

## **OREGON MEASURE 49 TRANSFER OF DEVELOPMENT CREDITS PROGRAM**

660-x-0000

### **Purpose**

In 2007 the voters approved Measure 49 (M49) which authorized certain property owners to develop additional home sites. The purpose of this division is to enable counties to develop local programs for transferring the development interest as allowed under and subsection 11(8) of chapter 424, Oregon Laws 2007 and ORS 94.531. This will enable landowners to realize the value of their M49 authorizations without developing the property from which the claim arose. These programs will permit landowners, on a voluntary basis, to transfer their development interest under M49 from one property to another property at a more suitable location. These programs will reduce the adverse impact of scattered residential development on farm and forest and other resource land.

660-x-0010

### **Definitions**

For purposes of this division, the definitions contained in ORS 197.015 and the Statewide Land Use Planning Goals (OAR chapter 660, division 15) apply. In addition, the following definitions apply:

- (1) “Conservation easement” has the meaning provided in ORS 271.715.
- (2) “Measure 49 Property” or “M49 property” means the entire property authorized for home site development as described in the order issued by the Department of Land Conservation and Development (department) under section 6 or 7, chapter 424, Oregon Laws 2007 titled “ORS 195.300 to ORS 195.336 (Measure 49) Supplemental Review of Measure 37 Claim Final Order and Home Site Authorization” or a court order issued upon review of a department order.
- (3) “Receiving area” means a designated area of land to which a holder of development credits generated from a sending property may transfer the development credits and in which additional residential uses or land divisions, not otherwise allowed, are allowed by reason of the transfer.
- (4) “Sending properties” means a M49 property that qualifies under 0030 from which development credits generated from forgone development are transferable, for residential uses or land divisions not otherwise allowed, to a receiving area.

- (5) “Transferable development credit” or “TDC” means a severable development interest in real property that can be transferred from a sending property to a lot, parcel or tract in a receiving area.

660-x-0020

### **County Authority to establish a M49 TDC Programs**

Counties may establish a program, consistent with this division, to allow for the transfer of development credits from M49 properties. Counties that choose to adopt a M49 TDC program shall:

- (1) Adopt a local M49 TDC ordinance that meets the requirements of this rule and that is substantially similar to the *Model M49 TDC Ordinance* adopted as “Exhibit A;”
- (2) Amend the comprehensive plan and zoning ordinance to:
  - (a) Designate M49 properties that are eligible sending properties consistent with 0030;
  - (b) Establish bonus credits that will apply to certain sending properties consistent with 0040;
  - (c) Designate receiving areas consistent with 0070;
  - (d) Identify any applicable overlay zones or other measures needed to implement the TDC program;
  - (e) Identify approved holders of conservation easements and approved entities for third-party enforcement of deed restrictions to satisfy OAR 660-x-0050; and
  - (f) Determine whether the TDC program will be stand-alone or inter-jurisdictional with other counties in the region, as described at OAR 660-x-0090; and
- (3) Utilize the following instruments to implement the M49 TDC program:
  - (a) *M49 Deed Restriction* adopted as “Exhibit B;” and
  - (b) *M49 Conservation Easement* adopted as “Exhibit C”, or another easement that is at least as protective.

660-x-0030

### **Sending Properties**

- (1) A county may designate sending properties consisting of M49 properties that:
  - (a) Authorize new dwellings (i.e. do not solely authorize partitions for existing dwellings); and

(b) Are located within zones adopted pursuant to the protection of resource lands under Goals 3, 4, 5, 7, 8 and 15 – 18; or

(c) Are identified in OAR 660-x-0040(1)(c)(C) through (F).

(2) Sending properties exclusions. Notwithstanding section (1), a county may designate areas or types of M49 properties that are not eligible as sending properties. If a county determines that some M49 properties are unbuildable and shall not be eligible as sending properties, it shall either:

(a) Include mapping of the extent of such lands in the ordinance establishing the TDC system; or

(b) Adopt clear and objective standards in the ordinance establishing the TDC system for case-by-case determinations of buildability based on a ministerial review.

660-x-0040

### **Calculation of Transferable Development Credits**

(1) The number of development credits that may be transferred from a M49 property must be determined as follows:

(a) One transferable development credit is available for each new dwelling authorized in the “Final Order and Home Site Authorization,” the number of new dwellings eligible for transfer is subject to sections 6(2), 6(3) and 11(6), chapter 424, Oregon Laws. Credits do not come from partitions without dwellings.

(b) A county may grant bonus fractional credits if:

(A) The M49 property is zoned pursuant to Goals 3, 4, 5, 7, 8 or 15-18;

(B) All authorized new dwellings, as described in (a), remain undeveloped; and

(C) The M49 property in its entirety is subject to a conservation easement or deed restriction in accordance with OAR 660-X-0050 that prohibits future development in accordance with section 0050.

A M49 property with one existing permanent dwelling as of [pre-existing, date Measure 37 enacted?] may still qualify for bonus fractional credits.

(c) For qualifying properties under subsection (b), a bonus of up to 0.2 credits may be awarded for each category of attributes listed in paragraphs (A) through (F) below for each M49 dwelling authorization being transferred, not to exceed a total bonus of 1.0 credit per M49 dwelling authorization being transferred, if the predominance of the M49 property is located within:

- (A) High-value farmland or high-value forest land as defined in ORS 195.300 ;
- (B) A Rural Reserve within three miles of an Urban Growth Boundary (UGB);
- (C) Scenic, historic, cultural or recreational resources or properties adjacent to such resources, as identified as follows:

- (i) X
- (ii) X
- (iii) X

(D) Natural Areas

- a. Wildlife habitat identified by the Oregon Department of Fish and Wildlife's Conservation Opportunity Areas maps (2006);
- b. Wetlands identified ....
- c. Within one-half mile of the coast or an estuary as mapped...

(E) Natural hazards as identified by:

- (i) Special Flood Hazard Areas on Flood Insurance Rate maps adopted by counties; and
- (ii) Hazard overlay zones adopted by counties; and
- (iii) Tsunami inundation maps by the Oregon Department of Geology and Mineral Industries (2014)
- (iv) Coastal erosion zones rated high (or moderate?) mapped by NHMP
- (v) Landslide rating of 1 (or 2? Covers a lot of area) mapped by NHMP
- (vi) Wildfire rating of 3 as mapped by NHMP
- (vii) Volcanic (a big area of Hood River, parts of Clackamas, Jefferson, Deschutes, Klamath...too long range to be of concern to us?)

(F) Groundwater-restricted areas as identified by the Oregon Water Resources Department, unless water can be provided by a community or public water system.

- (d) If a M49 property qualifies for bonus fractional credits under subsections (b) and (c), it may, in addition to those credits, qualify for an additional 0.2 credits for each increment of 20 acres that are part of the M49 claim, not to exceed a total bonus of 1.0 credit per M49 claim.

- (2) The department will maintain an online M49 TDC Registry that calculates a preliminary estimate of available TDC credits for all M49 properties that received home site authorizations, based on mapping identified in Subsection (2). The department will update the Registry as counties submit requests for TDCs. The preliminary estimates

provided on the registry are not a determination of whether or not a property qualifies as a sending property.

- (3) When a landowner seeks to transfer M49 development rights from a M49 property for which lots or parcels have been created pursuant to a Measure 49 home site authorization, such lots or parcels must be vacated by the county prior to the severance of development rights. The county shall provide notice of such vacation to the department as required by OAR 660-041-0170.

660-x-0050

### **Protection of Sending Area Properties**

- (1) Amended Final Order: When a county approves an application for transfer of development credits, the county will request an Amended Final Order from the department. The department will prepare an Amended Final Order documenting the number of home site authorizations that have been severed from the M49 property and the number that remain. The county will record the Amended Final Order in the deed records and provide a copy to the department within 30 days.
- (2) If a transfer qualifies for bonus credits under 0040(1)(c) or (d), the M49 property must be permanently restricted from future development or land division for any purpose other than agricultural use, forest use, public parkland devoted to passive, low intensity uses, conservation areas or similar nonstructural uses, by either a deed restriction or a conservation easement, as described in subsections (3) and (4).
  - (a) A deed restriction or a conservation easement may be applied to any M49 property under 20 acres.
  - (b) A conservation easement must be applied to all M49 properties of 20 acres or more.
- (3) A deed restriction must:
  - (a) Designate the following entities as having separate and independent enforcement rights with respect to the deed restriction:
    - (A) An entity described in ORS 271.715(3) that is acceptable to the county;
    - (B) All future owners of the subject M49 property;
    - (C) The county; and
    - (D) The department; and
  - (b) Be approved by the county and recorded with the county clerk, a copy of which must be provided to the department within 30 days.

(4) A conservation easement must:

- (a) Be accompanied by a title search and a legal description of the property sufficient to determine all owners of the property and all lienholders;
- (b) Designate an entity described in ORS 271.715(3) as having a third party right of enforcement of the conservation easement; and
- (c) Be recorded with the county clerk, a copy of which must be provided to the department within 30 days.

660-x-0060

### **Subsequent Transfers of Development Credits**

- (1) If the current owner of TDCs (transferor) transfers ownership of credits or fractional credits to another person (transferee), the transferor must submit notice of the transfer to the department, using a department transfer form.
- (2) On receipt of a transfer form department shall:
  - (a) Verify the transfer by contacting the transferor to determine the validity of the transfer; and
  - (b) Update the M49 TDC tracking database to reflect the new owner of the credits.

660-x-0070

### **Receiving Areas**

A county may designate receiving areas based on criteria in Subsections (1), (2) and (3):

- (1) Receiving areas may include lands that are:
  - (a) Within Rural Residential exceptions areas zoned for 5- and 10-acre minimum lot sizes that are selected based on criteria in Subsection (2). Within these areas, transferred development credits may be used to permit a higher density of residential development than would otherwise be allowable in the underlying zone, subject to the following:
    - (A) Areas zoned for rural residential 10-acre minimum lot sizes may be developed at lot sizes of 5 acres;
    - (B) Areas zoned for rural residential 5-acre minimum lot sizes may be developed at lot sizes of 2.5 acres; and
    - (C) Within a Rural Reserve area designated under ....., transferred development credits must originate from other Rural Reserve locations.

- (b) Within substantially developed subdivisions in resource zones that are selected based on criteria in Subsection (2). Within these areas, transferred development credits may be used to permit development that would not otherwise be allowable in the underlying zone, if:
  - (A) The subdivision was approved prior to January 1, 1985;
  - (B) All lots are five acres or smaller in western Oregon or 10 acres or smaller in eastern Oregon;
  - (C) The subdivision is at least 50% built-out and at least 50% of the undeveloped lots are adjacent to a developed lot; and
  - (D) One dwelling per lot is permitted, with no new land divisions allowed.
- (c) In EFU zones, for the purpose of allowing a lot or parcel with two dwellings to be partitioned if:
  - (A) The dwellings existed as of December 6, 2007 and meet the standards in OAR 660-033-0130(8);
  - (B) Neither dwelling was approved as an accessory farm dwelling, a family farm help dwelling or a temporary hardship dwelling;
  - (C) If high-value farmland or forest land, at least one parcel is no larger than two acres;
  - (D) If non high-value farmland or forest land, at least one parcel is no larger than five acres; and
  - (E) Deed restrictions are recorded for both parcels that prohibit subsequent property line adjustments or the approval of accessory farm dwellings or family farm help dwellings.

(2) Selection criteria for Receiving Areas

- (a) Receiving areas under paragraphs (1)(a) and (b) must be selected to minimize conflicts with nearby commercial agricultural and forest operations. Potential ways to do this include but are not limited to:
  - (A) Minimizing the selection of receiving areas that are adjacent to high-value farmland or irrigation districts; and
  - (B) Restricting increases in permitted density to the interior of exceptions areas.
- (b) Receiving areas under paragraphs (1)(a) or (b) may not include lands that are identified in OAR 660-x-0040(1)(c)(C) through (F).

(c) Receiving areas within Urban Reserves are not permitted.

660-x-0080

### **Process for Using Transferable Development Credits**

- (1) Any person may acquire M49 development credits, may accept ownership of development credits through transfer by gift, or may accept land in fee simple for the purpose of severing development rights. All resulting development credits may be used, resold, held for future use or sale, or permanently retired. There shall be a 10-year development clock that begins when the deed of transferable development credits is issued by the department, unless it has begun prior to that date.
- (2) A person who proposes to use transferable development credits on a property in a designated receiving area shall submit an application to the county for the use of such credits as part of an application for a Type II development permit. In addition to any other information required for the development permit, the application must be accompanied by TDC certificates sufficient to permit the proposed development.
- (3) The county shall evaluate the application based on the locally-adopted ordinance and the provisions of this division to determine whether the proposed development can be authorized and how many credits are required, and shall request verification from the department that the credits are available and belong to the applicant.
- (4) The department shall consult the TDC tracking database to verify the credits and their ownership, provide the results to the county and update the database to record that the credits have been used.
- (5) If the county approves the application, it shall notify the department of the utilization of development credits within 30 days of approval of their use.

### **660-x-0090 Interjurisdictional Transfer of Development Credits**

- (1) A county may allow the transfer of development interests from a sending area within one jurisdiction to a receiving area within another jurisdiction in the same region, as set forth in Section (2).
- (2) The regions within which counties may transfer development interests are as follows:
  - (a) Metro, to include Clackamas, Multnomah and Washington counties;
  - (b) Willamette Valley, to include Lane, Linn, Marion, Polk and Yamhill counties;

- (c) Coastal, to include Clatsop, Columbia, Coos, Curry, Lincoln and Tillamook counties;
- (d) Southern, to include Douglas, Jackson and Josephine counties;
- (e) Central, to include Crook, Deschutes, Hood River, Jefferson, Klamath and Wasco counties; and
- (f) Eastern, to include Baker, Gilliam, Grant, Harney, Lake, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa and Wheeler counties.

(3) When development credits that are transferred from one jurisdiction to another cause a potential shift of ad valorem tax revenues between jurisdictions, the local governments may enter into an intergovernmental agreement under ORS 190.003 to 190.130 that provides for sharing between the local governments of the prospective ad valorem tax revenues derived from new development in the receiving areas.

660-x-0100

### **TDC Record Keeping**

- (1) The county shall:
  - (a) Keep a permanent record of Amended Final Orders, vacations, deed restrictions and conservation easements that apply to M49 sending properties to ensure that they do not later issue development approvals for unauthorized uses or land divisions; and
- (2) Provide notice and copies to the department within 30 days of:
  - (a) The recording with the county clerk of Amended Final Orders, vacations, deed restrictions and conservation easements as they apply to M49 sending properties; and
  - (b) Decisions involving the utilization of transferable development credits as they apply to receiving area properties.

660-x-0110

### **TDC Bank Option**

The county may establish a transferable development credits bank to facilitate:

- (1) Buying transferable development credits from M49 sending properties;
- (2) Selling transferable development credits to potential developers in a receiving area;
- (3) Managing funds available for the purchase and sale of transferable development credits;
- (4) Serving as a clearinghouse and information source for buyers and sellers of transferable development credits; and
- (5) Accepting donations of transferable development credits from M49 sending properties.'

660-x-0120

### **Buy-back of TDCs within Urban Growth Boundaries**

When an urban growth boundary expands to include a sending property that is protected under section 0050(2), the landowner may request to buy back development rights that were extinguished under section 0040(1)(c) or (d), if:

- (1) All holders and parties with designated enforcement rights agree to the buy-back in writing;
- (2) The value of the development credits to be bought back is determined by the original purchase price for the bonus TDCs generated under section 0040(1)(b) and (c) plus annual interest computed....;
- (3) The buy-back payment is made to the primary holder or designated entity with enforcement rights; and
- (4) Notice is provided to the county and the department of the buy-back within 30 days of its execution.

660-x-0130

### **Amendment**

A county reserves the right to amend its local M49 TDC ordinance in the future, including the right to change the receiving area locations. No owner of land or development credits shall have any claim against a county for damages resulting from a change in a local ordinance. A county may further reserve the right to terminate its transferable development credits program at any time. If, following notification of holders of outstanding development credits, the program is abolished, such holders shall have at least 12 months from the effective date of the termination of the program to apply to use their remaining development credits within designated receiving areas.