

**Agenda Item 8**  
**Comments Received After Packet Mail Out**

**JILL S. GELINEAU**  
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April 24, 2008

VIA E-MAIL [SARAH.WATSON@STATE.OR.US](mailto:SARAH.WATSON@STATE.OR.US) AND FIRST CLASS MAIL

Chairman John VanLandingham  
c/o Sarah Watson  
Dept. of Land Conservation & Development  
635 Capitol Street NE, Suite 150  
Salem, OR 97301-2540

**DEPT OF**

**APR 25 2008**

**LAND CONSERVATION  
AND DEVELOPMENT**

Re: Comments on Draft Measure 49 Rule

Dear Chairman VanLandingham:

This letter is to provide comments on the draft Measure 49 rule. As you know, my firm represents numerous clients and has experience with the implementation of Measures 37 and 49. The proposed rule would create important new barriers for applicants that are inconsistent with Measure 49, the *Corey* decision, and the 14th Amendment.

More specifically, ORS 195.300(7) defines "File" to mean "to submit a document to a public entity." Later on, ORS 195.305(8)(3) requires claimants to choose how they plan to proceed "By filing the form provided by the department within 90 days..." The State now purports, with draft rule 660-041-0010(9) to add a new definition of "Elected". The first draft of that definition conformed with the language of the statute, where "Elected" "means filed the form provided by DLCD..." The proposed revision reads: "means completed and filed the form provided by DLCD..." In other words, if the DLCD decides the election form is not complete, then the form does not qualify as being "Filed".

We recently had an instance where due to a de minimus omission on the form, the State threatened to deny a claim if the omission was not corrected prior to the end of the 90 day period for filing the form.

That threat is contrary to the statement in Mr. Whitman's letters that "After you submit your Election form, DLCD staff will contact you with any questions concerning your claim, and will work with you to ensure your claim is complete and accurate." Now we are told by your

staff, and by the draft rule, that there may not be an opportunity for DLCD staff to work with us after all, that the staff has no obligation to work with us if time is short, and that if the Election form is not "complete" as defined by the staff – which definition is subject to change and interpretation – the claim will be denied. This undermines the assurance in Mr. Whitman's letter. The DLCD is already – without even waiting for adoption of this draft rule – implementing a completeness requirement, but did not notify applicants about it. Inevitably some claimants will lose the rights they are entitled to under Measure 49.

DLCD should provide a reasonable completeness review, such as that provided by ORS 215.427(2): "If an application for a permit, limited land use decision or zone change is incomplete, the governing body or its designee shall notify the applicant in writing of exactly what information is missing within 30 days of receipt of the application."

Please take a moment to consider the due process issues involved. Section 5 of Measure 49 succinctly begins: "A claimant that filed a claim under ORS 197.352 on or before the date of adjournment sine die of the 2007 regular session of the Seventy-fourth Legislative Assembly is entitled to just compensation..." As the Oregon Court of Appeals concluded in their first *Corey* decision, "they [the claimants] were entitled to notice and a meaningful hearing before DLCD could deny them the waivers." In this draft rule, DLCD is offering no opportunity for a hearing of any kind. DLCD is apparently only willing to notify claimants about what information is missing at its convenience. The draft rule 660-041-0080 gives the State the ability to request more information, but no obligation to do so.

If it is not convenient for DLCD, and a claimant who is otherwise entitled to just compensation in the form of statutory property rights makes an omission which DLCD in its sole discretion deems to be dispositive, the claim can be denied without a hearing, a letter, or a phone call, or without any communication or opportunity for response whatsoever. That is not due process. The draft rule 660-041-0080 rule should be revised to provide for a completeness review modeled on ORS 215.427(2), and a hearing as per the *Corey* decision.

A third concern is the manner in which the rule significantly diminishes the force of Section 8(7) of Measure 49, which reads: "...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 to ensure that the use of the property is lawful." In the draft rule (660-041-0090(8)), this is watered down to: "Following issuance of the Final Decision, upon application by the owner of the Measure 37 Claim Property, the county with land use jurisdiction over the Measure 37 Claim Property may approve a permit to divide the Measure 37 Claim Property or to establish dwellings on the Measure 37 Claim Property, or both, as specified in the decision."

Using the word "may" gives counties the authority to deny permits to divide property or establish dwellings, even if the permits comply with all other requirements. That authority does not appear in Measure 49. If the State has "issued" "home site approvals" the counties should not have discretion over those approvals beyond the discretion over development standards as provided by Section 11 of the measure. The word "may" should be changed to "shall";

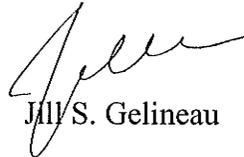
Chair, LCDC  
April 24, 2008  
Page 3

otherwise, the State's Final Decision will not provide the rights that are clearly provided in the statute.

In summary, we are concerned that the draft rule is unnecessarily harsh toward claimants with imperfect applications, and ignores their due process rights. If, as stated in the statute, claimants are "entitled to just compensation" then the State has the legal obligation to provide due process, which the Court of Appeals spelled out in *Corey*. The State should not give counties the discretion to countermand home site approvals issued by the State. The draft rule is not consistent with the statute, and falls short of the legal requirements in *Corey* and the 14th Amendment. We ask you to revise it and to comply with those legal requirements.

Thank you for your consideration.

Very truly yours,



Jill S. Gelineau

JG:cfi

cc: Joe Willis  
Mr. Michael Morrissey

## Jenny Hill - Fwd: M49 Definition of "contiguous"

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**From:** Jenny Hill  
**Subject:** Fwd: M49 Definition of "contiguous"

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>>> "Mark David Haneberg" <[MDHattorney@ashlandhome.net](mailto:MDHattorney@ashlandhome.net)> 04/22/2008 10:31 AM >>>  
Sarah,

Element 6-2 of the Jackson County Comprehensive Plan defines "contiguous" to mean:

18) CONTIGUOUS PARCELS: Parcels, whether under joint or different ownerships, are contiguous if: The parcels share a common boundary of at least 100 feet, even if the common boundary is separated by a two-lane road, a creek, or the Applegate River and its tributaries. Parcels are not contiguous if their common boundary is separated by the Rogue River, or highway having four or more lanes, unless specific provisions exist for the movement of farm animals, products, and machinery across these barriers.

Lane Code 16.090 defines "contiguous" to mean:

"Having at least one common boundary line greater than eight feet in length. Tracts of land under the same ownership and which are intervened by a street (local access, public, County, State or Federal street) shall not be considered contiguous."

These definitions were in place when the voters passed Measure 49. Therefore, the voters had no notice that the DLCD would want to change the meaning of "contiguous" under Measure 49 from those already established. "Contiguous" in Jackson County and Lane County does not include properties that "touch" at a corner. Measure 49 should follow established definitions. I do not have the resources to determine what "contiguous" means in all 36 counties. I understand that Douglas County has a definition similar to Lane County. I urge the DLCD to study and follow pre-existing Oregon definitions of contiguous when implementing Measure 49.

Mark

**Sarah Watson - M49 Definition of contiguous**

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**From:** "Danceror" <tersher@apbb.net>  
**To:** WATSON Sarah <Sarah.Watson@state.or.us>  
**Date:** 04/25/2008 11:21 AM  
**Subject:** M49 Definition of contiguous

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Sarah,

Why is the State now trying to change the meaning of contiguous after M49 was passed? I asked the County Surveyor about it and he said Property touching only at one corner had never been considered contiguous in his known definitions.

We were promised "Fair" treatment if M49 passed, this to me and many other Oregon Property owners is not considered "Fair".

My wife and I purchased our property 45 year ago a young adults for the purpose to have something to fall back on in our retirement, and to give to our children, with all due respect may I ask you if this was yours would you consider that "Fair"?

Terry and Sherry Larson



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Southern Oregon Office • PO Box 2442 • Grants Pass, OR 97528 • 541-474-1155 • fax 541-474-9389

Willamette Valley Office • 189 Liberty Street NE, Suite 307A • Salem, OR 97301 • 503-371-7261 • fax 503-371-7596

Central Oregon Office • PO Box 242 • Bend, OR 97709 • 541-382-7557 • fax 541-317-9129

April 28, 2008

Richard Whitman, Director  
Oregon Department of Land Conservation and Development  
635 Capitol Street NE, Suite 150  
Salem, Oregon 97301-2540

DEPT OF

APR 29 2008

LAND CONSERVATION  
AND DEVELOPMENT

RE: Measure 49 Rules

Dear Mr. Whitman,

1000 Friends of Oregon supports adoption of permanent Measure 49 rules by the Commission. There is, however, one sentence in the rule that does not mirror the statute, which may lead to a less restrictive definition of high-value farmland in 660-041-0130(c) than in statute.

OAR 660-041-0130(c) contains the following provision in its definition of "high-value farmland":  
"The Measure 37 Claim Property is greater than five acres in size and all of the Measure 37 Claim Property is planted in wine grapes, as provided by ORS 195.300(10)(d)."

ORS 195.300(10)(d) uses different language:

"Land that contains not less than five acres planted in wine grapes."

The rule appears to require all of the Measure 37 property to be planted in wine grapes in order to be considered high value farmland. The statute, on the other hand, considers the property to be high value farmland if five acres of it is planted in wine grapes, even if this is not most or all of property.

We respectfully recommend that the rule be amended to mirror the statutory language exactly so there is no confusion or cause for additional litigation.

Thank you for your consideration of these views.

Sincerely,

A handwritten signature in black ink that reads "Mary Kyle McCurdy".

Mary Kyle McCurdy  
Senior Staff Attorney

DEPT OF

APR 29 2008

LAND CONSERVATION  
AND DEVELOPMENT

**Sarah Watson - LCDC rules for an express waiver on land not forest or fam zoned**

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**From:** "Jeff Hansen" <meltedmetal@hotmail.com>  
**To:** WATSON Sarah <Sarah.Watson@state.or.us>  
**Date:** 04/28/2008 5:44 PM  
**Subject:** LCDC rules for an express waiver on land not forest or fam zoned  
**CC:** <meltedmetal@hotmail.com>

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Sarah,

M49 is vague regarding land that is zoned RR (rural residential) and outside an UGB but not in an exclusive farm or forest zone. The intent of the section 6 (express) option is to provide landowners an easy path toward development and home building while limiting impacts that might arise due to over-development. Impact limits are partially accomplished through a section 6 requirement that only three or fewer lots can be created. However, if the lots are large enough and the land lies within RR zoning, it is possible for a landowner to create several more than the allowable three lots, thereby bypassing the three-lot condition. In effect, an express option election can be used to achieve a section 7 (conditional) option result without fully meeting conditional option requirements, such as a before-and-after appraisal. As an example, consider a 22 acre piece of land that is currently zoned RR5 (5 acre minimum). Without a M49 waiver, a maximum subdivision of four lots is permissible. With a M49 express waiver, two half-acre lots and one 21-acre lot is permissible. Allowing for roads, the 21 acre lot can immediately be further divided into four lots under the RR5 zoning for a total of six lots, circumventing the intent and conditions of the express option.

I would like the LCDC to adopt a rule to prevent such a maneuver. Should a rule not be possible, I would like the LCDC to require hearings to be included in any decision-making process involving a responsible governing body. The hearing requirement must include a mandate for notification of all interested persons living within traditional hearing distances of a RR property that has a potential for express option abuse.

Please respond to:

Jeff Hansen  
Oakwood Heights Road District  
7795 NW Oxbow  
Corvallis, Oregon 97330

541-753-7776

[meltedmetal@hotmail.com](mailto:meltedmetal@hotmail.com)

Thank you.

Sincerely,

Jeff Hansen

**Sarah Watson - Measure 37 Permanent Rules**

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**From:** "Alta Gildersleeve" <agandaw@webtv.net>  
**To:** WATSON Sarah <Sarah.Watson@state.or.us>  
**Date:** 04/29/2008 12:21 AM  
**Subject:** Measure 37 Permanent Rules

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Regarding Measure 37 Vesting and Transferability:

Will the new permanent rules make a statement of the Attorney General's present position, that Measure 37 waivers, which are legally vested, are transferable?

There is a great deal of confusion among counties, attorneys, etc. regarding this. A clarifying statement regarding transferability when vested would be helpful.

If a county Measure 37 partitioning decision contains a statement (based on the Attorney General's Letter of Intent) that the property is "not transferable unless a dwelling is completed", can, or should, the county rescind this provision, now that an owner has become legally vested by the county, (due to development before December 6, 2007)?

## The Proposed Definitions of "Contiguous"

I understand that LCDC is proposing to adopt its obtuse draft definition of "**contiguous**" (provided on the department's website (See line 5 of page 2).). The proposed rules will be considered for adoption at the LCDC meeting later this week.

The **traditional definition** of Contiguous: "*Contiguous Property*" means any real property that shares a common boundary along most or all of one side.

LCDC's **obtuse draft definition** "*Contiguous Property*" means any real property that shares a common boundary (including across a road and common corner) with the real property that is the subject of the Claim.

**Basic Principle:** Do not define any parcel(s) as being contiguous across a line, point or intervening road, etc that LCDC/ Planning would not want a one-acre parcel to permanently straddle.

Example 1. Straddling a road (including Interstate 5) is not a good idea and represents extremely poor planning and should be avoided at all cost.

Example 2. Straddling a section corner where two parcels touches at only one point is a terrible idea of contiguous. A person could not drive or even walk from one part of the property to the other without trespassing on the neighbors. This is very objectionable and should be avoided. Such a proposal should be avoided.

### Discussion:

This draft, **obtuse definition of contiguous** is seriously flawed (and is the dumbest idea I have heard in a very long time).

1. It flies in the face of the traditional definition.
2. It violates precedents. LCD would do well to respect this established precedence.
3. There may be no physical connection between the two properties that are "called contiguous."
4. It represents extremely poor planning.
5. LCDC has an image of being heavy handed, making poor decisions and displaying a "public be damned" attitude. This would further validate that image.
6. LCDC is opening itself up for a legal challenge. Taxpayers hate to see their tax dollars wasted supporting such irrational ideas.
7. There appears to be little or no benefit to adopting this bad definition.

### Recommendations:

- (1) The State should adopt the **traditional definition** of Contiguous as stated above.
- (2) It should abandon **all** definitions of contiguous that does not preserve a **significant physical connection** (not just one point such as a common corner). If you cannot put a road through the narrowest point (or drive a car) through the narrowest point, it should

not be defined as contiguous.

(3) The State should drop the idea of straddling a road, especially if each side of the road has its own separate deed.

David Wingerd – Josephine County

**BRYANT  
EMERSON  
& FITCH, LLP**  
Attorneys at Law

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Craig P. Emerson  
Edward P. Fitch  
Steven D. Bryant  
Michael R. McLane  
Michael W. Flinn  
Lisa D.T. Klemp  
Alison M. Trimble  
Tony F. De Alicante \*  
\* Also admitted in Washington

April 29, 2008

*Sent by email: [sarah.watson@state.or.us](mailto:sarah.watson@state.or.us) and USPS*

Chair, Land Conservation and Development Commission  
c/o Sarah Watson  
635 Capitol Street, Suite 150  
Salem, OR 97301-2540

**RE: Proposed Permanent Rules for LCDC's Division 41 Rules**

Dear Sarah:

Please include the following comments in your consideration of the Proposed Permanent Rules for LCDC, Division 41, Measure 49 Rules.

Specifically, proposed OAR 660-041-0060 addresses the effect of 2007 Ballot Measure 49 on DLCDC Measure 37 Waivers. This proposed rule violates the Goal Post Statutes of ORS 215.427(3) and ORS 227.178. Those statutes require that the approval or denial of a land use application shall be based upon the standards and criteria that were applicable at the time application was first submitted if the other criteria of the statutes are satisfied. This rule attempts to modify that statutory requirement. LCDC cannot modify a statute by rule. This exceeds the rule making authority of LCDC.

Thank you for your attention to this matter.

Sincerely,  
BRYANT, EMERSON & FITCH, LLP

LISA D.T. KLEMP

/pbj

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>>> Norm Wingerd <skiernorm@sbcglobal.net> 05/01/2008 7:50 AM >>>

On April 30, 2008, I sent you an email expressing my objections to to the definition of "contiguous", as proposed in the draft administrative rules. Your draft rules propose to expand the definition of "contiguous" to include "non contiguous".

In the first paragraph, I erroneously indicated that Your hearing is scheduled for 1:00 pm on May 8, 2008. I am aware that the hearing is scheduled for today, 1:00 pm on May 1, 2008. **Please be as objective as you can at the hearing.**

Please recognize my objection to the definition of "contiguous", as proposed in the draft administrative rules. Your draft rules propose to expand the definition of "contiguous" to include "non contiguous".

My objection follows.

**Chair, Land Conservation and Development Commission  
c/o Sarah Watson  
635 Capitol Street, Suite 150  
Salem, OR 97301-2540**

Subject: Proposed permanent rule making for the definition of contiguous

I am aware that The Land Conservation and Development Commission (LCDC) is considering the adoption of permanent administrative rules regarding Ballot Measure 49 (2007). I am also aware that a public hearing is scheduled for the Commission to hear the matter on May 1, 2008.

Per your invitation, I am providing these written comments relative to your draft rules. Please have my comments heard at the hearing.

I specifically, and strongly object to what you are proposing to do with the definition of contiguous (provided on the department's website (See line 5 of page 2).).

All dictionaries I am aware of would define the word contiguous as; in physical contact, to touch upon, to border upon, etc. Yet you are proposing to define the word contiguous, to include non contiguous.

There is nothing in M 49 that would give license to your committee to make such a restricting rule. I view your proposed definition as an effort to go well beyond the intent of M 49.

Insisting on such a convoluted definition of the word "contiguous" will only enhance the overbearing image the citizenry has of the LCDC.

The LCDC has a well earned image of being very heavy handed, and having a "public be damned" attitude. Over restrictive rules that go well beyond the ill conceived M 49 will further validate that overzealous image. M 49 already gutted M 37. You don't need the very last drop of blood.

Surely your proposed definition to expand the definition of "contiguous" to include non contiguous will only add to the already confusing, arbitrary, and litigious rules.

I recommend that LCDC use the traditional definition of "contiguous" (physical contact), that we all know and understand. It will save a lot of debate, litigation, and legal cost.

Sincerely,  
Norman Wingerd-Josephine County



Zupancic  
Group Inc.  
Real Estate Advisors and Developers

May 1, 2008

Chair, Land Conservation and Development Commission  
c/o Sarah Watson  
635 Capitol Street, Suite 150  
Salem, OR 97301-2540

SENT VIA FAX TO: 503-378-5518 AND VIA EMAIL TO: sarah.watson@state.or.us

RE: Comments on DLCD Proposed Rulemaking – Division 41, Measure 49

Regarding the proposed rules posted on the state's website as of April 30, 2008, we offer the following comments:

**Comment 1**, regarding proposed OAR 660-041-0010 "Definitions":

**(4) "Contiguous Property" means any real property that shares a common boundary (including across a road and common corner) with the real property that is the subject of the Claim.**

This broad definition of "contiguous" is not supported by the text of the statute. Other existing Oregon statutes make it clear that "contiguous" does not necessarily include property that is separated by a road, particularly if the roadway has been deeded in fee to a government body. For example, ORS 199.490(2)(b) states in part:

"The notice of intent to annex shall name the affected city or district and generally describe the boundaries of the territory sought to be annexed, which territory must be **contiguous to the city or district or separated from it only by a public right of way or a stream, bay, lake or other body of water.**"

From the sentence above, it is obvious that "contiguous" property would NOT include property that was separated from the city or district by a public right of way. If contiguous included property separated by the road, the phrase in bold would be mere surplusage. The same language is used in ORS 222.111(1), as well as in Section 5, Chapter 844, Oregon Laws 2005 paragraphs (2)(a)(B) and (3)(b).

In a similar vein, ORS 321.700(2) states that "Contiguous means having a common boundary that is greater than a single point." Thus, in the only statute to include a direct definition of "contiguous," the legislature has indicated that a corner to corner relationship does not create contiguity.

**Comment 2**, regarding OAR 660-041-0060.

In line 46, it appears that "(2005)" is a typographical error and should not be included.

**Comment 3, regarding OAR 660-041-0070.**

This rule should not apply to any Measure 37 Claim Property for which a Vested Rights Determination has been granted. Therefore, we suggest adding the following clause to the end of the first sentence: "unless that use of Measure 37 Claim Property has been deemed vested."

**Comment 4, regarding OAR 660-041-0110.**

Regarding paragraph (2), until a comprehensive plan was complete and "acknowledged" by LCDC, a land use applicant was typically subject to the local land use rules and regulations of the county, not to state policy statements. In addition, in the 1970's and 1980's, the amount of "pre-entitlement" information required by most counties was minimal, meaning very little paper was generated. Further, it is clear from lawsuits in the 1980's that some local authorities neither notified LCDC nor referred to state statutes when analyzing development applications prior to comprehensive plan acknowledgement. The proposed rule takes a "hindsight is 20/20" approach and biases the outcome of a claimant's allowed use investigation today squarely against any development. The rule places the burden on the applicant to produce evidence that the proposed use would have been allowed, even though any such evidence would be kept by the local planning or development authorities. Not only must a claimant prove that the use would have been approved through local processes that were not tracked closely, but a claimant is forced into proving the State government's assumption is wrong. This is not in keeping with either the letter or the spirit of Measure 49.

We therefore suggest that paragraph (2)(b) be eliminated, and that paragraph (2)(a) be changed by deleting the specific date. The opening sentence would then read, in part: "If the Claimant's acquisition date is prior to the date the county with land use jurisdiction over the Measure 37 Claim Property had its applicable comprehensive plan acknowledged by LCDC for compliance with the Statewide Planning Goals, DLCD will apply . . ."

**Comment 5, regarding OAR 660-041-0160**

Measure 49, Section 7, paragraph (7) states that the appraisal "must also show the fair market value of each home site approval." Rule 0160 changes this to state that the appraisal must provide the fair market value of each "lot, parcel, or dwelling that the Claimant is seeking." This is simply a substitution of the definition of "home site approval" from the statute into the paragraph and does nothing to clarify the statute. The information requested cannot be obtained, as any value would be completely dependent on the finished product which does not yet exist. Measure 37 and 49 claimants are requesting authorizations to develop property that is currently undeveloped. The value of each additional Measure 49 home site authorization should be evaluated as follows:

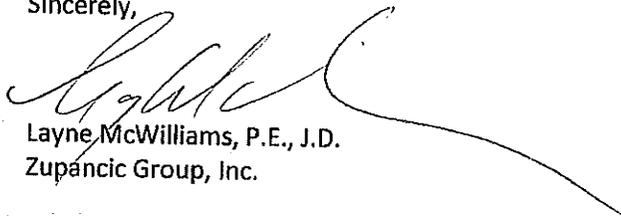
1. Determine the FMV of the property today under current zoning restrictions with associated number of allowed home sites.
2. Determine the FMV today under different zoning that would allow the historic number of home sites or the maximum allowed under Measure 49, whichever is less.
3. Subtract the result in step 1 from step 2.

4. Divide the result in step 3 by the difference in allowable home sites used in step 2 and step 1. This results in the value of each individual Measure 49 home site authorization.
5. The applicant would then obtain the number of Measure 49 authorizations that does not exceed the historic devaluation of the property as adjusted by inflation, taxes, etc. The number of added authorizations would be combined with the number of dwellings allowed under current zoning to obtain the total number of home sites available for development.

In this way, the calculations and dollar values derived today are based on the same asset as the loss in value calculated due to the impact of regulations. The historical value is the difference in value of undeveloped land before and after the restrictive regulation. The current value of authorizations must be determined using the same analysis and the same asset, undeveloped land.

We respectfully request that the above comments and recommended amendments be considered as part of this rule making process.

Sincerely,



Layne McWilliams, P.E., J.D.  
Zupancic Group, Inc.

May 1, 2008

Growing up as a second generation Oregonian, I learned to value the natural beauty and diversity that our beautiful state has to offer. As an adult, I was fortunate to marry into a wonderful family that shared the same values. Mr. and Mrs. Harold A. Wright, my wife's parents, had given a lifetime to purchasing and becoming stewards of the 102 acre farm they purchased. They spent day after day working the land into the farmable, productive, and pristine environment they wished it to be.

The Wright's, Harold and Milly, had a vision for the future of their family farm. They wanted the family farm to be a place for our family's future generations of children and grandchildren to grow and live. The Wright's believed in teaching each new generation the importance of being a steward to the land. This very dream led to a lengthy 5 year partitioning process that ended with the building of mine and my wife's home.

Harold passed away in 1994. My wife, children, and I have been carrying on his dream and caring for his land and his beloved wife Milly. Since Harold's passing, we have helped her move from their farm house at the bottom of their property to a manufactured home next to us.

At this time, I am here to represent Milly. Recently I have acted on her behalf, helping her file a Measure 37 claim with Marion County. Throughout this process we have met all county requirements and paid fees totaling over \$900. As we've proceeded, we have relied on the County Planning Commission for the proper guidance each step of the way. Even more recently, we understood that the last requirement under Measure 37 was to file with the state. Upon attempting to complete this final step, we were told we had not met the cut-off date established by legislation.

Now, the original family farm is nearly surrounded by single-family dwellings. Milly will turn 87 this year and is trying to partition three individual pieces of approximately 18 acres each. Our intent in doing this is to continue both Harold and Milly's dream of keeping the land in the family. Our family's goal in filing the Measure 37 claim was to continue and perhaps expand our current cattle production business as well as allow other family members to participate. Now, after all the paperwork, advice, and fees, it seems that the land use laws in Oregon are no longer protecting the agricultural purposes of the land. They seem to be more driven by monetary gain.

Ultimately, our family believed that Measure 37 was intended to help families like ours. We are currently disappointed in this process and feel that it could be improved to be more easily understood and user-friendly. Additionally, it would be beneficial if it could be more easily understood by the elderly as most landowners that are eligible to file Measure 37 claims are likely in their 70's or 80's.

We would appreciate any consideration possible in regards to these issues.

Sincerely, Ron Cox

# OREGONIANS IN ACTION

April 30, 2008

Land Conservation and Development Commission  
635 Capitol St. NE, Suite 150  
Salem, OR 97301

Re: Comments on Draft Measure 49 Rules

Dear Commission:

The purpose of this letter is to provide comments on the proposed permanent Measure 37/Measure 49 administrative rules. Please include this letter in the record in this matter.

As a preliminary matter, I have read the April 24, 2008 letter submitted by Jill Gelineau of the Schwabe, Williamson & Wyatt law firm, agree with each of Ms. Gelineau's suggestions, and incorporate those points and suggestions into this letter.

In addition, there are a number of additional changes that we hope the Commission will consider, as follows:

1. "Contiguous Property" (OAR 660-041-0010(4)): The proposed definition of contiguous property includes land that "shares a common boundary" with property that is the subject to a Measure 37 claim. That seems appropriate. But the proposed definition further provides that a lot or parcel across a "road" from property that is subject to a Measure 37 claim is considered to be "contiguous" to the Measure 37 property. That makes no sense.

For example, if a property owner owns two parcels separated by a flag lot, with the "flagpole" being used as a driveway (and hence a "road"), the property would be considered to be contiguous as defined by this rule, despite the fact that they do not "share a common boundary." Or assume a farmer owns properties on either side of I-5. Are these properties contiguous? It appears from the proposed definition that they are.

And how do we know when a parcel is "across" a road from the Measure 37 property? If a Farmer owns 40 acres on one side of I-5, and another 40 acres a half-mile down the "road" on the other side of I-5, are these properties "across" from each other?

I am aware of at least one factual situation involving Measure 49 where two parcels are separated by an interstate freeway, have never been a part of one parcel, were purchased separately, but happen to now be owned by the same

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property owner, and may be “across” the “road” from each other. Is it really the Commission’s intention to consider these parcels to be “contiguous”?

2. Vested Rights (OAR 660-041-0060): This proposed rule would limit the ability to pursue uses authorized by Measure 37 waivers to only those Measure 37 claimants who had a “common law vested right to complete and continue that use on December 6, 2007.” There are two problems with this rule.

First, there are a handful of Measure 37 claimants whose Measure 37 development was completed prior to December 6, 2007. They did not have a “common law vested right to complete and continue that use on December 6, 2007.” Instead, they had a lawfully established use (we can quibble about whether the use was non-conforming or not, but it makes no difference for purposes of this rule). Surely those whose uses were authorized under Measure 37 and who successfully completed the development pursuant to their Measure 37 waivers should be entitled to continue those uses.

This issue can be resolved by broadening the language in this rule.

Second, it is not clear whether a vested right springs from the common law, the Constitution, or both, and the Oregon appellate courts have muddled the distinction, if one exists. To the extent that a vested right finds its source in the Constitution, the proposed rule is unconstitutional, as it attempts to deprive a Measure 37 claimant who has established a vested right under the Constitution from continuing the use of the property in the manner in which it has vested.

3. Supplemental Information Requests (OAR 660-041-0080): As Ms. Gelineau suggests in her comments, the DLCDC should be obligated to inform a claimant of any missing information necessary for the Department to make a determination under the express or conditional paths of Sections 6 and 7 of Measure 49. Measure 49 was presented to the public as creating a simple and quick path for people to obtain relief to create a small number of homesites for their retirement or their children. The Department has done an admirable job to date of assisting claimants and those of us attempting to help claimants work their way through the process, and has assured claimants that there would be no “gotchas” in the claims process. Requiring the Department to inform applicants of the infirmities of their claims carries on that spirit of cooperation between the claimants and the Department.
4. Procedures for Supplemental Review of Measure 49 Claims (OAR 660-041-0090): There are two concerns with the draft language.

First, in subsection (6) of the rule, the claimant is given an opportunity to “file a written response” to any comments evidence or information filed by a third

party or county to the proposed Measure 49 claim. It is unclear whether the "written response" may include new evidence to rebut any evidence submitted by a third party or county in response to the Preliminary Evaluation. The language should be clarified to indicate that a claimant may submit additional evidence in response to any evidence submitted by third parties or the county during the 28 day period in which people have to respond to the Preliminary Evaluation, especially since the claimant will not have had any opportunity to see the evidence submitted by third parties or the county during the 28 day period.

Second, subsection (7) of the rule is problematic, unless the state plans to condition approval of Measure 49 claims upon the claimant making a showing to the county that they can meet any local land use criteria that were applicable to the homesite approvals as of the date of acquisition of the property. One of the vexing questions under Measure 49 that is very troubling to claimants and their counsel is what must be proven in order to get a homesite approval from the state. In many situations, a Measure 49 claimant could have gained approval for the homesites they are seeking under Measure 49, but had to satisfy certain state or local conditions before a building permit would issue. Thus, counties would condition approval of the development upon satisfaction of these approval conditions.

It is not clear under subsections (7) and (8) of the rule whether the DLCD intends to step into the shoes of the county planning departments and require claimants to demonstrate that they can satisfy all conditions of approval in order to gain approval from the DLCD for homesite approvals, or whether the DLCD intends to issue conditional homesite approvals, and leave to the counties the role of assuring that the claimant satisfies the conditions before developing the property. If it is the former, then subsections (7) and (8) should provide that the county must issue permits for the homesite approvals, subject only to the siting standards found in Measure 49. If it is the latter, then the rule should make this clear, as the proof requirements for claimants will be much different.

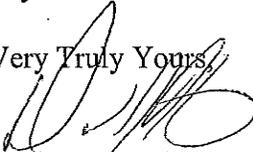
5. Measure 49 Submission Requirements (OAR 660-041-0100): To date, the DLCD has indicated that the only form that must be submitted within the 90 day period specified by Measure 49 is the election form. This should be spelled out in this rule.
6. Determining What Was Lawfully Permitted (OAR 660-041-0110): For claims involving property that was acquired between January 25, 1975 and the date of the county's first acknowledged comprehensive plan and zoning ordinance (subsection (2)(b) of the rule), the rule should allow a claimant to submit evidence demonstrating that the county approved claims for uses of equal or greater levels of development to those proposed by the applicant under Measure 49 as a second alternative to the test proposed by the rule. If

the claimant can meet this burden, then the Measure 49 claim should be approved. To do otherwise is to allow the Department to review claims in 2008 based on current Department interpretations of the old goals and rules that were not shared by the Department at the date of acquisition. If the goal is to ensure that the property owner is entitled to homesite approval for a modest number of homesites based on what was allowed at the time the property was acquired, the Department ought to "put itself into the shoes" of the Department staff who were present at the date of acquisition.

7. High Value Farmland and High Value Forestland (OAR 660-041-0130): The definition of "high value forestland" in subsection (2) of this rule is inconsistent with the definition in Measure 49, and thus outside the scope of the agency's rulemaking authority. In order for property to be considered high value forestland under Measure 49, it must be in a forest zone or mixed farm forest zone. The rule definition allows property to be considered high value forestland even if it is not zoned for forest or mixed farm/forest uses. As a result, the rule is inconsistent with the Measure, and cannot be adopted.

Thank you for the opportunity to testify.

Very Truly Yours,



David J. Hunnicutt

**Chair, Land Conservation and Development Commission**  
**635 Capitol Street, Suite 150, Salem, OR 97301-2540**

Subject: Input to public hearing **May 1, 2008**. Proposed permanent rule making for the definition of "**contiguous**"

The Land Conservation and Development Commission (LCDC) is considering the adoption of permanent administrative rules regarding Ballot Measure 49 (2007). Please have my comments heard at the hearing.

I strongly object to what you are proposing to do with the definition of "contiguous" (provided on the department's website (See line 5 of page 2)).

All dictionaries I am aware of would define the word contiguous as; in physical contact, to touch upon, to border upon, etc. Yet you are proposing to define the word "contiguous", to include "non contiguous".

The use of this **obscure definition** goes will beyond the law. There is nothing in M 49 that would give license to your committee to make such a restricting rule. LCDC is proposing a definition that is making regulations that go far beyond the intent of M 49.

Insisting on such a convoluted definition of the word "contiguous" will only enhance the overbearing image the citizenry has of the LCDC.

The LCDC has a well earned image of being very heavy handed, and having a "public be damned" attitude. Over restrictive rules that go well beyond the ill conceived M 49 will further validate that overzealous image. M 49 already gutted M 37. You don't need the very last drop of blood.

Surely your proposed definition to expand the definition of "contiguous" to include non contiguous will only add to the already confusing, arbitrary, and litigious rules.

The **traditional definition** of Contiguous: "*Contiguous Property*" means any real property that shares a **common boundary along most or all of one side**.

LCDC's **obtuse draft definition** "*Contiguous Property*" means any real property that shares a common boundary (including **across a road and common corner**) with the real property that is the subject of the Claim.

**Hypocrisy** : LCDC would have us use this one definition for Measure 49 evaluation and another definition for land division. Straddling a road (including Interstate 5) is not only a bad idea, it represents extremely poor planning and should be avoided when deviding

parcels. However LCDC would use this definition for contiguous. **This is hypocrisy**, an example of LCD inconsistency.

**Discussion:**

This LCDC draft, **unusual definition of contiguous** is serious flawed (and is the dumbest idea I have hear in a very long time).

1. It flies in the face of the traditional definition.
2. It violates precedents. LCD would do well to respect this established precedence.
3. There may be no physical connection between the two properties that are “called contiguous.” How is this possible.
4. Its represents extremely poor planning
5. LCDC has an image of being heavy handed, making poor decisions and displaying a “public be damned” attitude. This would further validate that image.
6. LCDC is opening itself up for a legal challenge. Taxpayers hate to see their tax dollars wasted supporting such irrational ideas.
7. There appears to be little or no benefit to adopting this bad definition.
8. This definition is not included in Measure 49 or Measure 37.

**Recommendations:**

- (1) The State should adopt the **traditional definition** of Contiguous as stated above.
- (2) It should abandon **all** definitions of contiguous that does not preserve a **significant physical connection** (not just one point such as a common corner). If you cannot put a road through the narrowest point (or drive a car) through the narrowest point, it should not be defined as contiguous.
- (3) The State should drop the idea of straddling a road, especially if each side of the road has its own separate deed.

Buford Wingerd – Josephine County