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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.