



**Marion County**  
OREGON

**ADMINISTRATIVE REVIEW  
APPLICATION**

**RECEIVED**

**DEC 08 2021**

**Marion County  
Planning**

**Applications submitted by mail will not be accepted**

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

**Fee: Please check the appropriate box:**

- Administrative Review - \$640
- Primary Farm Dwelling - \$940
- Replacement Dwelling - \$375
- Lot of Record - \$1250 (staff); \$1880 (hearing)
- Secondary Farm - \$1250

- Forest Dwelling - \$1250
- Wireless Comm. Facility, Attached - \$1880
- Wireless Comm. Facility - \$2500
- Wildlife Habitat - \$310

PROPERTY OWNER(S): Joshua N. Fogarty	ADDRESS, CITY, STATE, AND ZIP: PO Box 95, Silverton, OR 97381
PROPERTY OWNER(S) (if more than one):	ADDRESS, CITY, STATE, AND ZIP
APPLICANT REPRESENTATIVE: Alan M. Sorem, Saalfeld Griggs PC	ADDRESS, CITY, STATE, ZIP PO Box 470, Salem, OR 97308
DAYTIME PHONE (if staff has questions about this application): (503) 399-1070	E-MAIL (if any): asorem@sglaw.com
ADDRESS OF SUBJECT PROPERTY: No address - tax lots 1400 and 1600 of Township 6S, Range 1W, Section 35D	SIZE OF SUBJECT PROPERTY: 13.53 acres
THE PROPERTY OWNERS OF THE SUBJECT PROPERTY REQUEST TO (summarize here; provide detailed information on the attached "Applicant Statement" page): <u>have the Planning Director conduct Administrative Review regarding the interpretation and application of</u> <u>Measure 49. Specifically, Applicant requests Marion County to conclude that the Measure 49 Order for the</u> <u>Subject Property remains valid and does not expire until May 3, 2029.</u>	
WILL A RAILROAD HIGHWAY CROSSING PROVIDE THE ONLY ACCESS TO THE SUBJECT PROPERTY? ( ) YES (X) NO IF YES, WHICH RAILROAD:	

FOR OFFICE USE ONLY:							
Township	6	Range	1w	Section	35D	Application elements submitted:	
Tax lot number(s)	1400, 1600					<input checked="" type="checkbox"/>	Title transfer instrument
Zone:	edw					<input checked="" type="checkbox"/>	Site plan
Zone map number:						<input checked="" type="checkbox"/>	Applicant statement
TPA/header						<input checked="" type="checkbox"/>	GeofHazard Peer Review (if applicable)
Case Number:	21-038					<input checked="" type="checkbox"/>	Filing fee
Urban <input checked="" type="checkbox"/> Rural						Application accepted by: BR	
Date determined complete:						Date: 12-10-21	

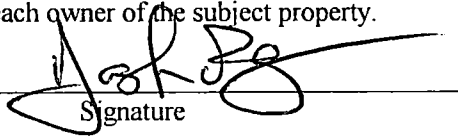
**THE APPLICANT(S) SHALL CERTIFY THAT:**

- A. If the application is granted the applicant(s) will exercise the rights granted in accordance with the terms and subject to all the conditions and limitations of the approval.
- B. I/We hereby declare under penalties of false swearing (ORS 162.075 and 162.085) that all the above information and statements and the statements in the plot plan, attachments and exhibits transmitted herewith are true; and the applicants so acknowledge that any permit issued on the basis of this application may be revoked if it is found that any such statements are false.
- C. I/We hereby grant permission for and consent to Marion County, its officers, agents, and employees coming upon the above-described property to gather information and inspect the property whenever it is reasonably necessary for the purpose of processing this application.
- D. The applicants have read the entire contents of the application, including the policies and criteria, and understand the requirements for approving or denying the application.

**PRINTED NAME AND SIGNATURE** of each owner of the subject property.

Joshua N. Fogarty

Print Name

  
Signature

Print Name

Signature

Print Name

Signature

Print Name

Signature

DATED this 12<sup>th</sup> day of December, 2021

**MEASURE 49 DEVELOPMENT RIGHTS – ADMINISTRATIVE REVIEW APPLICATION  
WRITTEN STATEMENT**

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**APPLICANT/OWNER:**

Joshua N. Fogarty  
PO Box 95  
Silverton, OR 97381

**APPLICANT'S REPRESENTATIVE:**

Alan M. Sorem  
Saalfeld Griggs PC  
PO Box 470  
Salem, Oregon 97308  
(503) 399-1070

**SUBJECT PROPERTY INFORMATION:**

The properties subject to this Administrative Review application are adjacent to Evans Valley Road NE near Silverton, Oregon. The two parcels are identified on the Marion County Tax Assessor's Map as tax lots 1400 and 1600 of Township 6S, Range 1W, Section 35D (collectively, the "**Subject Property**"), which is attached as **Exhibit 103**. The Subject Property is vacant land and is improved only with a general-purpose building. The owner of the Subject Property is Joshua N. Fogarty, and a copy of the current deed is attached as **Exhibit 104**.

Applicant has applied for various building permits on the Subject Property, further explained below, and there is an open building permit file. A site plan for this application is not needed due to the request. The building permit file has additional property information if needed for review.

DLCD issued a Measure 49 Final Order for No. E133582 benefiting the Subject Property on June 3, 2010, that granted one home site approval for the Subject Property (the "**Order**"). See **Exhibit 105**. Mary Ruhl Dodds was named as the Claimant in the Order (the "**Claimant**"). The Claimant had filed a Measure 37 claim in 2006 and the Measure 49 on May 14, 2008 (collectively, the "**Claim**"). The Claimant died on October 12, 2008.

Claimant's trust, the Norman L. Dodds and Mary Ruhl Dodds Family Trust, (herein the "**Trust**") owned the Subject Property when the Measure 49 claim was initiated. The trustee of the Trust, West Coast Trust, f.k.a. The Commercial Bank (herein the "**Trustee**"), distributed the Subject Property by Warranty Deed June 14, 2010, corrected on August 17, 2010, to the Trust beneficiaries, Gretchen L. Rhyne and Justine C. Fogarty (collectively, the "**Beneficiaries**"), daughters of the Claimant.

**FACTUAL BACKGROUND:**

The Claimant was married to Norman L. Dodds on September 4, 1942. Norman L. Dodds acquired the Subject Property on May 10, 1979.

Timeline of Relevant Events:

- The Claimant filed her Measure 37 claim on December 1, 2006 (M133582) with the state.
- Measure 37 Claim filed with Marion County on November 30, 2006 (M06-246).
- Claimant filed the Measure 49 claim on May 14, 2008.
- DLCD issued the final order on the Measure 49 claim on June 3, 2010 (E133582) (see *Exhibit 105*).
- The Trust conveyed the Subject Property to the Beneficiaries by Warranty Deed on June 14, 2010, corrected on August 17, 2010 (*Exhibit 106*).
- December 8, 2015, Gretchen L. Rhyne, Trustee of the Gretchen Lee Rhyne Revocable Living Trust, one of the Beneficiaries, conveyed the Subject Property to Justine C. Fogarty, the other beneficiary (*Exhibit 107*).
- Justine C. Fogarty, Trustee of the Justine C. Fogarty Revocable Living Trust, conveyed the Subject Property to the Applicant, her son, on May 3, 2019 (see *Exhibit 104*).

As Claimant's grandson and the son and nephew of the Beneficiaries, Applicant has been solely responsible for the maintenance of the Subject Property for approximately the last twenty years. Applicant has cut and removed brush and ivy, remove fallen trees, and cleared internal dirt roads within the Subject Property using heavy equipment. Applicant has maintained fences along the property lines of the Subject Property and established positive relationships with the neighboring property owners. Applicant has been hunting on the Subject Property since he was 14 years old.

Applicant has applied for various building permits for the Subject Property since it was conveyed to him in 2019. Applicant obtained a septic permit for new installation on July 16, 2019, and received approval after inspection on August 29, 2019. *Exhibit 108*. Applicant applied for a residential plumbing permit on October 17, 2019 and received inspection approval on December 19, 2019. *Exhibit 109*. Applicant received approval for a general-purpose building on the Subject Property on June 26, 2019. *Exhibit 110*. A boundary survey of the Subject Property and adjacent properties was completed for Applicant on August 21, 2019. *Exhibit 111*. Applicant has applied for other residential building permits to prepare for construction of a dwelling pursuant to the Order.

**SUMMARY OF REQUEST AND ISSUES PRESENTED:**

Marion County has authority to review and approve building permit requests. Applicant is seeking administrative review by the Planning Director regarding the interpretation and application of Measure 49. Specifically, Applicant requests Marion County to conclude that the Measure 49 Order remains valid and does not expire until May 3, 2029.

The question presented by this request is what legal effect, if any, did the December 17, 2010 distribution deed from West Coast Trust, f.k.a. The Commercial Bank as Trustee of the Norman L. Dodds and Mary Ruhl Dodds Family Trust to Gretchen L. Rhyne and Justine C. Fogarty, the beneficiaries of the trust have under Measure 49 (the "*Distribution Deed*"). Applicant explains that Distribution Deed from the trustee to the beneficiaries did not constitute a third-party transfer that triggered the ten-year period for the Measure 49 Order.

Applicant requests this application be directed to the Hearings Officer for review and decision. Applicant further requests the Hearings Officer decision be called up to the Board of Commissioners as provided in Marion County Code 17.110.765. This application presents issues of interpretation and application of Measure 49 that impact property owners in Marion County beyond the Applicant. The Board should

exercise its authority to review Applicant's request due to the far-reaching impacts of the decision on this application.

**APPLICABLE CRITERIA:**

Under ORS 195.300 As used in this section and ORS 195.301 and 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, and sections 2 to 9 and 17, chapter 855, Oregon Laws 2009, and sections 2 to 7, chapter 8, Oregon Laws 2010:

(18), "Owner" is defined as follows:

- "(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."

Measure 49, as adopted under Section 11, chapter 424, Oregon Laws 2007, provides:

"(7) An authorization to partition or subdivide the property, or to establish dwellings on the property, granted under section 6, 7 or 9, chapter 424, Oregon Laws 2007, 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, chapter 424, Oregon Laws 2007, 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, chapter 424, Oregon Laws 2007, within 10 years of the conveyance..."

(10) If a claimant is an individual, the entitlement to prosecute the claim under section 6, 7 or 9, chapter 424, Oregon Laws 2007, and an authorization to use the property provided by a waiver under section 6, 7 or 9, chapter 424, Oregon Laws 2007:

- (a) Is not affected by the death of the claimant if the death occurs on or after December 6, 2007; and
- (b) Passes to the person that acquires the property by devise or by operation of law.

**PROPOSED FINDING:**

When the Measure 49 claim was filed, Mary Ruhl Dodds, the Claimant, was the settlor of the Trust. When the Claimant died, under the definition of Owner, the Trustee became the Owner. The Trustee was West Coast Trust, f.k.a. The Commercial Bank. However, the Trustee is not the only holder of rights granted under Measure 49 and not the only owner under Oregon law.

The Trustee's ownership of the Subject Property is in a limited capacity as a fiduciary acting on behalf of the Beneficiaries under the Trust. The Trustee holds legal title to the Subject Property. However, the Beneficiaries under the Trust own equitable title to the Subject Property. *See Brown v. Brown*, 206 Or App 239, 249 (2006). The Beneficiaries have an equitable interest in the Subject Property that vested when

the Claimant died. The Trustee had to distribute the Subject Property after the Claimant's death under the terms of the Trust.

The Trustee could not make use of the Claim nor exercise any of Claimant's rights under the Claim because Trustee was not entitled to possession of the Subject Property. The Beneficiaries were entitled to use and enjoy the Subject Property as heirs of the Claimant and equitable owners of the Subject Property. Moreover, Measure 49 expressly granted to the *Beneficiaries* the right to prosecute and make use of the Claim. Interpreting Measure 49 to limit Beneficiaries role as an Owner is contrary to the text and intent of Measure 49. The Trustee could not possess the Subject Property, nor could it prosecute or make use of the Claim. The Trustee's interest in the Subject Property was limited title only.

The Beneficiaries owned equitable title to the Subject Property when the Measure 49 Order was issued. The deed transferring legal title from the Trustee to the Beneficiaries was not a conveyance from a person who was authorized to partition or subdivide the land to some other person who was not authorized under Measure 49. It was instead a transfer of the legal title interest in Subject Property from a corporate trustee who could not legally use the Subject Property or the Measure 49 Order to the owner of equitable title. The owners of the equitable interest, i.e., the Beneficiaries, were the only people authorized to use the property and the Measure 49 Order. The distribution deed from Trustee to Beneficiaries merely unified title in the Beneficiaries. It plainly was not a transfer to another person who was not authorized to prosecute the Measure 49 claim and use the Subject Property. This transfer to the Beneficiaries from the Trustee did not initiate the ten-year development period.

The death of a claimant of Measure 49 rights is not meant to close off the claimant's heirs from prosecuting the claim after the claimant's death. As stated in Section 10, when the claimant is an individual and the claimant dies, the rights of the Measure 49 claim pass on to their heirs. Applying the ten-year time limit to a conveyance from a Trustee to beneficiaries of the trust is not consistent with the purpose and intent of Measure 49. Similarly, in ORS 195.300(18), the owner of the equitable interest under a land sale contract is the "owner" of the Property.

Statutory interpretation in Oregon operates under the framework spelled out in *State v. Gaines*, 346 Or. 160, 171-73 (2009). Statutory interpretation requires examining the text of the statute in context and relevant legislative history and canons of statutory construction. Interpreting the text of Section 7 requires consideration of the context of Section 10.

To give effect to Section 7 and Section 10 in concert, a beneficiary of a trust and an heir of a deceased individual should be in the same position regarding Measure 49 claims. Section 10 demonstrates the intent of Measure 49 that the rights under Measure 49 granted to property owners be inherited.

Similarly, the conveyance between the Beneficiaries did not initiate the ten-year development period. The Beneficiaries had equitable ownership rights in the Subject Property at the time the Order was issued, as explained above. The conveyance that initiated the ten-year development period was when Justine Fogarty conveyed the Subject Property to the Applicant because neither of the Beneficiaries held an interest in the Subject Property. The prior Marion County Planning Director has previously decided a matter consistent with this reasoning in Administrative Review Case No. 20-023, dated September 16, 2020.

**CONCLUSION:**

The Applicant requests the Planning Director decide the proposal consistent with this written statement. Please contact Applicant's representative if there are any questions concerning this application.