



Oregon

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September 17, 2009



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 8(a) – October 1-2, 2009, 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 pending procedures for House Bill 3225 (HB 3225) 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.

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 authorizes eligible claimants to establish up to ten home sites (Section 7 claims) if the claimant is 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. A rigorous requirement in applying for more than three home sites is the provision to submit 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 must be 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.

The commission adopted temporary rules to implement the provisions of HB 3225 in July 2009. In addition to HB 3225 facilitating additional review of a category of claims where claimants never filed a county claim, HB 3225 also allows additional review of over one hundred claimants who missed the 90-day deadline to file claims after Measure 49 took effect by 30 days or less. Approximately 70 claimants missed by seven days or fewer. There are thirteen claimants who missed the additional 30-days provided by HB 3225.

Completing the Measure 49 supplemental review process will allow those property owners who receive a “homesite” authorization to move forward with their development plans. House Bill 3225 (HB 3225) acknowledges the need to expedite the processing of Measure 49 elections of Measure 37 claims by mandating a dateline 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).

IV. CLAIMS PROCESSING

A. Measure 49 Election Review Process

Measure 49 requires the department to review elections in the order received. The Department of Justice (DOJ) completes an initial ownership review of each claim to verify that the claimant owns the property, and when the claimant acquired the property. This is the first step in the analysis and resolution of an election. Once DOJ completes its review, an election receives completeness review by the department. Once an election has been reviewed for completeness, it is assigned to a claims analyst who will draft the department’s preliminary evaluation of the election. The draft preliminary evaluation is forwarded to DOJ staff attorneys for review. Once the preliminary evaluation is deemed complete, it is mailed to the claimant, their agent where applicable, the county, neighbors of the subject property and any community planning organizations on file. Those recipients will have 28 days to submit comments in response to the preliminary evaluation, and any comments received will be forwarded to the claimant for their response. The claimant then has 21 days to submit their response to any comments before the department proceeds with preparation and issuance of a final order.

Given the many variables in processing any particular election, it is difficult to forecast when a final decision will be issued for any particular claimant.

B. Processing Status As Of September 14, 2009

As of September 14, 2009, the Department of Justice (DOJ) has completed 4,231 initial ownership reviews, and Measure 49 Development Services Division completeness specialists have completed 3,378 completeness reviews for Measure 49 Elections (claims). Measure 49 team leads have assigned 3,569 claims to the division's planning claims analysts. The claims analysts have drafted 2,710 draft preliminary evaluations which have been forwarded to DOJ for review. The Department of Justice has returned to the department 2,334 draft preliminary evaluations for completion and issuance. The department has issued 1,882 preliminary evaluations, and 1,351 final orders.

1. Progress

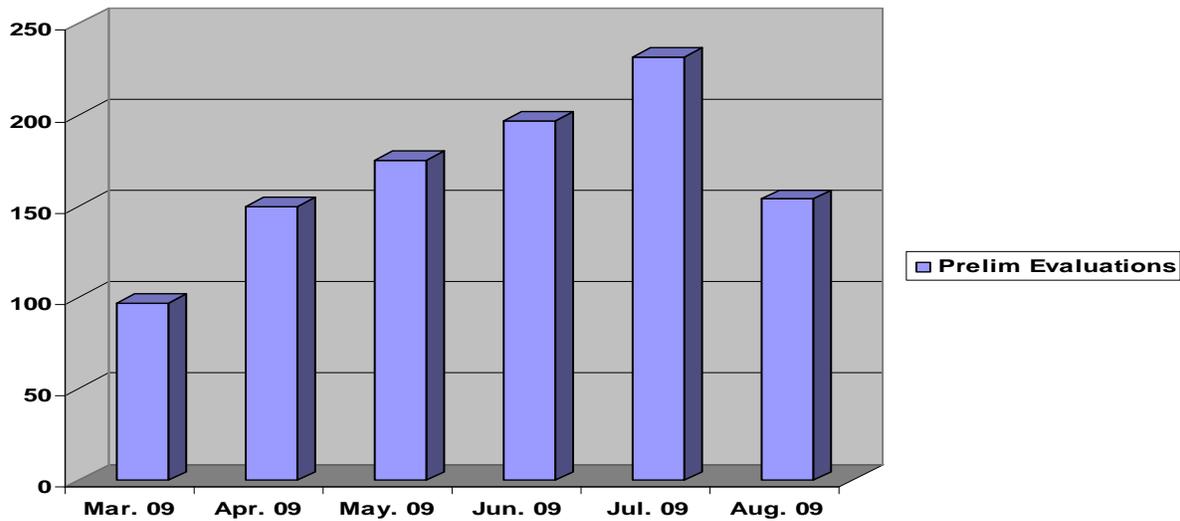
The following table provides a summary of Measure 49 implementation status and tasks:

Measure 49 Implementation Status and Tasks

Step	Task	Percent Complete
1	Confirm current owners of property and determine property acquisition date	93%
2	Determine ownership of surrounding property and confirm claim completeness	74%
3	Evaluate number of lots/dwellings permitted and draft preliminary evaluation	58%
4	Mail preliminary evaluation to claimant, county, and neighbors for comment	40%
5	Draft and mail final order	29%

2. Trends

Over the last six months (March 2009 through August 2009), there has been an average of 168 preliminary evaluations mailed, with a high of 232 preliminary evaluations mailed in July. The bar graph below shows the trend in completion of preliminary evaluations over the last six months. Data are incomplete for September 2009.



The Measure 49 Development Services Division continues to work with the Department of Justice to examine ways to increase the number of Measure 49 claims processed.

V. LITIGATION

Six Measure 49 claimants have challenged their final orders, five in circuit court and one in the Court of Appeals; none of the circuit court cases will become moot with the passage of HB 3225. Most current litigation involves cases where the property owner has claimed a vested right to continue development started under Measure 37. The State is actively litigating approximately eight circuit court cases where a claimant seeks a vested rights determination; one appeal to the Court of Appeals is pending. Another four circuit court cases involve claims that Measure 37 rights remain even after the voters' passage of Measure 49; seven such cases are pending in the Court of Appeals.

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

Amendments to Measure 49 rules earlier this year require counties to submit to the department notices of proposed land use actions that are a result of Measure 49 authorizations (final orders). The department's County Communication and Compliance Coordinator, Steve Miller, 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. Steve has been effectively working 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.

VII. COMPENSATION AND CONSERVATION OMBUDSMAN

Carmel Bender Charland, the department's Compensation and Conservation Ombudsman, works with claimants concerned about the outcomes of their claims, claimants that are not eligible for relief under Measure 49, as well as claimants with unique circumstances that have been referred to her by the division, DOJ, legislators, and counties. She reviews the record of the claim and identifies issues for clarification and monitors the progress of these claims.

In conjunction with the director's office and DOJ, Carmel is working through the final stages of drafting a policy and practice document for the ombudsman position which includes the scope of the ombudsman's role and process for interacting with the Measure 49 Development Services Division.



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September 17, 2009

TO: Land Conservation and Development Commission

FROM: Carmel Bender Charland, Conservation & Compensation Ombudsman

SUBJECT: **Agenda Item 8(b), October 1-2, 2009, LCDC Meeting**

OMBUDSMAN UPDATE

I. OVERVIEW

The Conservation and Compensation Ombudsman position was created through Measure 49 to facilitate resolution of issues involving compensation claims. The United States Ombudsman Association describes the role of an ombudsman as follows:

While [ombudsman] receive complaints from the public, their job is not to be an advocate for the complainant or the governments they have jurisdiction over. Ombudsman are charged with collecting and evaluating all of the facts regarding a matter as a neutral investigator. They determine if there was an error, unfairness or harm by the agency involved, or no basis to the complaint. Ombudsman make recommendations to correct wrongs done to individuals to improve the administration of government. If their recommendations are not accepted and good reasons not given, the ombudsman may become an advocate for their implementation.

Following this guideline, the ombudsman typically works with claimants in the following circumstances:

- Supplemental review of the claim has not yet begun: The ombudsman reviews the claim materials, identifies issues that may require additional evidence to support the claim, and provides guidance to the claimant in acquiring and submitting that evidence.
- Claim has been preliminarily denied: The ombudsman reviews the analysis, recommends additional evidence that claimant may submit to support the claim. The ombudsman also may raise issues with management if the outcome does not appear consistent with department policy. As patterns have emerged that may be counter to

the intent of Measure 49, the ombudsman has made recommendations to the director regarding policy revisions.

- Claimants are not eligible/qualified to receive relief under Measure 49: The ombudsman reviews current regulations and evaluates opportunities for the claimant to develop property under existing law. Generally, this involves coordination with local governments and the ombudsman may act as liaison between local government and claimants.

ORS 182.500 mandates that any person performing ombudsman services make quarterly reports to the Governor. The report must include a summary of services provided, and recommendations for improving ombudsman services and the services for which the person provides assistance. The ombudsman will make her first report, covering January – September, in early October. Subsequent reports will be issued quarterly.

II. HB 3225 REPORTS

Through HB 3225, the legislature directed the department to investigate two groups of Measure 37 claimants that are currently not eligible for relief under Measure 49: 1) claimants that filed Measure 37 claims with their county but not the state; 2) claimants that elected Measure 49 supplemental review under section 7 of chapter 424, Oregon Laws 2007, but failed to submit the required appraisal within 180 days of their election filing.

The ombudsman has been assigned the task of conducting these investigations and reporting the findings to the designated legislative committee in December.

A. NO STATE CLAIM FILED

An estimated 900 claimants filed Measure 37 claims with their counties, but not the state. Willamette University Student, Alexandra Ninneman, has been hired to assist with this project. We are in the process of identifying these claimants and developing survey questions. In October, we will contact a sampling (target 100) of these claimants to learn why they did not file a claim with the state. Upon completion of the interviews, the data will be organized, reviewed, and a draft report prepared for early November.

B. NO APPRAISAL FILED

Approximately 100 claimants filed Measure 49 elections under section 7, but failed to submit an appraisal or elect down to section 6 prior to the 180-day deadline. Preliminary evaluations denying these claims have been issued, but final orders were put on hold pending the legislative session and potential amendments that could change the status of these claims. In response to the preliminary evaluation, many claimants sent in written responses. These will be used to determine the reasons claimants did not comply with the requirements of Measure 49. The draft report will be available by early October.

III. HARDSHIP PRIORITY PROCESSING

HB 3225 provides the opportunity for up to 100 Measure 49 Supplemental Reviews to be advanced for priority processing upon demonstration of a hardship - generally involving circumstances that threaten loss of the claim property.

Requests for hardship priority processing are reviewed by the ombudsman. Upon finding that an appropriate hardship has been documented, and that priority processing of the claim will likely achieve the desired results for the claimant, the ombudsman makes a recommendation to the director, who may approve priority processing of the claim at his discretion.

As of the date of this memo, two claims for priority processing have been approved, and three requests are being reviewed.