



# Oregon

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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 3(a) – November 5-6, 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](mailto: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. In order to apply for more than three home sites, claimants must 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. The temporary rules expire in February 2010. The commission will conduct a public hearing at the January 20-22, 2010 meeting to discuss adoption of permanent rules that would reflect existing temporary rules as well as include information concerning a refund process for the \$175 processing fee required of HB 3225 categories of claimants.

In addition to HB 3225 facilitating additional review of a category of claims where claimants never filed a county Measure 37 claim, HB 3225 also allows additional review for over one hundred claimants who missed the 90-day deadline to file Measure 49 elections, by 30 days or less. Approximately 70 claimants missed the original election deadline by seven days or fewer. There are thirteen claimants who, despite the additional 30 days provided by HB 3225, still filed their elections too late to qualify for supplemental review under Measure 49. Other categories of claimants affected by HB 3225 include:

- A.** Claimants not eligible for relief under Measure 49 because they filed a Measure 37 claim after December 4, 2006 but did not obtain the required local or agency final decision of denial in response to a land use application. If a claimant in this category either filed a county Measure 37 claim on or before December 4, 2006 or filed a completed land use application with a city, county, Metro or an agency prior to June 28, 2007 in an attempt to obtain a final written decision indicating that an existing regulation of DLCD, another agency or a county was an approval criterion for that application, the claim is no longer subject to denial for failure to submit a final decision of denial.
- B.** Claimants who checked "Vested" on their election form. Under HB 3225, claimants who initially checked only "Vested" on their Measure 49 election forms and who have not been determined to have a common law vested right to a Measure 37 use may change that election to request supplemental review under section 6 of Measure 49.
- C.** Claimants whose property is located within a city boundary but outside any urban growth boundary (UGB). Section 5a of HB 3225 allows this category of claimants to pursue relief under section 6 of Measure 49.
- D.** Claimants whose property was partially inside a UGB. Section 4 of HB 3225 amends Measure 49 to require that only a majority of, rather than all of the claim property lies outside the UGB in order for a claim to be eligible for review under Section 6 of Measure 49.

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 Measure 49 supplemental reviews of Measure 37 claims by mandating a deadline for final review of claims by June 30, 2010. The department “shall issue a final order on or before June 30, 2010, for claims reviewed under [sections] 6 or 7” of Measure 49 (Section 8, HB 3225), and “shall issue a final order on or before December 31, 2010,” for the category of claims receiving additional review (Section 6, HB 3225).

#### **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 October 15, 2009**

As of October 19, 2009, the Department of Justice (DOJ) has completed 4,455 initial ownership reviews, and Measure 49 Development Services Division completeness specialists have completed 3,893 completeness reviews for Measure 49 Elections (claims). Measure 49 team leads have assigned 4,060 claims to the division’s planning claims analysts. The claims analysts have drafted 3,187 draft preliminary evaluations which have been forwarded to DOJ for review. The Department of Justice has returned to the department 2,402 draft preliminary evaluations for completion and issuance. The department has issued 2,255 preliminary evaluations, and 1,614 final orders.

##### **1. Progress**

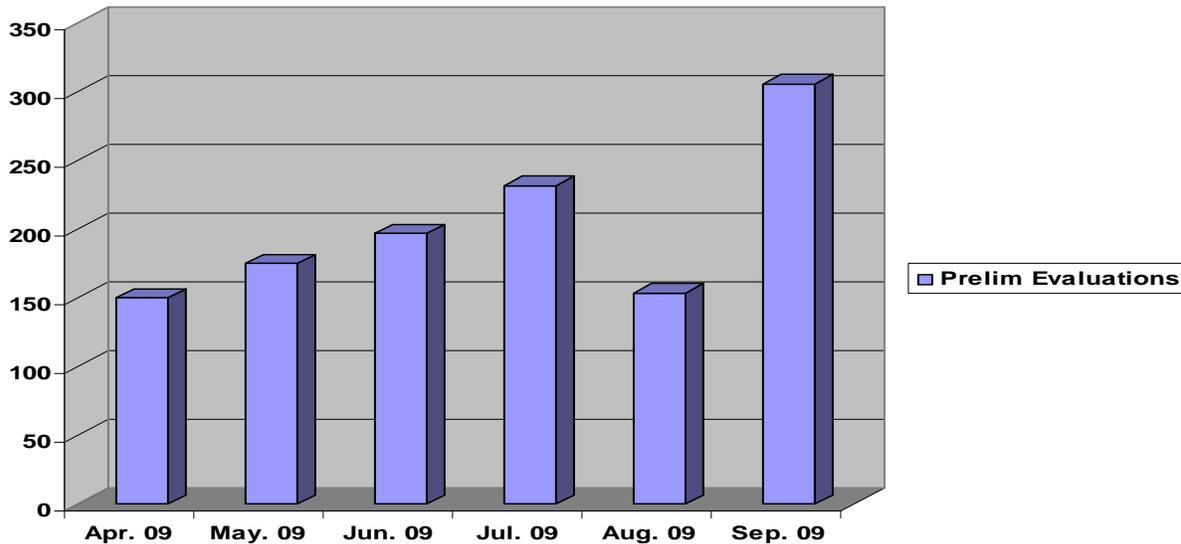
The following table provides a summary of Measure 49 implementation status and tasks:

**Measure 49 Implementation Status and Tasks**

Step	Task	Percent Complete
1	Confirm current owners of property and determine property acquisition date	98%
2	Determine ownership of surrounding property and confirm claim completeness	86%
3	Evaluate number of lots/dwellings permitted and draft preliminary evaluation	68%
4	Mail preliminary evaluation to claimant, county, and neighbors for comment	48%
5	Draft and mail final order	34%

**2. Trends**

Over the last six months (April 2009 through September 2009), there has been an average of 202 preliminary evaluations mailed, with a high of 306 preliminary evaluations mailed in September. The bar graph below shows the trend in completion of preliminary evaluations over the last six months. Data are incomplete for October 2009, but we will hand carry an update to the commission meeting.



**V. LITIGATION**

Twelve Measure 49 claimants have challenged their final orders in circuit court. Two cases have been filed by neighbors of claimants who obtained final Measure 49 orders allowing 1-3 home sites to be developed. Since the last report, the circuit courts have issued decisions on the several vesting cases in which the State participated; one remains under advisement in the circuit courts on Writ of Review. Since the last report, DLCD has decided to appeal one vesting case and is considering potential appeals in two others. Two appeals to the Court of Appeals are already pending. In one of these cases the Court of Appeals will consider the contention that DLCD does not have legal authority to appeal local vesting decisions. Vesting cases involve a claimant's

application for a determination of a common law vested right to continue development started under Measure 37.

Two circuit court cases and nine cases in the Oregon Court of Appeals involve claims that Measure 37 rights remain even after the voters' passage of Measure 49. The State recently intervened in a federal district court case against Jefferson County that involves constitutional challenges to Measure 49. In addition, in October 2009, a group of Measure 37 claimants sued DLCD and its director in federal court; the agency is still evaluating this case and has not yet responded to the Complaint. The state is preparing an amicus brief in the Ninth Circuit Court of Appeals in the appeal of Judge Panner's federal court decision that Measure 49 unconstitutionally alters Measure 37 relief (the state was not a party in that case).

**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.