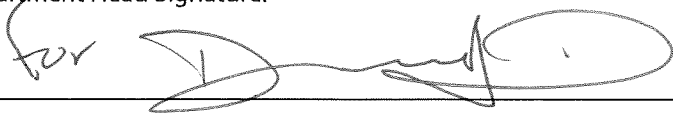




MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date:	June 29, 2022		
Department:	Public Works	Agenda Planning Date:	June 16, 2022
		Time required:	30
<input type="checkbox"/> Audio/Visual aids	None		
Contact:	Lindsey King	Phone:	503-566-4162
Department Head Signature: 			

TITLE	Public hearing on an appeal of the Hearings Officers decision denying Administrative Review (AR) Case 21-038/Josua Fogarty.
Issue, Description & Background	<p>Joshua Fogarty submitted an application to determine whether a Measure 49 Order was valid on two tax lots in an EFU zone located in the 14300 block of Evans Valley Rd NE, Silverton. The request was for the Hearings Officer to make a legal determination whether the 10-year timeline was triggered by the conveyance of the subject property to the beneficiaries of the trust.</p> <p>On January 21, 2022, Planning staff issued a recommendation of denial to the Hearings Officer. On March 10, 2022, a public hearing was held; the record was left open until March 31, 2022. On May 13, 2022, the Hearings officer issued a decision of denial. The Hearings Officer determined that the distribution of the subject property from the trustee to the beneficiaries by warranty deed on June 14, 2010, was the conveyance that triggered the 10-year development clock. No dwelling was established within the ten years of the transfer. Therefore, the Hearings Officer determined that the Measure 49 Order on the 13.53 acre parcel expired on June 14, 2010.</p>
Financial Impacts:	None.
Impacts to Department & External Agencies	None.
Options for Consideration:	<ol style="list-style-type: none">1. Continue the public hearing if applicant grants a time extension.2. Close the public hearing and leave the record open if applicant grants a time extension.3. Close the public hearing and approve, modify, or deny the request.4. Remand the matter back to the hearings officer, if applicant grants a time extension.
Recommendation:	Staff recommends that the Board close the public hearing, deny the appeal and uphold the Hearings Officer decision that the Measure 49 Order expired on June 14, 2010.
List of attachments:	Hearings officer's decision. Appeal of planning divisions decision.
Presenter:	Lindsey King

Copies of completed paperwork sent to the following: (Include names and e-mail addresses.)



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Copies to:

Lindsey King - Lking@co.marion.or.us Brandon Reich - Breich@co.marion.or.us
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Marion County
OREGON

APPEAL OF PLANNING DIVISION DECISION

Marion County Planning Division
5155 Silverton Rd. NE
Salem, Oregon 97305
(503) 588-5038

Fee: \$250

NAME(S): Joshua N. Fogarty	ADDRESS, CITY, STATE, ZIP PO Box 95, Silverton, OR 97381
DATE SUBMITTED: May 31, 2022	APPLICATION CASE NO: AR 21-038

Do not double-side or spiral bind any documents being submitted

Notice of Appeal: Every notice of appeal should contain:

1. How the decision is factually or legally incorrect; or
2. Present new facts material to the decision; or
3. The specific reasons for the appeal.

I/we are filing this appeal because (attach additional pages if needed): Please see attached appeal letter.

FOR OFFICE USE ONLY:

Appeal accepted by: _____ Date: _____

Case Number:

Filing fee

File attached

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22 MAY 31 2022

May 31, 2022

VIA HAND DELIVERY



Marion County Board of Commissioners
C/O Marion County Clerk
555 Court St. NE, Suite 2130
Salem, Oregon 97301

RE: Appeal of Hearings Officer's Decision (Case No. AR 21-038)
Our File No: 41460-00001

Dear Honorable Commissioners:

This office represents Joshua Fogarty ("**Applicant**") in his request for an administrative review to determine whether DLCD Measure 49 Final Order for No. E133582 (the "**Measure 49 Order**") remains valid. The Measure 49 Order is regarding property identified on the Marion County Assessor's Maps as tax lots 1400 and 1600 of Township 6S, Range 1W, Section 35D. We submit the following as our appeal of the Hearings Officer's decision dated May 13, 2022 (the "**Decision**") determining the Measure 49 Order had expired and denying the application. This appeal is timely submitted before the deadline of May 31, 2022 at 5:00 pm, as stated in Section VIII of the Decision.

Applicant respectfully requests the Marion County Board of Commissioners (the "**Board**") review the Decision and grant a new *de novo* hearing to consider the issues of interpretation and application of Measure 49. Applicant further requests the Board reverse the Decision and determine the Measure 49 Order is valid. Applicant appeals the Decision because it is unlawful in substance. The Decision misinterpreted Measure 49 and other applicable Oregon laws, and it failed to correctly apply the principles of statutory interpretation under *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009) and *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993).

The Hearings Officer's application of statutory construction is not consistent with Oregon Law. The Hearings Officer stated legislative history is considered "only when the text of a statute is not capable of only one meaning." Decision, pg. 13. This reasoning is contrary to ORS 174.020(1)(b), which states "[t]o assist a court in its construction of a statute, a party may offer the legislative history of the statute." Further, *State v. Gaines* held: "***a party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis." 346 Or at 172. The Hearings Officer rejected testimony regarding applicable legislative history and applicable context in an erroneous application of statutory construction. The Board must grant *de novo* review of the Decision.

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The Decision improperly excluded evidence as to the intent of Measure 49 to pass the ability to prosecute the claim onto the heirs of the claimant after the original claimant has died. The Hearings Officer noted that if the property had been probated under a will instead of titled in the Trust, the Measure 49 Order would still be valid and would not have expired. The Hearings Officer's reasoning expressly ignored the inconsistency of her statutory construction with the intent of Measure 49. If the Hearings Officer had properly considered these arguments, she would have found in favor of the Applicant. The clear intent of Measure 49 is to allow the heirs of a deceased claimant to prosecute the claim without triggering the ten-year development period, and the Hearings Officer's Decision is inconsistent with this intent.

The Decision is in error for three reasons:

1. **GRETCHEN L. RHYNE AND JUSTINE C. FOGARTY, THE BENEFICIARIES UNDER THE TRUST, AND WEST COAST TRUST, THE TRUSTEE, WERE CO-OWNERS OF THE PROPERTY.**

The Hearings Officer's interpretation and application of the term "Owner" as used in Measure 49 regarding property titled in a trust contradicts the text and context of applicable Oregon law. Statutory interpretation requires consideration of the text of Measure 49 in context of all other applicable laws. Applicant explained in the attached letter that by examining the text of Measure 49 in context, the definition of Owner includes the beneficiaries of a trust (Gretchen L. Rhyme and Justine C. Fogarty) in addition to the trustee of the trust (West Coast Trust). See *attached* Applicant's Final Legal Argument letter. The Decision failed to give proper weight to the context of Measure 49, specifically the Oregon Uniform Trust Code. The beneficiaries of the Norman L. Dodds and Mary Ruhl Dodds Family Trust (the "*Trust*") had a vested property interest at the time the Measure 49 Order was issued. Under the Oregon Uniform Trust Code, "...the interests of a beneficiary under a revocable or irrevocable trust vest when the trust becomes irrevocable..." ORS 130.730. When the Trust became irrevocable, the beneficiary's interest vested and became a property interest. Therefore, the beneficiaries and the trustee were all current owners under Oregon law.

2. **DEATH OF A CLAIMANT DOES NOT AFFECT MEASURE 49 RIGHTS.**

The Hearings Officer's interpretation of "Owner" contravenes the intent of Measure 49 that the right to prosecute the Measure 49 claim survives the death of the claimant as stated in Or. Laws 2007, ch. 424, §11(9). The operative section of Measure 49 regarding the death of the claimant is Section 11(9). The intent of Measure 49 is for the heirs of the claimant to assume the ability to prosecute the claim. Here, the beneficiaries of the Trust are the heirs of the claimant and are entitled to prosecute the claim granted in the Measure 49 Order. Measure 49 did not intend to create two classes of heirs of property owners who die before the final decision on their Measure 49 claim is issued. Under the Decision, transferring property through probate does not trigger the ten-year development period but transferring property to beneficiaries of a trust does. Measure 49 must be construed to give effect to all provisions. The only way to interpret Measure 49 to give effect to all provisions is to consider the beneficiaries of a trust as owners.

3. A CONVEYANCE FROM A TRUSTEE TO THE CLAIMANT AND CURRENT OWNER OF THE PROPERTY DOES NOT TRIGGER THE 10-YEAR PERIOD.

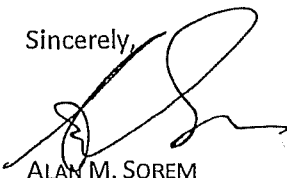
The Trustee of the Trust transferring the property to the beneficiaries did not initiate the ten-year development period under Section 11(6) in Measure 49. Or. Laws 2007, ch. 424, §11(6). Section 11(6) of Measure 49 provides:

...[O]nce the owner who obtained the authorization conveys the property to a person other than the owner's spouse or the trustee of a revocable trust in which the owner is the settlor, the subsequent owner of the property must create the lots or parcels and establish the dwellings authorized by a waiver under section 6, 7 or 9 of this 2007 Act within 10 years of the conveyance.

The Trustee's transfer of the property to the beneficiaries of the Trust is a conveyance among current co-owners of the Property, and the beneficiaries receiving the title to the Property were themselves the party authorized as claimants to use the Measure 49 claim and order. The beneficiaries are not "subsequent owners" under this section as they already had a vested property interest and are the claimants. The transfer to the beneficiaries was similar to a transfer of property between a husband and wife because both already have an interest in the property. The actions of the trustee of the Trust after the death of Mary Ruhl Dodds were pursuant to the terms of the Trust to administer the Trust. The Trustee was bound by the Trust to distribute the Trust assets to the Beneficiaries and the actions taken pursuant to that duty are not a conveyance from the owner who obtained the authorization to a subsequent owner under Measure 49. The Trustee's actions distributing the Trust assets are the same as distribution of an estate through probate. Both the trust and plain intent of Measure 49 and applicable laws require reversal of the Decision.

For the reasons discussed above, Applicant disagrees with the Hearings Officer's Decision because it contravenes the text and context of Measure 49. Applicant's interpretation that the beneficiaries of the Trust are Owners under Measure 49 is consistent with the text, context, and intent of Measure 49. We respectfully request you grant a *de novo* hearing and reverse the Hearings Officer's Decision, authorizing development of one homesite.

Sincerely,



ALAN M. SOREM
asorem@sglaw.com
Voice Message #303

AMS
Enclosures

COPY



March 31, 2022

VIA ELECTRONIC MAIL: ASchrems@co.marion.or.us

Honorable Hearings Officer
C/O Alyssa Schrems
Marion County Planning Department
5155 Silverton Rd NE
Salem, OR 97305

RE: Supplemental Legal Argument Case No. AR 21-038
Our File No: 41460-00001

Dear Madam Hearings Officer:

Applicant submits this letter as its final legal argument for Administrative Review Case No. 21-038 and in response to Friends of Marion County's comments submitted on March 24, 2022. Applicant will discuss the ambiguity in Measure 49 that requires utilization of the statutory interpretation framework in Oregon; next, Applicant will discuss what owner means as used in Measure 49 and the ownership interest of a beneficiary under a trust; last, Applicant will cover the definition of convey as used in Measure 49.

I. Ambiguity in Measure 49

The relevant section of Measure 49 as set out in Or. Laws 2007, ch. 424, § 11(6):

An authorization to partition or subdivide the property, or to establish dwellings on the property, granted under section 6, 7 or 9 of this 2007 Act runs with the property and may be either transferred with the property or encumbered by another person without affecting the authorization. There is no time limit on when an authorization granted under section 6, 7 or 9 of this 2007 Act must be carried out, except that once the owner who obtained the authorization conveys the property to a person other than the owner's spouse or the trustee of a revocable trust in which the owner is the settlor, the subsequent owner of the

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property must create the lots or parcels and establish the dwellings authorized by a waiver under section 6, 7 or 9 of this 2007 Act within 10 years of the conveyance.

Additionally, Measure 49 provided the following for the event of death of an individual claimant:

“(9) If a claimant is an individual, the entitlement to prosecute the claim under section 6, 7 or 9 of this 2007 Act and an authorization to use the property provided by a waiver under section 6, 7 or 9 of this 2007 Act:

(a) Is not affected by the death of the claimant if the death occurs on or after the effective date of this 2007 Act; and

(b) Passes to the person that acquires the property by devise or by operation of law.” Or. Laws 2007, ch. 424, § 11(9).

The issue is the triggering event for the 10-year limit to create lots or establish dwellings contained in Measure 49. This issue requires interpreting the meaning of the phrases: “the owner who obtained the authorization conveys to a person other than the owner’s spouse or the trustee of a revocable trust in which the owner is the settlor” and “the subsequent owner.” There is more than one plausible interpretation of these phrases. DLCD asserts their interpretation of the owner who obtained authorization is limited to the trustee of the Norman L. Dodds and Mary Ruhl Dodds Family Trust (the “Trust”) and the distribution deed from the trustee to the beneficiaries under the trust was a conveyance that initiated the ten-year development clock. Marion County Planning agrees with DLCD’s interpretation. Applicant asserts this interpretation unreasonably limits the text of Measure 49 and contradicts the context of Measure 49 and related statutes.

Issues of statutory interpretation are resolved under the framework of *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009) and *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). Under *Gaines*, statutory interpretation requires analyzing the text in context as well as any legislative history and canons of statutory construction relevant to the interpretation. 317 Or at 171-73. These principles of statutory interpretation are codified in ORS 174.020. Further, the general rule for statutory construction includes: “...where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.” ORS 174.010.

II. Definition of Owner & Beneficiary’s Interest

The definition of “Owner” in Measure 49, as specified in ORS 195.300(18) provides:

“(a) The owner of fee title to the property as shown in the deed records of the county where the property is located;

(b) The purchaser under a land sale contract, if there is a recorded land sale contract in force for the property; or

(c) If the property is owned by the trustee of a revocable trust, the settlor of a revocable trust, except that when the trust becomes irrevocable only the trustee is the owner."

The relevant definition applicable in this case is ORS 195.300(18)(c). When a trust is revocable, the trustee and the settlor are the owners. When the trust becomes irrevocable, "only the trustee is the owner." Reading that phrase in the greater context of the full sentence, "only the trustee is the owner" means when the trust is irrevocable the settlor is no longer an owner.

The Oregon Uniform Trust Code under ORS 130.010(2) provides: "Beneficiary means a person that: (a) Has a present or future beneficial interest in a trust, whether vested or contingent; or (b) Holds a power of appointment over trust property in a capacity other than that of trustee." Under the terms of the restated Trust that was submitted by Applicant on March 17, 2022, the trust estate was to be divided into equal shares of the Trustor's children and lineal descendants of any deceased children. The Trust indicated the Trustor's children were Gretchen L. Rhyne and Justine C. Fogarty.

While the Trust is revocable, the Beneficiaries do not have a real property interest in the Trust property. This is because a beneficial interest in a revocable trust is not usually considered a property interest. *Tseng v. Tseng*, 271 Or App 657, 667 (2015). When Mary Ruhl Dodds died on October 12, 2008, the Trust became irrevocable. ORS 130.730 provides "...the interests of a beneficiary under a revocable or irrevocable trust vest when the trust becomes irrevocable..." When the Trust became irrevocable, the Beneficiary's interest vested and became a property interest. This occurred before the Measure 49 order was issued on June 3, 2010. At the time the Order was issued, the Beneficiaries had a vested interest in the property under the trust. The First Restatement of Property explains that the person who may "become entitled to the beneficial enjoyment of the affected thing" in a trust has a future interest in that thing. Restatement (First) of Property, §153 Future Interests Differentiated from Other Property Interests, Comment on Subsection (3)(b). Here, the Subject Property was the thing affected by the trust and the Beneficiaries had a future interest. The Beneficiaries' vested interest was a present property interest whereas before the death of Mary Ruhl Dodds, the Beneficiaries had a future property interest. As such, the Beneficiaries were owners in addition to the Trustee when the Measure 49 order was issued. The settlor/trustor of the Trust was no longer an Owner.

Inclusion of the Beneficiaries as "Owners" at the time the Trust became irrevocable is consistent with the context of Measure 49 and the Oregon Uniform Trust Code. When the Trust became irrevocable, the interest of the Beneficiaries vested and became a real property interest. The court does "not interpret statutory phrases in isolation. Instead, we construe them in their overall context, including related statutory provisions." *Moore v. City of Eugene*, 308 Or App 318, 330 (2020) (internal citations omitted). This is consistent with the codified principles of statutory construction that provide; "...where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." ORS 174.010. The only interpretation of Measure 49 and the Oregon Uniform Trust Code is to conclude that after the death of the settlor and original claimant, the Trustee and Beneficiaries were co-owners of the Property – each with a recognized ownership interest in the Property.

Under Measure 49, when a claimant is an individual, "the entitlement to prosecute the claim...and an authorization to use the property provided by a waiver..." is not affected by the claimant's death. Or. Laws 2007, ch. 424, § 11(9)(a). The death of Mary Ruhl Dodds should not affect the Beneficiaries of her Trust in a different manner than had she died and the property was owned by her as an individual. If the

Trust had not existed, the right to prosecute the Measure 49 claim and use the property would have passed to the living children of Mary Ruhl Dodds without triggering the ten-year development period. Applicant is requesting the term "Owner" as it pertains to the ten-year development period, be interpreted in a manner consistent with other provisions of Measure 49 and the Oregon Uniform Trust Code. The state's Measure 49 analysis contradicts the text, context, and intent of Measure 49 and Oregon trust and real property law. It creates an absurd result that unnecessarily terminates an otherwise valid Measure 49 order.

III. Definition of Convey

The relevant provision using the term "convey" in Measure 49 provides: "...once the owner who obtained the authorization *conveys* the property to a person other than the owner's spouse or the trustee of a revocable trust in which the owner is the settlor..." Or. Laws 2007, ch. 424, § 11(6) (*emphasis added*). The Miriam Webster definition of convey regarding property is: "to transfer or deliver (something, such as property) to another especially by a sealed writing." When the Trustee of the Trust transferred the property to the Beneficiaries of the Trust, the Beneficiaries already had an interest in the property. "A trust implies two estates-one legal, and the other equitable. It also implies that the legal title is held by one person, the trustee, while another person, the cestui que trust, has the beneficial interest." *Allen v. Hendrick*, 104 Or 202, 223 (1922).

Here, the Beneficiaries held the beneficial interest and the Trustee's transfer of legal title to the Beneficiaries unified the two ownership interests in the Beneficiary. This transfer unifying title in the Beneficiaries was not a conveyance as that term is used in Measure 49. Creating a trust "requires a separation of the legal title and equitable interests in the property." *Morse v. Paulson*, 182 Or 111, 117 (1947). The transfer of the Property unified title in the Beneficiaries. This action did not convey the Property. As such, the deed from the Trustee to the Beneficiaries, and the deeds between Beneficiaries, did not initiate the ten-year development time period. Applicant requests the Hearings Officer determine that the Measure 49 order remains valid notwithstanding the execution and recording of the distribution deed.

Sincerely,



ALAN M. SOREM
asorem@sglaw.com
Voice Message #303

AMS
Enclosures

Receipt #: 101250

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MARION COUNTY

BILL BURGESS

COUNTY CLERK

Receipt Date: 05-31-2022

Receipt Time: 10:36 am.

Page: 1

Issued To: JOSHUA & KERRY FOGARTY
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SILVERTON, OR 97381-9740

Document Number	Type	Description	Total		
0	12	COMM APPEAL	500.00		
Total Fees Due:			500.00		
Amount Due	Paid By Check	Paid In Cash	Charged to Acct	Overage to Acct	Change Due
500.00	500.00	.00	.00	.00	.00

Thank You!
BILL BURGESS
MARION COUNTY

Itemized Check Listing		
Check	Check No.	Amount
1	2764	500.00

BEFORE THE MARION COUNTY HEARINGS OFFICER

In the Matter of the Application of:)	Case No. AR 21-038
)	
JOSHUA N. FOGARTY)	ADMINISTRATIVE REVIEW

ORDER

I. Nature of the Application

This matter came before the Marion County Hearings Officer on the application of Joshua Fogarty for an administrative review to determine whether a measure 49 Order remains valid on ad 13.53 acre property consisting of two tax lots in an EFU (Exclusive Farm Use) zone located in the 14300 block of Evans Valley Road NE, Silverton (T6S, R1W, Section 35D, tax lots 1400 and 1600). The Measure 49 Order was approved as Election Number E133582.

II. Relevant Criteria

The standards and criteria relevant to this application are found in the Marion County Code, the text of Measure 49 as set out in Or. Laws 2007, ORS Chapter 195, and Oregon Uniform Trust Code (ORS Chapter 130).

III. Hearing

A public hearing was held on the application on March 10, 2022. At the hearing, the Planning Division file was made a part of the record. The following persons appeared and provided testimony:

- | | | |
|----|----------------|--------------------------|
| 1. | Alyssa Schrems | Planning Division |
| 2. | Alan M. Sorem | Attorney for Applicant |
| 3. | Joshua Fogarty | Applicant |
| 4. | Roger Kaye | Friends of Marion County |

The record was left open following documents were entered into the record. On March 17, 2022, the Applicant provided The Complete Restatement of the Norman L. Dodds and Mary Ruhl Dodds Revocable Living Trust. On March 24, 2022, Friends of Marion County submitted additional comments. On March 31, 2022, Applicant submitted final legal argument.

IV. Executive Summary

Applicant requests administrative review to determine whether a Measure 49 Order remains valid on two tax lots in and EFU in the 14300 block of Evans Valley Road NE, Silverton. The Administrative Review requests the Hearings Officer to make a legal determination whether the ten-year timeline was triggered by the conveyance of the subject property to the beneficiaries of the trust. The Hearings Officer determines that the distribution of the subject property from the trustee to the beneficiaries by warranty deed on June 14, 2010 was a conveyance that triggered the ten-year development clock. A dwelling was not established within ten years of the transfer. Therefore, the Measure 49 Order on the 13.53 acre property expired on June 14, 2020 the home site authorization is void. The Administrative Review application is DENIED.

Although the Hearings Officer is bound to apply the Marion County Code, the text of Measure 49, and the Oregon Uniform Trust Code, the Hearings Officer agrees with the Applicant that this determination is an unfortunate and unintended termination of a valid Order. The subject property has remained in the family since the 1950s, and the Applicant is the grandson of the claimant. If the trust had not existed, the right to prosecute the Measure 49 claim and home site authorization would have passed to the claimant's living children without triggering the ten-year development period. It is especially unfortunate that at the time Applicant would have been able to timely establish a dwelling, the global COVID-19 pandemic likely precluded him from doing so.

V. Findings of Fact

The Hearings Officer, after careful consideration of the testimony and evidence in the record, issues the following findings of fact:

1. The property is located on the south side of Evans Valley Road NE, approximately 365 feet east of the intersection of Evans Valley Road NE and East View Lane NE. There are two parcels which are generally sloped downward in a southwest direction. The tax lots together are considered one legal unit of land.
2. Abutting properties in all directions are zoned EFU (Exclusive Farm Use). Properties to the north and south are zoned UT and in the City of Silverton's Urban Growth Boundary (UGB). Properties to the west are all single family residential in the City of Silverton.
3. Mary Ruhl Dodds filed a Measure 37 claim with the State of Oregon under ORS 197.352. Mary Ruhl Dodds was the settlor of the Norman L. Dodds and Mary Ruhl Dodds Family Trust was the "Claimant." West Coast Trust, formerly known as The Commercial Bank was the Trustee of the Norman L. Dodds and Mary Ruhl Dodds Family Trust.

4. On or about October 12, 2008, Mary Ruhl Dodds passed away. When Mary Ruhl Dodds died, the trust became irrevocable, and the property was transferred to West Coast Trust, formerly known as The Commercial Bank, the Trustee.
5. Under Measure 49, if a claimant dies on or after December 6, 2007, entitlement to prosecute the claim passes to the person who acquires the claim property by devise or by operation of law. ORS 195.300(18)(c) provides that when the trust becomes irrevocable, only the trustee is the owner.
6. The Final Order and Home Site Authorization was issued on June 3, 2010 and concluded that the one home site approval the claimant qualifies for under Section 6 of Measure 49 authorizes the claimant to establish one dwelling on the subject property.
7. The Final Order and Home Site Authorization stated in Paragraph 12 that "A home site approval will not expire except that if a claimant who received this home site authorization later conveys the property to a party other than the claimant's spouse or the trustee of a revocable trust in which the claimant is the settlor, the subsequent owner of the property must establish the authorized dwelling within 10 years of the conveyance. (Ex. 105)
8. On or about June 10, 2010, West Coast Trust transferred the property to Gretchen L. Rhyne and Justine C. Fogarty by Statutory Warranty Deed that was recorded on June 14, 2010 (Reel 3184, Page 336). A corrected deed was issued on April 17, 2010 (Reel 32007, Page 428). The Corrected Deed states: "It is believed that this transfer from Grantor to Grantee will trigger that ten-year time period and the Final Order will expire if the Final Order home site approval is not utilized by the Grantee. Grantee takes the property subject to this."
9. On September 1, 2015, Gretchen L. Rhyne transferred her 50% ownership into the Gretchen Lee Rhyne Revocable Living Trust (Reel 3738, Page 142). This deed states "The Final Order and Oregon law at the time of this transfer put a limitation on the validity of this Order for a period of ten (10) years from the date of transfer. The ten years has already begun to run based upon an earlier transfer to the Grantor".
10. On December 8, 2015, the Gretchen Lee Rhyne Revocable Living Trust transferred its 50% interest in the subject property to Justine C. Fogarty (Reel 3765, Page 291). At that time, Justine C. Fogarty retained 100% ownership in the subject property.
11. On May 22, 2018, Justine C. Fogarty transferred 100% ownership to the Justine C. Fogarty, Trustee, or her successor(s) in trust, under the Justine C. Fogarty Revocable Living Trust Dated the 10th Day of May, 2018, and any amendments thereto (hereafter referred to as the Justine C. Fogarty Revocable Living Trust)(Reel 4082, Page 123).

12. On May 3, 2019, the Justine C. Fogarty Revocable Living Trust conveyed 100% ownership of the subject property to Joshua N. Fogarty (Reel 4193, Page 208), the current property owner and Applicant.
13. On or about July 16, 2019, Applicant Joshua Fogarty obtained a septic permit for a single-family dwelling at the subject property. (Ex. 108)
14. On or about October 17, 2019, Applicant Joshua Fogarty received a Building Permit for residential plumbing at the subject property. (Ex 109).
15. On or about June 26, 2019, Applicant Joshua Fogarty received Approval of Application for an Agricultural Building at the subject property. (Ex. 110)
16. The Applicant proposed to place one home on the subject property and a site plan was submitted by the Applicant that proposed a homesite located on Tax Lot 1600, which was included as part of the property on which the Measure 49 claim was approved.
17. The Marion County Planning Division requested comments:

Marion County Building Inspection commented: "There are no building inspection issues noted.

Marion County Septic commented that a septic installation permit (555-19-004990-PRMT) was finalized on August 30, 2019 after the inspector gave the final inspection on August 29, 2019.

Friends of Marion County commented that the application should be denied as the applicant should have been aware of the 10 year deadline imposed by Measure 49. Friends of Marion County also allege that a commercial business (concrete contractor) is being operated out of a building that was approved as an agricultural exempt structure.

Department of Land Conservation and Development (DLCD) commented that based on the evidence provided by the applicant, the Measure 49 claim has expired because the owner who obtained the authorization conveyed the property by warranty deed on June 14, 2010. DLCD commented that the transferees were not the owner's spouse and were not the trustees of a revocable trust, and the warranty deed transfer in 2010 started the 10-year clock, and a dwelling was not established within 10 years of the transfer.

Patrick Fogarty commented that he is the father of the applicant, and the sone in law of Mary Ruhl Dodds. Mr. Fogarty commented that the subject property is not farmable land and was never operated as a farm. He commented that the subject property was purchased by the Dodds in the 1950s and that it is the

Applicant's dream to live on his grandparents' nonfarmable land. Applicant was issued a building permit for an agricultural building and a house and permit for a common septic to serve the agricultural building and a dwelling. Mr. Fogarty commented that Covid hit and time passed before Applicant was able to apply for the building permit.

Aileen Kaye commented that the Application should be denied because the Applicant did not meet the deadline that is established by law. Pat and Mary Fogarty commented that Covid-19 had a major impact on the State of Oregon and that the State and County took measures to ease the impact on its citizens. Many government offices were closed or restricted and that the State and the County extended timelines.

Pat and Mary Fogarty also commented that the County made sure that the approved septic was adequate for a 2,000 square foot house on the subject property.

Other contacted agencies had no comment or stated to objection to the Application.

18. Attorney for Applicant, Alan Sorem, argues that upon the death of Mary Dodds, the interests of the beneficiaries in the property "became a real property interest." The Applicant argues that Measure 49 and the Oregon Uniform Trust Code should be interpreted to conclude that after the death of the settlor and original claimant (Mary Ruhl Dodds), the "Trustee and the Beneficiaries were co-owners of the Property – each with a recognized ownership interest in the property." Under such a conclusion, the ten-year development period would not have been triggered by the warranty deed because the beneficiaries were already "owners" of the property interest.

19. The Marion County Planning Division recommended denial of the application based on the expiration of the ten-year timeline on June 10, 2020. If the hearings officer grants the Application, staff recommends the following conditions be applied:

- A. The applicant shall obtain all permits required by the Marion County Building Inspection Division, including any septic permits.
- B. Prior to issuance of a building permit, the applicant shall sign and submit a Farm/Forest Declaratory Statement to the Planning Division. This Statement shall be recorded by the Applicant with the Marion County Clerk after it has been reviewed and signed by the Planning Director.

VI. Additional Finding of Fact and Conclusions of Law

1. Applicants have the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met as explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390, 394-395(1987).

"Preponderance of the evidence" means the greater weight of evidence. It is such evidence that when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the burden of proof rests. (Citation omitted).

2. Applicants must prove, by substantial evidence in the record, it is more likely than not that each criterion is met. If the evidence for any criterion is equal or less, applicants have not met their burden and the application must be denied. If the evidence for every criterion there's a hair or breath in applicant's favor the burden of proof is met and the application is approved.

3. Under MCC 16.42.110, where a determination about a proposed use, structure or the legality of a parcel cannot be made without interpretation or the exercise of factual, policy or legal judgment, the proposed use, structure or the legality of a lot or parcel may be reviewed as an administrative review subject to submitted of an application as provided in Chapter 16.36 of the Marion County Code.

4. Under MCC 16.42.110(A), the zoning administrator or designee may forward any land use permit or application to the hearings officer for a public hearing and initial decision. The hearings officer may hear and decide this matter.

5. Friends of Marion County submitted comments supporting denial based on an alleged violation of the agricultural building permit. The Application before the hearings officer is an administrative review to determine the Applicant's rights to construct a dwelling on the subject property based on a Measure 49 final order. There is no enforcement matter regarding the subject property and the hearings officer has subject matter jurisdiction of the application.

6. The State of Oregon granted a waiver under Measure 49 from state land use regulations, subject to the terms contained the Final Order and Home Site Authorization. The subject property was the subject of Measure 49 Election Number E133582. As part of the final Order, the State found that the Claimant qualified for one home site, subject to the terms stated in the final order, specifically, the terms stated in Section IV (Home Site Authorization).

7. The Claimant's qualification for one home site is subject to the following term:

1. Each dwelling must be on a separate lot or parcel, and must be contained within the property on which the claimant is eligible for Measure 49 relief. The establishment of a dwelling based on this home site authorization must comply with all applicable standards governing the siting or development of the dwelling. However, those standards must not be applied in a manner that prohibits the establishment of the dwelling, unless the standards are reasonably necessary to avoid or abate a nuisance, to protect public health or safety, or to carry out federal law.

Based on the site plan provided by the applicant, the proposed homesite is located on tax lot 1600, which was included as part of the property on which the claim was approved. The homesite will be required to meet the siting standards contained within MCC 17.136.100 at the time of building permits. Based on the site plan submitted, the proposed homesite appears to meet the minimum setbacks of 20 feet from all property lines within the EFU zone. This criterion is met.

8. The Claimant's qualification for one home site is subject to the following term:

2. This home site authorization will not authorize the establishment of a dwelling in violation of a land use regulation described in ORS 195.305(3) or in violation of any other law that is not a land use regulation as defined by ORS 195.300(14).

The applicant is not requesting any of the uses that are described in ORS 195.305(3) or a use that is a violation of any other law that is not a land use regulation as defined by ORS 195.300(14). The applicant is requesting to place one house on the property that was approved under Measure 49 Election Claim Number E133582. This criterion is met.

9. The Claimant's qualification for one home site is subject to the following term:

3. A claimant is not eligible for more than 20 home site approvals under Sections 5 to 11 of Measure 49 regardless of how many properties a claimant owns or how many claims a claimant filed. If the claimant has developed the limit of twenty home sites under Measure 49, the claimant is no longer eligible for the home site approval that is the subject of this order.

The applicant has not developed the limit of twenty home sites under Measure 49 and is not requesting twenty home sites as part of this review. This criterion is met.

10. The Claimant's qualification for one home site is subject to the following term:

4. The number of dwellings a claimant may establish under this home site authorization is reduced by the number of dwellings currently in existence on the Measure 37 claim property and contiguous property in the same ownership, regardless of whether evidence of their existence has been provided to the department. If, based on the information available to the department, the department has calculated the number of currently existing dwellings to be either greater than or less than the number of dwellings actually in existence on the Measure 37 claim property or contiguous property under the same ownership, then the number of additional dwellings a claimant may establish pursuant to this home site authorization must be adjusted according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49. Statements in this final order regarding the number of lots, parcels or dwellings currently existing on the Measure 37 claim property are not a determination on the current legal status of those lots, parcels, or dwellings.

Based on the analysis contained in the Measure 49 Final Order and Home Site Authorization, the claimant qualifies for only one home site. A review of the Marion County Tax Assessor's Office records and the Marion County Building Inspection records indicate that there are no homes on either of the tax lots that are the subject of this order. A review of the land use history of Tax Lots 1400 and 1600 indicate that they have been described using one boundary description since 1979 and are therefore considered to be one unit of land for land use purposes. This criterion is met.

11. The Claimant's qualification for one home site is subject to the following term:

5. Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimant may choose to convert any temporary dwelling currently located on the property on which the claimant is eligible for Measure 49 relief to an authorized home site pursuant to a home site approval. Otherwise, any temporary dwelling is subject to the terms of the local permit requirements under which it was approved, and is subject to removal at the end of the term for which it is allowed

There are no temporary dwellings located upon the subject property. This criterion is met.

12. The Claimant's qualification for one home site is subject to the following term:

6. A home site approval only authorizes the establishment of a new dwelling on the property on which the claimant is eligible for Measure 49 relief. No additional development is authorized on contiguous property for which no Measure 37 claim was filed.

The applicant is requesting to locate a dwelling on tax lot 1600, which was previously the subject of Marion County Measure 37 claim M06-246. The applicant is not requesting development on any contiguous property. This criterion is met.

13. The Claimant's qualification for one home site is subject to the following term:

7. *The claimant may use a home site approval to convert a dwelling currently located on the property on which the claimant is eligible for Measure 49 relief to an authorized home site. If the number of dwellings existing on the property on which the claimant is eligible for Measure 49 relief exceeds the number of home site approval the claimant qualifies for under a home site authorization, the claimant may select which existing dwellings to convert to authorized home sites.*

There are no existing dwellings on the subject property. This criterion is met.

14. The Claimant's qualification for one home site is subject to the following term:

8. *The claimant may not implement the relief described in this Measure 49 home site authorization if a claimant has been determined to have a common law vested right to a use described in a Measure 37 waiver for the property. Therefore, if a claimant has been determined in a final judgment or final order that is not subject to further appeal to have a common law vested right as described in Section 5(3) of Measure 49 to any use on the Measure 37 claim property, then this Measure 49 Home Site Authorization is void. However, so long as no claimant has been determined in such a final judgment or final order to have a common law vested right to a use described in a Measure 37 waiver for the property, a use that has been completed on the property pursuant to a Measure 37 waiver may be converted to an authorized home site.*

There have been no applications received for a vested rights determination on the subject property. This criterion is met.

15. The Claimant's qualification for one home site is subject to the following term:

9. *A home site approval does not authorize the establishment of a new dwelling on a lot or parcel that already contains one or more dwellings.*

There are no dwellings on the subject property. This criterion is met.

16. The Claimant's qualification for one home site is subject to the following term:

10. *Because the property is located in an exclusive farm use zone, the owner must comply with the requirements of ORS 215.293 before beginning construction.*

ORS 215.293 requires the landowner to file a declaratory statement preventing the landowner or future landowners from pursuing a claim for relief or cause of action for which no claim or action is allowed under ORS 30.936 or 30.937. This criterion could be met as a condition of approval if the application is approved.

17. The Claimant's qualification for one home site is subject to the following term:

11. If an owner of the property is authorized by other home site authorizations to subdivide partition, or establish dwellings on other Measure 37 claim properties, Measure 49 authorizes the owner to cluster some or all of the authorized lots, parcels, or dwellings that would otherwise be located on land in an exclusive farm use zone, a forest zone or a mixed farm and forest zone on a single Measure 37 claim property that is zoned residential use or is located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone but is less suitable for farm or forest use than the other Measure 37 claim properties.

Claimant Mary Dodds has no other Measure 37/49 claim properties. This criterion is met.

18. The Claimant's qualification for one home site is subject to the following term:

12. If the claimant transferred ownership interest in the Measure 37 claim property prior to the date of this order, this order is rendered invalid and authorizes no home site approvals. Provided this order is valid when issued, a home site approval authorized under this order runs with the property and transfers with the property. A home site approval will not expire except that if a claimant who received this home site authorization later conveys the property to a party other than the claimant's spouse or the trustee of a revocable trust in which the claimant is the sett/or, the subsequent owner of the property must establish the authorized dwellings within 10 years of the conveyance. A dwelling lawfully created based on a home site approval is a permitted use.

Mary Ruhl Dodds was the original claimant who qualified for the Measure 49 waiver. Mary Ruhl Dodds passed away on October 12, 2008. The footnote in Claim EI33582 notes that under Measure 49, if a claimant dies on or after December 6, 2007, entitlement to prosecute the claim passes to the person who acquires the claim property by devise or by operation of law. During the Measure 37/49 claim process, the Norman L. Dodds and Mary Ruhl Dodds Family Trust held the subject property. Upon her passing, the property was transferred to West Coast Trust formerly known as The Commercial Bank, who was trustee of the Norman L. Dodds and Mary Ruhl Dodds Family Trust.

West Coast Trust transferred the property to Gretchen L. Rhyne and Justine C. Fogarty on June 10, 2010 (Reel 3184, Page 336) and issued a corrected deed on August 17,

2010 (Reel 3207, Page 428). On the corrected deed, it states: "it is believed that this transfer from Granter to Grantee will trigger that ten-year time period and the Final Order will expire if the Final Order home site approval is not utilized by the Grantee".

On September 1, 2015, Gretchen L. Rhyne transferred her 50% ownership into the Gretchen Lee Rhyne Revocable Living Trust (Reel 3 73 8, Page 142). This deed contains a section that states "The Final Order and Oregon law at the time of this transfer put a limitation on the validity of this Order for a period of ten (10) years from the date of transfer. The ten years has already begun to run based upon an earlier transfer to the Grantor."

On December 8, 2015, the Gretchen Lee Rhyne Revocable Living Trust transferred their 50% interest in the subject property to Justine C. Fogarty (Reel 3765, Page 291). At that time, Justine C. Fogarty retained 100% ownership in the subject property.

On May 22, 2018, Justine C. Fogarty transferred 100% ownership to the Justine C. Fogarty, Trustee, or her successor(s) in trust, under the Justine C. Fogarty Revocable Living Trust Dated the 10th Day of May, 2018, and any amendments thereto (hereafter referred to as the Justine C. Fogarty Revocable Living Trust) (Reel 4082, Page 123).

On May 3, 2019, the Justine C. Fogarty Revocable Living Trust conveyed 100% ownership of the subject property to Joshua N. Fogarty (Reel 4193, Page 208), the current property owner.

The threshold inquiry is whether the conveyance of the property from West Coast Trust to Gretchen L. Rhyne and Justine C. Fogarty on June 14, 2010 (date of recording) started the ten-year development restriction term included in the Measure 49 Final Order (Section IV, Paragraph 12).

Applicant argues that upon the death of Mary Dodds, Justine and Gretchen became "part owners" as they were beneficiaries of the trust and that conveyance of the property from West Coast Trust to them did not start the ten-year development timeframe. The Applicant argues that when the Trust became irrevocable, the Beneficiary's interest vested and became a "property interest" before the Measure 49 order was issued on June 3, 2010. Applicant's position is that when the Measure 49 Order was issued, the beneficiaries already had a vested interest in the property under the terms of the trust which should be considered as an ownership interest. If the beneficiaries are considered "owners" based upon a vested interest in the property when the Measure 49 final order was issued, as Applicant argues, the June 14, 2010 conveyance from West Coast Trust to Gretchen L. Rhyne and Justine C. Fogarty by Statutory Warranty Deed did not start the ten-year development timeline (and the Measure 49 order to allow one homesite on the subject property is remains valid).

The relevant section of Measure 49 as set out in Or. Laws 2007, ch. 424, § 11(6) states:

An authorization to partition or subdivide the property, or to establish dwellings on the property, granted under section 6, 7 or 9 of this 2007 Act runs with the property and may be either transferred with the property or encumbered by another person without affecting the authorization. There is no time limit on when an authorization granted under section 6, 7 or 9 of this 2007 Act must be carried out, except that once the owner who obtained the authorization conveys the property to a person other than the owner's spouse or the trustee of a revocable trust in which the owner is the settlor, the subsequent owner of the property must create the lots or parcels and establish the dwellings authorized by a waiver under section 6, 7 or 9 of this 2007 Act within 10 years of the conveyance.

Additionally, Measure 49 addresses the event of an individual claimant's death:

"(9) If a claimant is an individual, the entitlement to prosecute the claim under section 6, 7 or 9 of this 2007 Act and an authorization to use the property provided by a waiver under section 6, 7 or 9 of this 2007 Act:

(a) Is not affected by the death of the claimant if the death occurs on or after the effective date of this 2007 Act; and

(b) Passes to the person that acquires the property by devise or by operation of law." Or. Laws 2007, ch. 424, § 11(9).

The Applicant suggests that there is more than one plausible interpretation of the phrases: "the owner who obtained the authorization conveys to a person other than the owner's spouse or the trustee of a revocable trust in which the owner is the settlor" and "the subsequent owner."

DLCD suggests that the "owner" who obtained authorization is limited to the trustee of the Norman L. Dodds and Mary Ruhl Dodds Family Trust and that the conveyance from the Trustee to the beneficiaries was the conveyance that initiated the ten-year development clock. DLCD's interpretation is consistent with the notation on the corrected deed (corrected deed of June 14, 2010 deed) that states: "it is believed that this transfer from Granter to Grantee will trigger that ten-year time period and the Final Order will expire if the Final Order home site approval is not utilized by the Grantee." Applicant argues that the DLCD's interpretation unreasonably limits and contradicts the text of Measure 49.

Applicant urges the hearings officer to consider statutory interpretation requires analyzing the text in context as well as any legislative history and canons of

construction, citing *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009) and *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 1993).

However, ORS 174.020 obligates a court to consider proffered legislative history only when the text of a statute is not capable of only one meaning. *State v. Gaines* at 173. See also, ORS 174.010 and ORS 174.020.

ORS 174.010 provides (in relevant part) that the in the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted.

The definition of "Owner" in Measure 49, as specified in ORS 195.300(18) provides:

- (a) The owner of fee title to the property as shown in the deed records of the county where the property is located;
- (b) The purchaser under a land sale contract, if there is a recorded land sale contract in force for the property; or
- (c) If the property is owned by the trustee of a revocable trust, the settlor of a revocable trust, except that when the trust becomes irrevocable only the trustee is the owner. (emphasis added)

The Oregon Uniform Trust Code under ORS 130.010(2) defines a beneficiary as a person that (a) has a present or future beneficial interest in a trust, whether vested or contingent; or (b) holds a power of appointment over trust property in a capacity other than that of trustee.

Under the terms of the restated Trust that was submitted by Applicant on March 17, 2022, the trust estate was to be divided into equal shares of the Trustor's children and lineal descendants of any deceased children. The Trust indicated the Trustor's children were Gretchen L. Rhyne and Justine C. Fogarty.

While the Trust is revocable, the Beneficiaries do not have a real property interest in the Trust property because a beneficial interest in a revocable trust is not usually considered a property interest. *Tseng v. Tseng*, 271 Or App 657, 667 (2015). When Mary Ruhl Dodds died on October 12, 2008, the Trust became irrevocable. ORS 130.730 provides "...the interests of a beneficiary under a revocable or irrevocable trust vest when the trust becomes irrevocable..." When the Trust became irrevocable, the Beneficiary's interest vested.

Applicant correctly states that a vested interest is a real interest in property. A vested interest in the subject property gave the beneficiaries the right to receive the property interest. However, upon the death of Mary Ruhl Dodds, the trust became

irrevocable, and when the trust becomes irrevocable, "only the trustee is the owner." ORS 195.300(18)(c). Although the beneficiaries had a vested interest in the property, the beneficiaries were not "owners" until the conveyance from West Coast Trust by warranty deed on June 14, 2010.

A beneficiary is not legally obligated to accept trust assets even with vested interests. The form of vesting does not impact the titled ownership interest. A vested interest is not ownership of the property or title.

Applicant argues that the June 14, 2010 deed "unified ownership interests in the Beneficiary" and should not be considered a true conveyance. The Applicant suggests that the warranty deed did not "convey the Property" because the beneficiaries already had an ownership interest in the subject property.

The plain meaning of the text of Measure 49 and the Oregon Uniform Trust Code forces the conclusion that upon the death of the settlor (original claimant), the Trustee became the only owner and the beneficiaries became holders of vested interests. The beneficiaries did not have ownership until the conveyance of titled ownership by warranty deed on June 14, 2010. Further, the beneficiaries were notified that the ten-year development timeline was triggered by the Warranty Deed in June, 2010, and again in September, 2015, when Gretchen L. Ryne transferred her ownership interest to the Gretchen Lee Ryne Revocable Living trust that stated that the ten year development period had already begun to run based upon an earlier transfer.

The entitlement to prosecute the claim passed to West Coast Trust upon the Claimant's death. The Trustee conveyed ownership of the property to Gretchen L. Rhyne and Justine C. Fogarty on June 14, 2010. This conveyance of titled ownership initiated the ten-year timeline for development. Because the ten-year timeline started on June 14, 2010, the Measure 49 claim expired on June 14, 2020, and on that date, there was no dwelling legally built on the Subject property.

This criterion is not met.

Applicant correctly states that if the trust had not existed, the right to prosecute the Measure 49 claim and establish a homesite on the subject property would have passed to the living children of Mary Ruhl Dodds without triggering the ten-year development period. But, the trust did exist, and that right passed to the trustee when the trust became irrevocable.

19. The Claimant's qualification for one home site is subject to the following term:

13. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent,

this home site authorization will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215. 402 or 227.160, other permits or authorization from local, state, or federal agencies, and restrictions on the use of the subject property imposed by private parties.

If the claim were determined to be valid, obtaining all required permits can be made a condition of approval, and this criterion could be met.

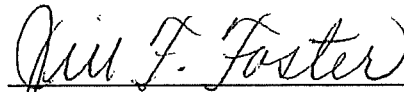
VII. Order

It is hereby found that Applicant has NOT met his burden of proving the applicable standards and criteria for approval of the administrative review application to determine whether a measure 49 Order remains valid on a 13.53 acre property consisting of two tax lots in an EFU (Exclusive Farm Use) zone located in the 14300 block of Evans Valley Road NE, Silverton (T6S, R1W, Section 35D, tax lots 1400 and 1600). The Measure 49 Order, Election Number E133582, has expired, and the administrative review application is DENIED.

VIII. Appeal Rights

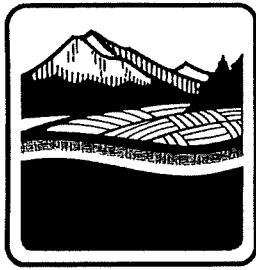
An appeal of this decision may be taken by anyone aggrieved or affected by this Order. An appeal must be filed with the Marion County Clerk (555 Court St. NE, Suite 2130, Salem, Oregon) by 5:00 p.m. on the 31st day of May, 2022. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be returned.

DATED at Salem, Oregon this 13th day of May, 2022.



Jill F. Foster

Marion County Hearings Officer



Marion County

OREGON

PUBLIC WORKS

BOARD OF COMMISSIONERS

Kevin Cameron
Danielle Bethall
Colm Willis

DIRECTOR

Brian Nicholas, P.E.

ADMINISTRATION

BUILDING INSPECTION

EMERGENCY MANAGEMENT

ENGINEERING

ENVIRONMENTAL SERVICES

OPERATIONS

PARKS

PLANNING

SURVEY

MEMORANDUM

TO: Marion County Hearings Officer

FROM: Marion County Planning Division/Alyssa Schrems

SUBJECT: Administrative Review 21-038

DATE: January 21, 2022

The Marion County Planning Division has reviewed the above-referenced application and offers the following comments:

FACTS:

1. Application of Joshua Fogarty for an administrative review to determine whether a Measure 49 Order remains valid on a 13.53 acre property consisting of two tax lots in an EFU (Exclusive Farm Use) zone located in the 14300 block of Evans Valley Road NE, Silverton (T6S, R1W, Section 35D, tax lots 1400 and 1600). The Measure 49 Order was approved as Election Number E133582.
2. The property is located on the south side of Evans Valley Road NE, approximately 365 feet east of the intersection of Evans Valley Road NE and East View Lane NE. There are two parcels which are generally sloped downward in a southwest direction. The tax lots together are considered one legal unit of land.
3. Abutting properties to in all directions are zoned EFU (Exclusive Farm Use). Properties to the north and south are zoned UT and in the City of Silverton's Urban Growth Boundary (UGB). Properties to the west are Single Family Residential in the City of Silverton.

COMMENTS:

4. Marion County Building Inspection commented that there are no building inspection issues noted.

Marion County Septic commented that a septic instillation permit (555-19-004990-PRMT) was finalized on 8/30/19 after the inspector gave a final inspection on 8/29/19.

Friends of Marion County commented that the application should be denied as the applicant should have been aware of the 10 year deadline imposed by Measure 49. Friends of Marion County also states that the application should be denied as there is an active violation occurring on the property (MCC 17.110.680). Friends of Marion County allege that a commercial business (concrete contractor) is being operated out of a building that was approved as an agriculture exempt structure pursuant to 555-19-004744-AGG.

Department of Land Conservation and Development (DLCD) commented that the based on the evidence provided by the applicant, the Measure 49 claim has expired as the owner who obtained the authorization conveyed the property by warranty deed on June 14, 2010.

Other contacted agencies either had no comment or stated no objection to the proposal.

STAFF FINDINGS AND ANALYSIS:

5. The State of Oregon granted a waiver under Measure 49 from state land use regulations, subject to the terms contained in the Final Order and Home Site Authorization. The subject property was the subject of Measure 49 Election Number E133582. As part of the Final Order, the State found that the claimant qualifies for one home site, subject to the terms in section IV (home site authorization) of the final order.

1. *Each dwelling must be on a separate lot or parcel, and must be contained within the property on which the claimant is eligible for Measure 49 relief. The establishment of a dwelling based on this home site authorization must comply with all applicable standards governing the siting or development of the dwelling. However, those standards must not be applied in a manner that prohibits the establishment of the dwelling, unless the standards are reasonably necessary to avoid or abate a nuisance, to protect public health or safety, or to carry out federal law.*

Based on the site plan provided by the applicant, the proposed homesite is located on tax lot 1600, which was included as part of the property on which the claim was approved. The homesite will be required to meet the siting standards contained within MCC 17.136.100 at the time of building permits. Based on the site plan submitted, the proposed homesite appears to meet the minimum setbacks of 20 feet from all property lines within the EFU zone.

2. *This home site authorization will not authorize the establishment of a dwelling in violation of a land use regulation described in ORS 195.305(3) or in violation of any other law that is not a land use regulation as defined by ORS 195.300(14).*

The applicant is not requesting any of the uses that are described in ORS 195.305(3) or a use that is a violation of any other law that is not a land use regulation as defined by ORS 195.300(14). The applicant is requesting to place one house on the property that was approved under Measure 49 Election Claim Number E133582.

3. *A claimant is not eligible for more than 20 home site approvals under Sections 5 to 11 of Measure 49 regardless of how many properties a claimant owns or how many claims a claimant filed. If the claimant has developed the limit of twenty home sites under Measure 49, the claimant is no longer eligible for the home site approval that is the subject of this order.*

The applicant has not developed the limit of twenty home sites under Measure 49 and is not requesting twenty home sites as part of this review.

4. *The number of dwellings a claimant may establish under this home site authorization is reduced by the number of dwellings currently in existence on the Measure 37 claim property and contiguous property in the same ownership, regardless of whether evidence of their existence has been provided to the department. If, based on the information available to the department, the department has calculated the number of currently existing dwellings to be either greater than or less than the number of dwellings actually in existence on the Measure 37 claim property or contiguous property under the same ownership, then the number of additional dwellings a claimant may establish pursuant to this home site authorization must be adjusted according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49. Statements in this final order regarding the number of lots, parcels or dwellings currently existing on the Measure 37 claim property are not a determination on the current legal status of those lots, parcels, or dwellings.*

Based on the analysis contained in the Measure 49 Final Order and Home Site Authorization, the claimant qualifies for only one home site. A review of the Marion County Tax Assessor's Office records and the Marion County Building Inspection records indicate that there are no homes on either of the tax lots that are the subject of this order. A review of the land use history of Tax Lots 1400 and 1600 indicate that they have been described using one boundary description since 1979 and are therefore considered to be one unit of land for land use purposes.

5. *Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimant may choose to convert any temporary dwelling currently located on the property on which the claimant is eligible for Measure 49 relief to an authorized home site pursuant to a home site approval. Otherwise, any temporary dwelling is subject to the terms of the local permit requirements under which it was approved, and is subject to removal at the end of the term for which it is allowed.*

There are no temporary dwellings located upon the subject property.

6. *A home site approval only authorizes the establishment of a new dwelling on the property on which the claimant is eligible for Measure 49 relief. No additional development is authorized on contiguous property for which no Measure 37 claim was filed.*

The applicant is requesting to locate a dwelling on tax lot 1600, which was previously the subject of Marion County Measure 37 claim M06-246. The applicant is not requesting development on any contiguous property.

7. *The claimant may use a home site approval to convert a dwelling currently located on the property on which the claimant is eligible for Measure 49 relief to an authorized home site. If the number of dwellings existing on the property on which the claimant is eligible for Measure 49 relief exceeds the number of home site approval the claimant qualifies for under a home site authorization, the claimant may select which existing dwellings to convert to authorized home sites.*

There are no existing dwellings on the subject property.

8. *The claimant may not implement the relief described in this Measure 49 home site authorization if a claimant has been determined to have a common law vested right to a use described in a Measure 37 waiver for the property. Therefore, if a claimant has been determined in a final judgment or final order that is not subject to further appeal to have a common law vested right as described in Section 5(3) of Measure 49 to any use on the Measure 37 claim property, then this Measure 49 Home Site Authorization is void. However, so long as no claimant has been determined in such a final judgment or final order to have a common law vested right to a use described in a Measure 37 waiver for the property, a use that has been completed on the property pursuant to a Measure 37 waiver may be converted to an authorized home site.*

There have been no applications received for a vested rights determination on the subject property.

9. *A home site approval does not authorize the establishment of a new dwelling on a lot or parcel that already contains one or more dwellings.*

There are no dwellings on the subject property.

10. *Because the property is located in an exclusive farm use zone, the owner must comply with the requirements of ORS 215.293 before beginning construction.*

ORS 215.293 requires the landowner to file a declaratory statement preventing the landowner or future land owners from pursuing a claim for relief or cause of action for which no claim or action is allowed under ORS 30.936 or 30.937. This can be made a condition of approval if the application is approved.

11. *If an owner of the property is authorized by other home site authorizations to subdivide partition, or establish dwellings on other Measure 37 claim properties, Measure 49 authorizes the owner to cluster some or all of the authorized lots, parcels, or dwellings that would otherwise be located on land in an exclusive farm use zone, a forest zone or a mixed farm and forest zone on a single Measure 37 claim property that is zoned residential use or is located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone but is less suitable for farm or forest use than the other Measure 37 claim properties.*

Mary Dodds has no other Measure 37/49 claim properties.

12. *If the claimant transferred ownership interest in the Measure 37 claim property prior to the date of this order, this order is rendered invalid and authorizes no home site approvals. Provided this order is valid when issued, a home site approval authorized under this order runs with the property and transfers with the property. A home site approval will not expire except that if a claimant who received this home site authorization later conveys the property to a party other than the claimant's spouse or the trustee of a revocable trust in which the claimant is the settlor, the subsequent owner of the property must establish the authorized dwellings within 10 years of the conveyance. A dwelling lawfully created based on a home site approval is a permitted use.*

Mary Ruhl Dodds was the original claimant who qualified for the Measure 49 waiver. Information provided to the State indicates that she passed away on October 12, 2008. The footnote in Claim E133582 notes that under Measure 49, if a claimant dies on or after December 6, 2007, entitlement to prosecute the claim passes to the person who acquires the claim property by devise or by operation of law. Upon her passing, the property was transferred to West Coast Trust f.k.a The Commercial Bank, who was trustee of the Norman L. Dodds and Mary Ruhl Dodds Family Trust (the trust owned the property during the Measure 37/49 claims). The chain of ownership is discussed further in detail below. Based on the facts contained here and discussed in detail below, it appears that entitlement to prosecute the claim passed to West Coast Trust. By conveying ownership of the property to Gretchen L. Rhyne and Justine C. Fogarty on June 14, 2010, the ten year timeline for development was initiated. If the ten year timeline started on June 14, 2010, then the Measure 49 claim expired on June 14, 2020 when no dwelling was legally built on the property.

13. *To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, this home site authorization will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or 227.160, other permits or authorization from local, state, or federal agencies, and restrictions on the use of the subject property imposed by private parties.*

If it is found that the Claim is still valid and has not yet expired, obtaining all required permits can be made a condition of approval.

6. Section 11(6) and (9) of Measure 49 (2007 HB 3540) discusses transferability of Measure 49 Claims in further detail:

(6) An authorization to partition or subdivide the property, or to establish dwellings on the property, granted under section 6, 7 or 9 of this 2007 Act runs with the property and may be either transferred with the property or encumbered by another person without affecting the authorization. There is no time limit on when an authorization granted under section 6, 7 or 9 of this 2007 Act must be carried out, except that once the owner who obtained the authorization conveys the property to a person other than the owner's spouse or the trustee of a revocable trust in which the owner is the settlor, the subsequent owner of the property must create the lots or parcels and establish the dwellings authorized by a waiver under section 6, 7 or 9 of this 2007 Act within 10 years of the conveyance. In addition:

(a) A lot or parcel lawfully created based on an authorization under section 6, 7 or 9 of this 2007 Act remains a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law; and

(b) A dwelling or other residential use of the property based on an authorization under section 6, 7 or 9 of this 2007 Act is a permitted use and may be established or continued by the claimant or a subsequent owner, except that once the claimant conveys the property to a person other than the claimant's spouse or the trustee of a revocable trust in which the claimant is the settlor, the subsequent owner must establish the dwellings or other residential use authorized under section 6, 7 or 9 of this 2007 Act within 10 years of the conveyance.

(9) If a claimant is an individual, the entitlement to prosecute the claim under section 6, 7 or 9 of this 2007 Act and an authorization to use the property provided by a waiver under section 6, 7 or 9 of this 2007 Act:

(a) Is not affected by the death of the claimant if the death occurs on or after the effective date of this 2007 Act; and

(b) Passes to the person that acquires the property by devise or by operation of law.

Mary Ruhl Dodds was the original claimant who qualified for the Measure 49 waiver. Information provided to the State indicates that she passed away on October 12, 2008. Upon her passing, the property was transferred to West Coast Trust f.k.a The Commercial Bank, who was trustee of the Norman L. Dodds and Mary Ruhl Dodds Family Trust.

West Coast Trust transferred the property to Gretchen L. Rhyne and Justine C. Fogarty on June 10, 2010 (Reel 3184, Page 336) and issued a corrected deed on August 17, 2010 (Reel 3207, Page 428). On the corrected deed, it states: "it is believed that this transfer from Grantor to Grantee will trigger that ten year time period and the Final Order will expire if the Final Order home site approval is not utilized by the Grantee".

On September 1, 2015, Gretchen L. Rhyne transferred her 50% ownership into the Gretchen Lee Rhyne Revocable Living Trust (Reel 3738, Page 142). It is of note that this deed contains a section that states "The Final Order and Oregon law at the time of this transfer put a limitation on the validity of this Order for a period of ten (10) years from the date of transfer. The ten years has already begun to run based upon an earlier transfer to the Grantor".

On December 8, 2015, the Gretchen Lee Rhyne Revocable Living Trust transferred their 50% interest in the subject property to Justine C. Fogarty (Reel 3765, Page 291). At that time, Justine C. Fogarty retained 100% ownership in the subject property.

On May 22, 2018, Justine C. Fogarty transferred 100% ownership to the Justine C. Fogarty, Trustee, or her successor(s) in trust, under the Justine C. Fogarty Revocable Living Trust Dated the 10th Day of May, 2018, and any amendments thereto (hereafter referred to as the Justine C. Fogarty Revocable Living Trust)(Reel 4082, Page 123).

On May 3, 2019, the Justine C. Fogarty Revocable Living Trust conveyed 100% ownership of the subject property to Joshua N. Fogarty (Reel 4193, Page 208), the current property owner.

Friends of Marion County submitted comments stating that Gretchen Lee Rhyne, Trustee of the Gretchen Lee Rhyne Revocable Living Trust was the rightful owner of the property and should have realized the ten year deadline imposed by M49 that required them to develop the property.

DLCD submitted comments stating that the owner who obtained the authorization conveyed the property by warranty deed on June 14, 2010. The transferees were not the owner's spouse and were not the trustees of a revocable trust. Therefore this warranty deed transfer started the 10-year time period to use the authorization following the conveyance.

The applicant argues that upon the death of Mary Dodds, Justine and Gretchen became part owners as they are beneficiaries of the trust and that conveyance of the property from West Coast Trust to them did not start the ten year development timeframe. The applicant will have an opportunity to discuss this in greater detail at the hearing.

CONCLUSION:

13. Staff recommends denial of the application as based on the available evidence it appears that the ten year timeline expired on June 10, 2020. Should the hearings officer grant the applicant's request and find that the Measure 49 claim is still valid; the Planning Division recommends the following conditions be applied:
 - A. The applicant shall obtain all permits required by the Marion County Building Inspection Division, including any septic permits.
 - B. Prior to issuance of a building permit, the applicant shall sign and submit a Farm/Forest Declaratory Statement to the Planning Division. This statement shall be recorded by the applicant with the Marion County Clerk after it has been reviewed and signed by the Planning Director.