

Howard, Lisa

From: Moore, Judith [judith.moore@state.or.us]
Sent: Monday, July 12, 2010 5:35 PM
To: HOWARD Lisa; GUSTAFSON Virginia L
Subject: FW: Recent Notice of Rulemaking RE: SB1049, new rule OAR 660-041-0180

From: McIntire, Rick [mailto:rickmci@co.clackamas.or.us]
Sent: Monday, July 12, 2010 5:31 PM
To: 'Moore, Judith'
Cc: McCallister, Mike; Hughes, Jennifer
Subject: RE: Recent Notice of Rulemaking RE: SB1049, new rule OAR 660-041-0180

Judith

Thanks for the info.

We have reviewed the proposed Rules and have the following comments:

Amendments to OAR 660-041-0170 (1) and (2) – Regarding the notice requirements, this is a problem for approvals of a single dwelling on an existing lot or parcel, or combination of parcels (one Lot of Record in our parlance) under the SB 1049 provisions.

The issuance of Building and Manufactured Home Placement Permits are not land use or limited land use decisions and once a Home Site Authorization for one dwelling on the existing lot or parcel is issued by DLCD, there is no further land use permit action needed at the County level; therefore no requirement for notice or opportunity to comment. We do set up an informational “land use permit” file in our electronic permits tracking system to track these permits issued under M49 approval, but there is no notice of a pending application since none is required.

In the case of Manufactured Home Placement Permits, you are often talking about a single day permitting process since there are no plans review needed. The proposed language would require an entirely new process to be set up just to provide a notice to DLCD and could entail a significant delay in the permitting process for some applicants, particularly those seeking a Manufactured Home Placement Permit.

Also, we are unclear on what an “approval of a lot or parcel” is. In the case of an approval for a single home site authorization on existing property, the lot or parcel already exists. Or are you referring to approval of an additional lot or parcel requiring a partition application?

Rick McIntire
Sr. Planner
Land Use and Planning Permits Division
150 Beavercreek Rd.
Oregon City, OR 97045
503-742-4516 (direct)
503-742-4550 (fax)
rickm@co.clackamas.or.us

*Our office hours are Mon. - Thurs., 7:00 am to 6:00 pm; however beginning on June 1st, 2010, our public service lobby hours will be reduced to 9:00 am to 4:00 pm. Plans, applications, fees, etc. can only be submitted during the open lobby hours. **For directions** to our office, follow this link:*

07/13/2010

<http://www.clackamas.us/map/map.php?b=150%20Beavercreek%20Road%20Oregon%20City,%20OR%2097045>



PLANNING DEPARTMENT

Room 106 • Justice Building • Douglas County Courthouse
Roseburg, Oregon 97470

Agency Coordination • Administrative • Long Range • Support Services
(541) 440-4289 • (541) 440-6266 Fax

On-Site Services Community Services
(541) 440-6183 (541) 464-6443
(541) 464-6429 Fax

July 19, 2010

MEMORANDUM

TO: John VanLandingham, Chair of the Land Conservation and Development Commission

FROM: Louise R. Nicholls, Administrative Planner *Louise R. Nicholls*

RE: Proposed permanent rules implementing Senate Bill 1049 (2010) and facilitating local government implementation of Measure 49 authorizations

Douglas County has reviewed the proposed permanent rules to OAR 660 as referenced above. The proposed rules to implement Senate Bill 1049 (2010) and facilitate local government implementation of Measure 49 authorizations appear to be consistent with the statutes. Douglas County has no objection to the rule adoption.

Douglas County looks forward to continuing to work with DLCD in implementing Measure 49 authorizations. Thank you for the opportunity to provide written comments to the proposed permanent rules at the July 22, 2010 public hearing.



Attorneys at Law

Medford Office
823 Alder Creek Drive
Medford, OR 97504

Phone: 541-772-1977
Fax: 541-772-3443

Ashland Office
125 N. 2nd Street
P.O. Box 1090
Ashland, OR 97520

Phone: 541-482-8491
Fax: 541-482-9173

Office E-mail:
office@medfordlaw.net
Website:
www.medfordlaw.net



Patrick G. Huycke
Daniel B. O'Connor*
Darrel R. Jarvis
David H. Lohman
Sydney B. Dreyer
Joseph R. Davis

Writer's Direct E-mail:
dano@medfordlaw.net

Writer's Assistant:
Lisa Canon

July 21, 2010

Land Conservation and Development Commission (LCDC)
635 Capitol Street NE, Suite 150
Salem, Oregon 97301-2540

**RE: PUBLIC HEARING AND POSSIBLE ADOPTION OF PROPOSED
PERMANENT ADMINISTRATIVE RULES AND RULE AMENDMENTS TO
IMPLEMENT SENATE BILL 1049 – RELATING TO BALLOT MEASURES
37/49**

Dear Commissioners:

This firm represents Naumes, Inc. and Wild River Orchards, Inc. (collectively "Naumes") concerning the above-stated matter. The purpose of this correspondence is to provide comment on the proposed rule amendments. In particular, Naumes respectfully requests that the language set forth in proposed OAR 660-041-0180(5) be modified as set forth herein.

A. Background.

Naumes is a large family operated pear grower in Southern Oregon and Northern California with its corporate offices being located in Medford, Oregon. In Jackson County alone, Naumes has approximately 1,500 acres of producing orchards. Naumes has obtained multiple Measure 49 home site authorizations from the Department of Land Conservation and Development (DLCD). Several of the aforementioned Measure 49 home site authorizations are located on marginal orchard properties. Accordingly, Naumes is working with both Jackson County and DLCD to develop clustering plan(s) in order to protect the healthier orchards.

B. Proposed Modification.

OAR 660-041-0180(5) proposes to implement certain conditions on the clustering of Measure 49 home site authorizations. Specifically, OAR 660-041-0180(5) will require the recording of a restrictive covenant prohibiting the development of any future dwelling on a parcel in which all the Measure 49 development rights have been transferred. As drafted, OAR 660-041-0180(5) states, in part, as follows:

(5) Prior to the final approval of clustered lots or parcels as provided in OAR 660-041-0180(3), the owner shall provide evidence that a Declaration of Use Restriction has been recorded with the county clerk of every county where a Measure 37 Claim Property from which home

*Also admitted in Washington

site approvals have been transferred is located.

(a) As shown in Examples A and B, the Declaration of Use Restriction shall:

(A) identify the Measure 37 Claim Property on which the lots, parcels or dwellings are approved to be clustered;

*(B) identify all the Measure 37 Claim Properties from which home site approvals are transferred; preclude on each Measure 37 Claim Property from which one or more home site approvals are transferred all future rights to establish new lots, parcels or dwellings other than any lot, parcel or dwelling established pursuant to a home site approval the owner did not transfer from the property; and * * *. OAR 660-041-0180(5), as proposed.*

Naumes, respectfully proposes that the following language (in bold) be added to OAR 660-041-0180(5)(a)(B):

*(B) identify all the Measure 37 Claim Properties from which home site approvals are transferred; preclude on each Measure 37 Claim Property from which one or more home site approvals are transferred all future rights to establish new lots, parcels or dwellings other than any lot, parcel or dwelling established pursuant to a home site approval the owner did not transfer from the property. **Notwithstanding the foregoing, dwelling(s) in conjunction with a farm use allowed pursuant to ORS 215.283(1)(d) and (e) shall not be precluded on a Measure 37 Claim Property located in an exclusive farm use zone from which all of the home site approvals have been transferred;** and * * *.*

Naumes also respectfully requests a corresponding change to proposed Example A (Declaration of Property Use Restriction – Full Transfer).

C. Basis for Proposed Modification.

The future development of farm dwellings on parcels zoned Exclusive Farm Use (EFU) should be encouraged not restrained. ORS 215.283(1)(d) and (e) and their corresponding administrative rules allow the development of dwellings customarily provided in conjunction with farm use. In particular, OAR 660-033-0135 sets forth standards for dwellings customarily provided in conjunction with farm use such as large tract farm dwellings (OAR 660-033-0135(1), farm capability dwellings (OAR 660-033-0135(2) and farm income dwellings (OAR 660-033-0135(5), (6), (7), (8) & (9)). The farm dwelling standards, especially the farm income dwelling standards, provide an incentive to owners of EFU lands to establish commercial agricultural operations. Accordingly, the proposed language modification is consistent with Goal 3 in that it will promote the commercial agricultural use of agricultural lands.

The proposed language modification will allow farm operators like Naumes to preserve and continue to farm Measure 37/49 agricultural lands that would otherwise need to be sold as home site properties. As proposed, Naumes would be allowed to

transfer all of its Measure 49 development rights for clustering on its marginal agricultural parcels for the sale of 2-acre home site parcels to non-agricultural buyers. Agricultural parcels from which the development rights were transferred would be maintained in farm use while maintaining value in the subject property for some future potential agricultural purchaser (i.e. organic agricultural operation). In particular, most organic farmers desire to reside on the property they are farming.

D. Conclusion.

For the reasons set above, Naumes respectfully requests that the proposed language for OAR 660-041-0180(5)(a)(B) be modified as suggested herein.

Yours truly,

HUYCKE, O'CONNOR, JARVIS & LOHMAN, LLP



DANIEL O'CONNOR

DOC:Imc

JEFFREY L. KLEINMAN
ATTORNEY AT LAW
THE AMBASSADOR
1207 S.W. SIXTH AVENUE
PORTLAND, OREGON 97204
TELEPHONE (503) 248-0808
FAX (503) 228-4529

M E M O R A N D U M

**To: OREGON LAND CONSERVATION AND DEVELOPMENT
COMMISSION**

From: JEFFREY L. KLEINMAN

**Re: PROPOSED PERMANENT MEASURE 49 RULE,
OAR 660-041-0150**

Date: JULY 22, 2010

These comments are submitted with respect to the above rule. The temporary and proposed permanent rule provide as follows:

“660-041-0150 Combining and Dividing Claims

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

However, Measure 49 does not authorize “dividing claims” as suggested in OAR 660-041-0150. * * * *.

Section 5 of Ballot Measure 49 sets out the options available to Measure 37 claimants, and provides:

“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 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 boundary 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 to the extent that the claimant's use of property complies with the waiver and the claimant has a common law vested right on the effective date of this 2007 Act to continue the use described in the waiver.”

As described by the Court of Appeals in *Frank v. Department of Land Conservation and Development*, 217 Or App 498, 502-505, 176 P3d 411 (2008):

“Section 6 [of Measure 49] allows the creation of one, two, or three home sites on property that was the subject of a claim under ORS 197.352 if particular criteria are met. Section 7 allows four to 10 home sites for a previously-filed claim under ORS 197.352 under even more particular circumstances. * * *”

Claimants who elect to seek one, two, or three home sites under Section 6 are said to have elected the “express” route. Claimants seeking more than three home sites must proceed under the onerous provisions of Section 7, which include, *inter alia*, the requirement of an appraisal by an appropriately certified or licensed professional “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.” Section 7 allows a maximum of 10 home sites on all the property which is the subject of any Measure 37 claim. No Section 7 election is available for high-value farmland.

As proposed, OAR 660-041-0150 would appear to allow a subdivision of essentially unlimited size to flow from a single Measure 37 claim in an Exclusive Farm Use zoning

district, so long as ownerships of contiguous tax lots within the subject property are not identical (*e.g.*, Mom, Mom and Son, Mom and Daughter, Mom, Mom and Son, and so forth *ad infinitum*). In fact, this is precisely how DLCD has interpreted and applied the identical temporary rule, in one instance allowing five Measure 49 “sub-claims” for a total of 15 lots on property described in a single Measure 37 claim in Polk County, as to which 21 lots had been sought under Measure 37. DLCD has also interpreted and applied the temporary rule so that, under the above “hypothetical,” Son and Daughter have the benefit of Measure 49 even though they owned their respective interests when the Measure 37 claim was filed *and did not file or participate in the Measure 37 claim*. Thus, the effect of the language of the proposed permanent rule has been to allow substantially more lots than would be permitted even under the onerous requirements of Section 7 of Measure 49, were the property not high-value farmland.

For the reasons set out below, the proposed rule is outside the scope of the agency’s delegated authority and violates statutory provisions.

A typical DLCD Measure 37 Order “waives” certain laws only as to the named claimant and goes on to state:

“These land use regulations will not apply to the claimant only to the extent necessary to allow him/her to use the subject property for the use described in this report, and only to the extent that use was permitted when he/she acquired the property on [date].”

(Emphasis added.)

Paragraph 2 of a typical Measure 37 Order states that the order “provides the state’s authorization to the claimant to use the subject property for the use described in this report * * *.” (Emphasis added.)

Under all the language highlighted above, DLCD's Measure 37 waiver is personal to the claimant or claimants. Nonetheless, the proposed rule has been interpreted and applied to allow any number of non-claimants to benefit, even if they acquired their respective interests long after the relevant regulations took effect. (In the Polk County case, the benefitted non-claimants acquired their interests in 2002, through a possibly improper partitioning.)

It has long been acknowledged by DLCD and the Oregon Attorney General, and has now been held by the Court of Appeals, that Measure 37 waiver rights are personal to the original claimant. *DLCD v. Jefferson County (Burk)*, 220 Or App 518, 521, 188 P3d 313 (2008). *See also Hines v. Marion County*, LUBA No. 2007-185 (Final Opinion and Order, 3/19/08). Measure 37, specifically as set out in *former* ORS 197.352(8), provided that "in lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property." (Emphasis added.) Again, the rule in question serves to greatly expand this benefit at the expense of surrounding agricultural uses.

Section 5 of Measure 49 provides that 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 * * *." Section 6 of Measure 49 governs claims relating to properties outside urban growth boundaries. Section 6(1) provides that a "claimant that filed a claim [as described in Section 5] is eligible for three home site approvals on the property * * *." (Emphasis added)

Section 6(2) provides in material part as follows:

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

(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.”

(Emphasis added.)

The express, clear, plain language set out above requires DLCD to treat a claimant’s tax lots/parcels together and not in “subparts,” and to allow not more than three home sites all together on the property described in a Measure 37 claim.

Section 6(5) of Measure 49 deals with multiple claims for the same property, and provides as follows:

“(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.”

(Emphasis added.)

This language shows further legislative intent to allow a Measure 37 claimant no more than a total of three dwellings, regardless of the number of subparts concocted for Measure 49 election purposes. Even if there had been multiple claims by that claimant and other purported owners of the subject property, the limitation established by Measure 49 would remain at three under Measure 49's express option.

Under no circumstances was the express route established by Measure 49 intended to allow the sort of bootstrapping or backdoor effort to obtain more than three home sites which,

even under Section 7 of Measure 49, would be barred on high-value farmland. Nonetheless, this is the effect of the proposed rule.

No additional or bonus benefit can be derived from the ownership interests of non-claimants under any sustainable interpretation of Measure 49. Nothing in the language of the ballot measure discussed above, permits such the division of claims the rule appears to allow; the rule is simply not “within the range of discretion allowed by the more general policy of the statute.” *Springfield Education Assn. v. School Dist.*, 290 Or 217, 229, 621 P2d 547 (1980).

Measure 49 was drafted and referred to the voters by the 2007 Legislative Assembly. Its interpretation is governed by the precepts set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993).

The first level of analysis under *PGE* is the text and context of the legislation. The second level of analysis under *PGE*, applied if text and context are not determinative, had been to look at the history of the provision. However, his methodology was modified by amendments to ORS 174.020, Or Laws 2001 ch 438, § 1. ORS 174.020(1)(b) now provides: "To assist a court in its construction of a statute, a party may offer the legislative history of the statute." ORS 174.020(3) now provides: "A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate." Under ORS 174.020(1)(b) , legislative history is now considered during the first step in a *PGE* analysis. *State v. Gaines*, 346 Or 160, 168-70, 206 P3d 1042 (2009).

If the meaning of the statute is unclear after examination of its text, context, and history, we reach a third tier of analysis in which judicial rules of construction may be used to resolve the uncertainty. *PGE v. Bureau of Labor and Industries, supra*, 317 Or at 612. One

of the "general maxims of statutory construction" used in this third level of PGE analysis is that language of a statute should be construed in a manner consistent with its assumed purposes. *Bartz v. State of Oregon*, 314 Or 353, 358, 839 P2d 217 (1992); *Linn-Benton-Lincoln Educ. Assn. v. Linn-Benton-Lincoln ESD*, 163 Or App 558, 570, 989 P2d 25 (1999).

(1) Text and Context.

I would reiterate: The language of Sections 5 and 6 of Measure 49 makes absolutely plain that only the designated Measure 37 claimant is entitled to relief under the measure. As discussed above, there is absolutely no language from which it can reasonably be gleaned or argued that a Measure 37 claimant is permitted to derive more than one "fast track" election benefit under Measure 49, regardless of the number of lots or parcels described in his/her Measure 37 claim, and regardless of the existence of other ownership interests. For the reasons discussed in detail above, the language of the measure is unambiguous in this regard.

(2) Legislative History; Purpose and Intent.

The intent and purpose of Measure 49 are clear from the original Ballot Title and Explanatory Statement drafted by the legislature and set out in the Voters' Pamphlet published for the November 6, 2007 special election in which the measure was enacted by the voters.

The ballot title states that the measure:

"MODIFIES MEASURE 37; CLARIFIES RIGHT TO BUILD HOMES; LIMITS LARGE DEVELOPMENTS; PROTECTS FARMS, FORESTS, GROUNDWATER."

The result of a "Yes" vote is described in material part as follows: "limits large developments; protects farmlands, forestlands, groundwater supplies." A "No" vote "allows claims to develop large subdivisions * * * on lands now reserved for residential, farm and forest uses." The Measure Summary states:

“Claimants may build up to three homes if previously allowed when they acquired their properties; four to ten homes if they can document reductions in property values that justify additional homes, but may not build more than three homes on high-value farmlands, forestlands and groundwater-restricted lands.”

(Emphasis added.)

The Explanatory Statement makes clear:

“Claimants may build up to three homes if allowed when they acquired their properties.

* * *

This measure protects farmlands, forestlands and lands with groundwater shortages in two ways.

First, subdivisions are not allowed on high-value farmlands, forestlands and groundwater-restricted lands. Claimants may not build more than three homes on such lands. * * *”

(Emphasis added.)

As explained above, the proposed rule may effectively permit large subdivisions in the EFU zone. The express route under Measure 49 does not allow *any* subdivisions whatsoever as defined under Oregon law, but only a partitioning for up to three lots with three home sites. The Explanatory Statement makes clear that a claimant may build up to three homes at the most. The recognition of multiple sub-claims for which approval is proposed do not protect farmlands, as mandated by the Explanatory Statement, nor do they comply with the mandate set out there that “subdivisions are not allowed on high-value farmlands.” Accordingly, the agency would act outside the range of its discretion and violate statutory provisions in adopting OAR 660-041-0150 with the current language allowing division of claims.

DLCD has argued the recognition of sub-claims is supported by the definition of “property” in Section 2(17) of Measure 49, now ORS 195.300(20):

“(20) ‘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.”¹

(Emphasis added.)

From the above language, DLCD appears to argue the voters intended Measure 49 to allow multiple claims or sub-claims derived from a single Measure 37 claim. That is an erroneous reading of the above definition of “property.” The statutory language plainly states that “property” means, first, all the private real property described in a Measure 37 claim. Second, “property” *also* includes any and all contiguous private property owned by the same owner. Hence, only one Measure 49 claim is permissible as to *all* the property described in the Measure 37 claim. At the same time, no additional Measure 49 claims or sub-claims are permissible as to contiguous property also owned by that claimant.

One Measure 37 claim means one property for the purposes of Measure 49. DLCD has argued that this “definition captures more property than may have been described in a Measure 37 claim.” However, taken together with the language of Section 6 of Measure 49, it does so for the purpose of strictly limiting rather than expanding the number of permissible new home sites. The language of the statute is consistently restrictive, not expansive. It was not intended to provide a crow bar which would let a Measure 37 claimant or anyone else get more than Measure 49 would otherwise allow.

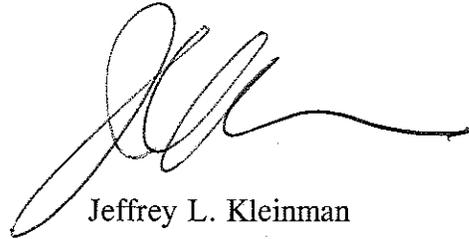
In the face of plain, clear, unambiguous wording drafted by the legislature and enacted by the voters, the proposed “implementing” rule has no basis in the statutory language or the attending, straightforwardly expressed legislative intent. Measure 49 says nothing about

¹ “[C]laim” is defined in ORS 195.300(2) as a claim filed under Measure 37.

treating five, 15 or 50 tax lots within a Measure 37 claimant's property as creating separate entitlements. The "property" upon which up to three home sites are allowed is all the property described in the Measure 37 claim together with any contiguous property owned by the claimant. The proposed rule could literally allow a 150-lot subdivision in the Exclusive Farm Use zone if a Measure 37 claimant had filed a claim covering 50 tax lots. That is not what was presented to or voted upon by the people of Oregon.

The language of OAR 660-041-0150 purporting to allow division of claims should be stricken. The same is true of the related language of OAR 660-041-0080(3) setting fees for filing divided claims.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'JK', with a long horizontal flourish extending to the right.

Jeffrey L. Kleinman