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LAND CONSERVATION & DEVELOPMENT
COMMISSION
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SUBMITTED BY: Bruce White

Hand Delivered

Land Conservation and Development Commission
635 Capitol St. NE, Suite 150
Salem 97301-2540

Re: Measure 49 Processing

Dear Chair Van Landingham and Commission Members:

I am writing to express concerns I have with the processing of the Measure 49 elections and the conduct of the Measure 49 Supplemental Reviews. My concerns are similar to concerns that I expressed in a letter dated August 14, 2008 to Director Richard Whitman regarding the lack of transparency and the slow rate at which the Measure 49 Supplemental Reviews are being conducted.

My concerns are made from the standpoint of an attorney who has represented and continues to represent a number of Measure 37 and Measure 49 claimants in presenting their claims to state and local governments and in proceeding with land use applications to local governments under Measure 37 authorizations.

As the body that oversees the Department of Land Conservation and Development (the Department), the Land Conservation and Development Commission (the Commission) needs to demand greater transparency, speed and accountability of the Department in its handling of the Measure 49 claims and the conduct of the supplemental reviews. As set forth below, given the lackluster performance of the Department so far in implementing Measure 49, the Commission needs to exercise its oversight function over the Department so that the needs of Measure 49 Claimants are given adequate consideration in the conduct of the supplemental claims review process. As set forth in greater detail below, I recommend that the Commission establish a target date of June 2009 for issuing all Measure 37 authorizations, that specific steps be taken to ensure greater transparency and that staff resources in the Department be reallocated as necessary to give processing Measure 49 claims the highest priority in the Department. In short, greater Commission oversight is necessary in order to give the Department a greater sense of urgency in implementing Measure 49.

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Lack of Transparency

The Measure 49 supplemental review process is marked by a lack of transparency. The Department's Elections and Supplemental Review process has been and still is essentially a black box, with Claimants left to guess where their claims stand in the supplemental review process. Elections are filed and Claimants hear nothing from the Department until a Preliminary Evaluation is issued, unless the Department sends a letter requesting additional information from the Department. In the interim, no information is provided to Claimants as to whether the election has been received, whether the claim has been assigned for processing or when the claim might be processed, other than the minimal information that is posted on the Department's website.¹ In my experience, trying to obtain answers by phone, email or even in person to questions such as whether a claim has been assigned for processing or when one might expect a preliminary evaluation might be issued has been less than satisfactory – even for claims that number in the 400s in terms of priority.

Until recently, the Department did not even advise Claimants as to where they stood in the processing que. In response to queries from some of my Measure 49 clients, I asked Michael Morrissey in early June to take the simple step of posting a spreadsheet on the Department website showing the elections in the order in which they had been received so that Claimants could determine where they stood in the processing que, without having to manually count through the hundreds of names on the election receipt registry. In response, I was told to wait until all elections had been filed. When nothing happened after the June deadline for filing elections, I followed up my request by email in early August. When I received no response from the Department, and after a frustrated client of mine had produced on his own an Excel spreadsheet of the claims showing the priority ranking of claims by date of election receipt, I wrote a letter to the Director on August 14, 2008 restating my request. Finally, on or about August 20, 2008, the Department started posting a number beside each claim showing its number in the processing que. This was a simple task that the Department's IT people should have been able to process in a matter of minutes, and given the statutory command that elections be processed in the order in which they were received should have been undertaken by the Department as a matter of course. It shouldn't have taken repeated contacts on my part to prompt the Department to take such action.

Unlike Measure 37, Measure 49 contains no specific timeline for completing the supplemental reviews. Accordingly, Claimants have no guidance as to when review of their claims may be completed and must therefore rely solely on information provided by the Department as to the status of their claim.

Why does any of this matter? Many Claimants have been in this process for over 3 years. They may have made financial commitments, changed their positions or at least developed expectations in reliance on their Measure 37 claims. Others may be at some stage of a permitting process under Measure 37 and need the information to evaluate whether to extend permitting processes or

¹ Posting information on the Department's website is useless to a great many Claimants under Measure 49, since a high percentage of the Claimants are elderly and are not connected to the internet (roughly 40% of my Measure 49 claimant clients fall into this category).

permits as they weigh their alternatives under Measure 37 and 49. Some Claimants have been prevented from making any economic use of their property and are anxious to proceed after years of frustration at a land use system that has stripped them of their property rights. A high percentage of Claimants are elderly with short life expectancies. Information on the status of their claims can help Claimants plan their lives and order their affairs. At a more fundamental level, Measure 49 took away Claimants' rights under Measure 37 and made them repeat the claims process. In light of that fact, it is only decent that the State should be as transparent as possible in processing these claims a second time.

So that Claimants can be better informed about the process and where they stand in the process, I would request that at a minimum the Department take the following actions:

- Post a description of the internal process the claims go through, such as completeness check, assignment, analysis, legal review, notice lookups, mailing, etc.
- Maintain on its website a spreadsheet showing which claims are currently being processed, the date and the person to whom each claim has been assigned and including an estimated date for issuance of the preliminary evaluation and what claims are likely to be assigned during the next month.
- Post an estimate each week of when the Department is likely to complete processing claims.

The Director has conveyed to the Commission some of this type of information in his most recent report to the Commission, so the information is clearly readily available. Why shouldn't such information be made directly available to those who are most affected by the Measure 49 process? Providing such information will not only lead to greater transparency, but will lead to accountability on the part of the Department in performing the supplemental reviews.

Slow Rate of Processing Elections

The Department's slow rate of conducting the Measure 49 supplemental reviews is unacceptable. As I write this, only six final "express lane" orders have been issued by the Department in the almost 9 months since the Department received its first Measure 49 election on January 22, 2008. This stands in stark contrast to the Department's productivity in processing claims under Measure 37, where in the first 9 months after receiving the first claims, the Department processed approximately 180 claims to a final order. While Measure 49 does not have the same action-forcing time line as Measure 37, it does include a command that claims be processed "as quickly as possible, consistent with a careful review of the claim." In addition, the Measure 49 requirement that the Department report to the Joint Legislative Audit Committee by March 31, 2008 concerning the Department's progress in completing review of claims under Measure 49 contemplates that the Department would have made an immediate start to processing claims under Measure 49, as it did under Measure 37. Certainly, there was an expectation by the use of the term "express lane" before the Legislative Committee that drafted the Measure and in the materials used to promote the Measure to the voters that approvals under the Express Lane would be granted in short order. The Commission made note of this in its January 2008 discussion regarding processing the Measure 49 claims.

When the Director discussed the conduct of the Supplemental Reviews with the Commission at that January 2008 meeting, he stated that he expected the Department to be into processing the more difficult post-1973 claims by July 2008. Instead, the Department was barely getting started with the first-filed claims in the latter part of July, with the first three claims being issued on the last two days in July. And then there was an unexplained 3+ week hiatus in August where *no* preliminary evaluations were issued. While the Department has made strides in recent weeks in boosting its productivity, at current processing rates (at a rate of 26 preliminary evaluations issued per week for the month of October), it will take the Department almost 4 years to process all the Measure 49 claims.

Given the fact the Department had already conducted Measure 37 reviews of all the top-priority election claims, with boilerplate forms, and given the fact that very few of these early claims involve situations where statewide Goals, statutes or administrative rules apply (only 15 total, or 9%, of the 156 preliminary evaluations issued by October 14, 2008 by my calculation), the lack of speed in processing the Measure 49 claims is inexplicable. A review of the preliminary evaluations shows that the language is basically boilerplate language, with a few blanks or footnotes to be completed in each application. Even those cases involving review of pre-1973 zoning ordinances, applies are not complicated, since early zoning ordinances typically involved minimum lot sizes of one acre and no restrictions on single-family dwellings.

This is plainly a case of the Department not giving sufficient priority to conducting the Measure 49 supplemental reviews. Processing these claims should be the agency's top priority. While this may delay other Department initiatives, in enacting Measure 49, the voters expected that the Measure 49 process would work to resolve the Measure 37 controversy and not fuel the next property rights backlash. The fact that the Legislature did not fund the implementation of Measure 49 to the level that the Department might have wished does not mean that the Department can't commit existing staff resources to conducting the Measure 49 supplemental reviews. This may not be popular with the Commission or Department staff, but the inconvenience of Measure 49 shouldn't rest solely on the shoulders of Claimants.

To speed the supplemental review process along, the Commission should direct the Department to:

- Reassign Department staff as necessary so that all claims will be resolved by June 2009;
- Accelerate hiring to fill the unfilled temporary Measure 49 positions and allow for flexibility in filling positions to attract experienced planners and land use consultants;
- Consider whether extensive Department of Justice review of preliminary evaluations and final orders is necessary; and
- Consolidate functions so that Measure 49 analysts are not also engaged in the largely clerical functions of determining which nearby properties should receive notice of the preliminary evaluations.

With respect to hiring additional staff, the Department should aggressively seek to hire from among the expanding pool of experienced planners who have recently been laid off by local

jurisdictions. If this means allowing such persons to work from their homes or from regional DLCD offices, rather than relocating to Salem, the Department should consider this. It is unrealistic to think that the Department can attract experienced planners to relocate to Salem for temporary jobs. In addition, the Department should consider contracting out some of the reviews with land use consultants who are not involved with Measure 37 or Measure 49 claims. Given the economic downturn, it is likely that such work might be attractive to underemployed consultants.

The Department seems to believe that in the absence of the strict deadlines imposed by Measure 37, there is no urgency to complete the Measure 37/49 process. This misapprehension needs to be corrected.

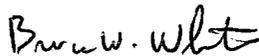
Lack of Accountability

Both the Department and the Commission need to be accountable for the Department's heretofore dismal record of processing the Measure 49 claims. The Department can be held accountable by a combination of greater transparency in processing of claims, establishment of more detailed periodic reporting requirements to the public and the Commission² on its progress in processing of claims and by the establishment of a target date for completion of the Measure 49 claims process that respects both Department capabilities and the needs of Claimants. Ultimately, accountability lies with the Commission to exercise its statutory oversight function under ORS Chapter 197.

Measure 49 was sold to the voters as a process that would balance fairness to Measure 37 claimants with fairness to Measure 37 neighbors and as a process for Claimants who selected the so-called "Express" option to have their claims efficiently and speedily handled. It now appears that there is nothing "express" about Measure 49 and that the voters were sold a bill of goods.

The Commission should exercise its statutory oversight function to correct the Department's misapprehension about the urgency of expeditiously conducting the Measure 49 reviews and to restore the will of the voters in approving Measure 49. Thank you for your consideration of my comments.

Sincerely,



Bruce W. White

- c. DLCD Director Richard Whitman
- Governor Ted Kulongoski
- Senator Ben Westlund
- Representative Gene Whisnant

² The Director's reports concerning progress under Measure 49 have not been very informative as to when completion of the Measure 49 reviews can be expected and what steps need to be taken to ensure timely review.