-year provision is not triggered.

Section 4: This section clarifies that where a county's first acknowledged zoning did not have a fixed minimum acreage for the approval of a dwelling, forty (40) acres is deemed to be the minimum acreage for purposes of determining whether a home was lawfully permitted.

Section 5: This section provides that section 7 claimants (under Measure 49) who failed to prove that the value of their property was reduced may still qualify for one dwelling if they otherwise meet the requirements of Measure 49.

Section 6: This section provides that Measure 37 claimants who failed to file a state claim but filed a county claim may nevertheless qualify for one dwelling if they otherwise meet the requirements of Measure 49.

Section 7: This section establishes deadlines for completion of claim reviews, and sets a fee of \$2,500 to pay for the cost of reviews under sections 5 and 6 of SB 1049.

Section 8: This section clarifies department authority to participate in judicial review of Measure 49 related litigation.

Section 9: This section provides expenditure limitation and position authority for review of additional claims.

Section 10: Applicability.

Section 11: Emergency clause.

For more information, please contact Michael Morrissey at 503-373-0050, ext. 320, or via e-mail at: michael.morrissey@state.or.us; or Judith Moore at 503-373-0050, ext 373, or via e-mail at judith.moore@state.or.us.