



# Oregon

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## Department of Land Conservation and Development

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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 6(a) – January 20-22, 2010, 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 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), or Dave Gulledge, Measure 49 Development Services Operations Manager, 503-373-0050 ext. 247; [dave.gulledge@state.or.us](mailto:dave.gulledge@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.

**A. House Bill (HB 3225)**

The commission adopted temporary rules to implement the provisions of HB 3225 on July 30, 2009. The temporary rules expire in February 2010. The commission will conduct a public hearing at the January 20-22, 2010 meeting to consider adoption of permanent administrative rules that would reflect existing temporary rules that facilitate additional review under HB 3225 and Measure 49 for approximately 400 Measure 37 claims. Agenda item 7 provides the report concerning the proposed permanent rules for HB 3225.

There are eight categories of claims that received notification from the department that they may be eligible for additional review under HB 3225. The department mailed 473 letters, and as of December 29, 2009, the department has received 207 responses within the 56-day deadline (198 responded with full payment, one response included only partial payment, and eight responses did not include a payment). Two categories of claimants were provided a December 31, 2009 deadline (checked “vested” and “gap” claimants).

The following table identifies the categories of claimants and number of claims within each category which received notification.

**Status of HB 3225 Categories of Claims, Notifications Mailed, and Responses Received.**

Category of Claim	Claims Mailed	Responses Received
<b>No County Claim</b> – Never Filed County Measure 37 Claim	31	22
<b>Late Election</b> – Missed 90-day Deadline By 30 days or Less	107	75
<b>UGB</b> – Majority of Measure 37 Claim Property Outside UGB	26	12
<b>City</b> – Inside City Limits but Outside UGB	4	2
<b>Filed Measure 37 Claim After 12-04-06</b> (but did not obtain required local/agency final decision of denial for a land use application)	100	73
<b>Checked “Vested”</b> (and not determined to have common law vested right)	141	7
<b>Gap</b> – Did Not File M37 Claim with State or County Before 06-29-07	27	6
<b>LU Application Inquiry</b> – Filed Claim Before 12-05-06 or Land Use Application Before 06-28-07	8	1
<b>Total</b>	<b>444</b>	<b>198</b>

Completing the Measure 49 supplemental review process will allow those property owners who receive a “homesite” authorization to move forward with their development plans. 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). Based on the division’s progress shown in the next section of this report, it is anticipated the mandated deadline for final review will be met.

## **B. Pre-Acknowledgement Claims**

There are approximately 600 claimants who acquired their Measure 37 claim property after the statewide land use planning goals were adopted in 1975, but before their respective counties’ comprehensive plan and land use regulations were acknowledged to be in compliance with those goals as was required by state law. If these claimants had applied to develop their property when they acquired it, the county would have applied both local land use regulations and the statewide planning goals to determine whether the claimants’ requested use was allowed.

Determining what uses would have complied with statewide planning goals during this period of time is difficult and time consuming; and most counties have limited information on what was lawfully permitted during this time. To determine what was lawfully permitted during this time, the department relies primarily on the first acknowledged local land use regulations and, if available, the department also considers decisions made by counties following Measure 37 waivers where the counties actually applied the statewide planning goals or local land use determinations issued during that time period where the counties applied the goals.

Due to the difficulty in determining what was lawfully permitted on claim properties acquired prior to the state’s acknowledgement of county land use regulations, the department is working with the legislature to clarify how these claims should be evaluated. For this reason, the department placed holds on approximately 600 claims involving property acquired during this time period, pending legislation that will be considered in February 2010. Almost all of the 600 claims have been processed through Step 3 of the ‘Implementation Status and Task’ table, below. All of the 600 claims must receive final review by June 30, 2010.

## **IV. CLAIMS PROCESSING**

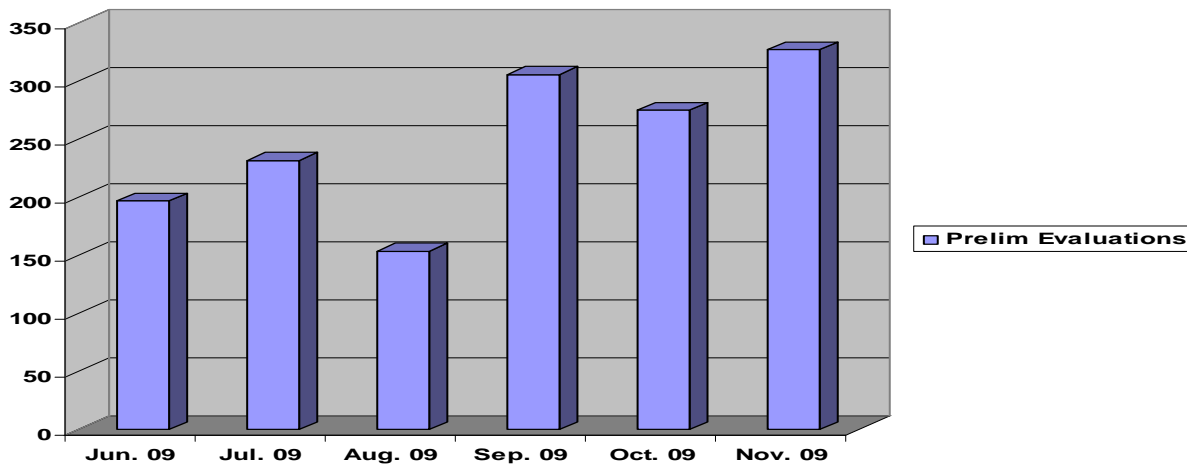
As of December 2009, the Department of Justice (DOJ) has completed initial ownership reviews for all of the 4,607 Measure 37/49 claims being reviewed, and Measure 49 Development Services Division completeness specialists have completed 4,594 completeness reviews for Measure 49 Elections (claims). Measure 49 team leads have assigned 4,587 claims to the division’s planning claims analysts. The claims analysts have drafted 4,530 draft preliminary evaluations which have been forwarded to DOJ for review. The Department of Justice has returned to the department 3,803 draft preliminary evaluations for completion and issuance. The department has issued 3,460 preliminary evaluations, and 2,415 final orders.

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	100%
2	Determine ownership of surrounding property and confirm claim completeness	99%
3	Evaluate number of lots/dwellings permitted and draft preliminary evaluation	98%
4	Mail preliminary evaluation to claimant, county, and neighbors for comment	75%
5	Draft and mail final order	52%

Over the last six months (June 2009 through November 2009), there has been an average of 249 preliminary evaluations mailed, with a high of 327 preliminary evaluations mailed in November. The bar graph below shows the trend in completion of preliminary evaluations over the last six months. Data are incomplete for December 2009, but the commission will be provided an update at their January 20-22 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 in April of 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. Conversely, if the proposed land use action does not comply with the Measure 49 authorization, then the department contacts the county to discuss possible concerns. The Measure 49 Development Services Division strives to effectively work 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.

The department has received over one hundred county land use applications regarding development resulting from Measure 49 final orders. Approximately one-half of the land use applications received are from Washington and Clackamas Counties; however, the department has also received a good number of land use applications from Yamhill and Jackson Counties.