



## MARION COUNTY BOARD OF COMMISSIONERS

**Board Session Agenda Review Form**

Meeting date: October 5, 2022

Department: Public Works

Agenda Planning Date: Sept. 22, 2022

Time required: None

☐ Audio/Visual aids None

Contact: Lindsey King

Phone: 503-566-4162

Department Head Signature:

**TITLE**

Schedule final consideration to adopt an administrative order granting Administrative Review (AR) Case 21-038/Joshua Fogarty.

**Issue, Description & Background**

The Marion County Hearings Officer held a duly noticed public hearing and on May 13, 2022, and issued a decision of denial. The board held a duly noticed public hearing on the appeal of that decision on June 29, 2022, considered all the evidence in the record, and approved the request.

The order and findings have been prepared and the matter needs to be scheduled for final consideration and adoption.

**Financial Impacts:**

None

**Impacts to Department & External Agencies**

None

**Options for Consideration:**

1. Schedule adoption of the order at the next Board Session, October 12, 2022.
2. Direct staff to prepare a modified order
3. Choose not to proceed with adopting an order at this time.

**Recommendation:**

Staff recommends the board schedule final consideration and adoption of the attached order at the next regular session on October 12, 2022.

**List of attachments:**

Order &amp; Exhibit A

**Presenter:**

Austin Barnes

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

Lindsey King - lking@co.marion.or.us  
Brandon Reich - Breich@co.marion.or.us

**BEFORE THE BOARD OF COMMISSIONERS  
FOR MARION COUNTY, OREGON**

In the Matter of the	)	Case No. 21-038
Application of:	)	
Joshua Fogarty	)	Administrative Review

**ORDER \_\_\_\_\_**

This matter came before the Marion County Board of Commissioners for a public hearing at its regularly scheduled public meeting held on June 29, 2022, to consider an appeal of a hearings officer denial of an application of Joshua Fogarty, for an administrative review, located at the 14300 block of Evans Valley Rd NE, Silverton.

The Board, after having considered the hearings officer's decision, the Clerk's file, and the testimony and evidence contained in the record and provided at the hearing, makes the following order.

IT IS HEREBY ORDERED that the Board adopts the findings contained in Exhibit A, attached, and approves an application for an administrative review to determine that a Measure 49 Order remains valid.

DATED at Salem, Oregon this \_\_\_\_\_ day of \_\_\_\_\_ 2022.

MARION COUNTY BOARD OF COMMISSIONERS

\_\_\_\_\_  
Chair

\_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Commissioner

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

## I. Statement of Case and General Findings of Fact and Conclusions of Law

The Marion County Board of Commissioners, after careful consideration of all testimony and evidence in the record, make the following findings of fact and conclusions of law in Case No. AR 21-038.

1. The subject 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, comprised of two tax lots identified on the Marion County Tax Assessor's Map as tax lots 1400 and 1600 of Township 6S, Range 1W, Section 35D (the "**Subject Property**"). The Subject Property is considered one legal unit of land. The Subject Property is generally sloped downward in a southwest direction. The Subject Property is zoned Exclusive Farm Use (EFU). The Subject Property is owned by Joshua N. Fogarty ("**Applicant**").
2. Abutting properties to the west, south, and east of the Subject Property are zoned EFU. Properties to the north of the Subject Property across Evans Valley Road are zoned Urban Transition, 5-acre minimum. Properties further north and south from the Subject Property are zoned UT and are within 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 on December 1, 2006. Mary Ruhl Dodds was the "Claimant." At the time she filed the claim, she was the settlor of the Norman L. Dodds and Mary Ruhl Dodds Family Trust, and as such, was an owner of the Subject Property. West Coast Trust, a division of West Coast Bank, formerly known as the Commercial Bank, was the Trustee of the Norman L. Dodds and Mary Ruhl Dodds Family Trust. Measure 49 allowed Measure 37 claimants to elect supplemental review. The Claimant filed the Measure 49 claim, State Election Number E133582, which was approved by a Final Order and Home Site Authorization dated June 3, 2010 (the "**Final Order**"). The Final Order indicated Mary Ruhl Dodds was the claimant. Final Order, Page 2.
4. On or about October 12, 2008, Mary Ruhl Dodds passed away. When Mary Ruhl Dodds died, the trust became irrevocable. Ownership of the property was transferred in part to the Trustee, West Coast Trust, formerly known as the Commercial Bank, and to the beneficiaries Gretchen Lee Rhyne and Justine C. Fogarty.
5. The Final Order 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.
6. 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 August 17, 2010 (Reel 3207, Page 428).
7. On September 1, 2015, Gretchen L. Rhyne transferred her 50% ownership into the Gretchen Lee Rhyne Revocable Living Trust (Reel 3738, Page 142).



8. 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.
9. On May 22, 2018, Justine C. Fogarty transferred her 100% ownership in the Subject Property to 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).
10. On May 3, 2019, the Justine C. Fogarty Revocable Living Trust conveyed its 100% ownership of the Subject Property to Joshua N. Fogarty (Reel 4193, Page 208), who is the current property owner and Applicant.
11. On or about July 16, 2019, Applicant Joshua Fogarty obtained a septic permit for a single-family dwelling at the Subject Property. *See Exhibit 108 to Applicant's original written statement.*
12. On or about October 17, 2019, Applicant Joshua Fogarty received a building permit for residential plumbing at the Subject Property. *See Exhibit 109 to Applicant's original written statement.*
13. On or about June 26, 2019, Applicant Joshua Fogarty received approval of an application for an agricultural building at the Subject Property. *See Exhibit 110 to Applicant's original written statement.*
14. 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.

## II. Summary of Comments and Responses

The Marion County Planning Division requested comments on the application from various governmental agencies. Summaries from the agencies and others are stated below with a response to comments in opposition:

1. Marion County Building Inspection commented: "There are no building inspection issues noted."
2. 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.
3. Friends of Marion County (FOMC) commented that the application should be denied. A summary of the issues raised by Friends of Marion County is below in italics with a brief response.

*a. The Applicant should have been aware of the 10-year deadline imposed by Measure 49.*

The correction deed dated August 17, 2010 (Reel 3207, Page 428) indicated the uncertainty regarding the interpretation of Measure 49. The Board heard testimony from Justine C. Fogarty that she had followed up with staff from DLCD following the issuance of the Measure 49 order, and she believed from those actions that the death of Mary Ruhl Dodds did not affect her right to enforce and use the Measure 49 order. She testified that she did not believe the ten year obligation to use Measure 49 rights was implemented until she conveyed the property to a



successor owner. Based on the text of Measure 49 that provides beneficiaries inherit the right to both prosecute and use Measure 49 orders by operation of law, the Board finds that such a belief was reasonable and in good faith.

- b. *FOMC also allege that a commercial business (concrete contractor) is being operated out of a building that was approved as an agricultural exempt structure. Friends of Marion County submitted comments supporting denial based on an alleged violation of the agricultural building permit.*

This application 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 Board has subject matter jurisdiction of the application. On February 9, 2022, the Marion County Sheriff's Office issued a letter that an inspection of the Subject Property was conducted and the allegations from Friends of Marion County were found unsubstantiated.

- c. *FOMC assert that when a trust becomes irrevocable at the time of the claimant's death, the 10-year development clock is triggered.*

This assertion misinterprets Measure 49.

Gretchen L. Rhyne and Justine C. Fogarty inherited both the right to prosecute the Measure 49 claim and use the Measure 49 order by operation of law. As the sole beneficiaries of Mary Ruhl Dodds, they owned the vested equitable interest of the Subject Property. The plain text of Measure 49 does not provide the ten-year development clock starts when a claimant dies, and the trust becomes irrevocable. The specific text regarding the effect of death of a claimant is that "Is not affected by the death of the claimant if the death occurs on or after December 6, 2007" and the person that acquires the property by devise or operation of law acquires the right to prosecute the claim and use the authorization. Subsection 10, Section 11, chapter 424, Oregon Laws 2007. Any comment that the death of Mary Ruhl Dodds or the conveyance of title to the equitable owners and holders of the Measure 49 order rights, Gretchen L. Rhyne and Justine C. Fogarty, is inconsistent with the text, context and purpose of Measure 49. This comment incorrectly reads the text of Measure 49.

- d. *FOMC commented the beneficiaries have no power with respect to managing the trust assets except to replace the trustee. Additionally, they argue the trustee must protect the assets so beneficiaries may receive full value when they inherit.*

Under ORS 130.730 "...the interests of a beneficiary under a revocable or irrevocable trust vest when the trust becomes irrevocable..." When the Claimant passed away, the interests of the beneficiaries vested. While it is correct to say that while the trust was revocable and the settlor was alive, the beneficiaries had a limited interest in the trust property, when the interest of the beneficiaries vested, they had a real property interest in the Subject Property.

- e. *Lastly, FOMC argued the development history of the Subject Property supports denial of the homesite approval. Applicant filed for various building permits in 2019 and since there were no restrictions on operations of the Planning Division due to COVID-19, Applicant was not prevented from submitting permit applications and getting approval.*

As an alternative basis for approval, the Board determines that Applicant “established” the dwelling prior to the expiration of the ten-year development clock. The dwelling was established based on Applicant’s various building permits, inspections, costs towards infrastructure for a dwelling, and construction and approval of the agricultural building obtained based on the establishment of the dwelling in good faith. Applicant budgeted approximately \$600,000 to construct the dwelling, outbuilding and related public and private infrastructure. Applicant spent approximately one-half of the expected expenditures related to the construction of the intended dwelling and related improvements prior to notice to cease and desist. All such expenses were made in furtherance of using the property as a single family dwelling. Applicant was delayed in construction because of COVID and acted according to a good faith belief that there was no deadline on completing construction until 2025, which was 10 years after he acquired title from Justine Fogarty, who had inherited the right to prosecute and use the Measure 49 right by operation of law.

4. Department of Land Conservation and Development (DLCD) opposed the application. A summary of the issues raised by DLCD is below in italics with a brief response.

- a. 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. 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.*

This interpretation is contrary to the text and context of Measure 49. As explained further below, authorization to use the property is not affected by a claimant’s death after December 6, 2007 and passes to those who acquire the subject property by operation of law.

- b. DLCD claims Section 11(9) of Measure 49 does not exempt individuals from the ten-year clock and is only meant to apply when prosecuting the claim.*

This is contrary to the text of Measure 49 which clearly provides the entitlement to prosecute the claim *and authorization to use the property* is not affected by a claimant’s death after December 6, 2007 and passes to those who acquire the subject property by operation of law.

- c. DLCD argues Section 11(6) of Measure 49 requires that if a claimant dies prior to the issuance of a Measure 49 Order, the order terminates 10 years following the issuance of Measure 49 Order.*

DLCD’s argument is inconsistent with the plain text of Measure 49 Section 11, subsections (6) and (9). Section 11(9) of Measure 49 provides the death of a claimant does not affect the right to either prosecute the claim or use the Measure 49 authorization. Section 11(6) of Measure 49 does not apply to the death of a claimant. DLCD’s interpretation inserts text that is not included in the law and is directly inconsistent with Section 11(9) of Measure 49. The Measure 49 Order acknowledged that Mary Ruhl Dodds had passed away prior to issuance of the order. It did not state it terminated within 10 years of issuance. Rather, it acknowledges the rights of survival under Section 11(9) of Measure 49 passing to the “person who acquires the claim property by devise or by operation of law.” Note 1, Final Order. Gretchen L. Rhyne and Justine C. Fogarty were the claimants who received the home site authorization – not a “subsequent owner”;



therefore, the ten (10) year period did not apply to any conveyance of title to Gretchen L. Rhyne and Justine C. Fogarty.

5. Aileen Kaye opposed the application. A summary of the issues raised by Aileen Kaye is below in italics with a brief response.

- a. The Application should be denied because the Applicant did not meet the deadline that is established by law.*

The Claimant in the Final Order passed away before it became final. Under the text of Measure 49, the entitlement to prosecute the claim and authorization to use the property is not affected by a claimant's death after December 6, 2007 and passes to those who acquire the subject property by operation of law. Since the Subject Property passed by operation of law to the beneficiaries when the Claimant passed away, the ten-year development clock has not yet lapsed.

6. Patrick Fogarty supported the application. He commented that he is the father of the Applicant, and the son-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 a 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.

7. Pat and Mary Fogarty supported the application and 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.

8. Chuck Sheketoff and Naseem Rakha supported the application and commented they are neighbors to the Subject Property. The approval of various building permits by the county inferred approval of the dwelling. The trustee did not become the owner of the Subject Property when the trustor died. The trust became administrative, and the trustee's responsibilities were ministerial fiduciary duties to sign off on bills and distribute the property held by the trust to the beneficiaries. This transfer was no different than if the Probate Court and personal representative re-titled the Subject Property to the trustor's daughters.

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

### III. Additional Findings 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 in the evidence for every criterion there's a hair or breath in applicant's favor, the burden of proof is met, and the application shall be approved.

3. Under MCC 17.115.110: “[w]hen 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 submittal of an application as provided in MCC 17.119.020 and 17.119.025.”

4. Under MCC 17.115.110(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 had the authority to make a decision on this application.

5. Under MCC 17.115.110(G), “MCC 17.122.070 through 17.122.130 shall apply to any appeals from the decision of the hearings officer.”

6. MCC 17.122.120. The Board has jurisdiction to hear the appeal. The Board provided adequate notice of the hearing. No party objected to the Board’s hearing of this appeal, notice, or jurisdiction.

7. The State of Oregon granted a waiver under Measure 49 from state land use regulations, subject to the terms contained in the Final Order. 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).

Section IV (Home Site Authorization) provides:

“Based on the analysis set forth above, this claim is approved, and the claimant qualifies for one home site approval. As explained in section III above, after taking into account the number of existing lots, parcels or dwellings the claimant is authorized for one dwelling on the property on which the claimants are eligible for Measure 49 relief subject to the following terms\*\*\*”

Said terms included in the Final Order that pertain to the Claimant’s home site, restated in italics, are discussed in turn below:

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

*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 dwelling on the Subject Property that was approved under Measure 49 Election Claim Number E133582. This criterion is met.

*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.

*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 Final Order, 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 comprising the Subject Property. 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.

*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.

*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.

*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 approvals 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.

*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.

*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.

*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.



As a condition of approval, the Applicant shall 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 prior to the County issuing a building permit.

This criterion is met through a condition of approval.

*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.*

Neither the original claimant Mary Ruhl Dodds nor her successor claimants by operation of law, Gretchen L. Rhyne and Justine C. Fogarty, have other Measure 37/49 claim properties. This criterion is met.

*If the claimant transferred ownership interest in the Measure 37 claim properly 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, as provided in the Final Order. Mary Ruhl Dodds passed away on October 12, 2008. The footnote in the Final Order 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 title to the Subject Property. Upon her passing, legal title to Subject 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, while equitable title to the Subject Property and the right to prosecute and use the Measure 49 rights transferred by operation of law to Gretchen L. Rhyne and Justine C. Fogarty.

West Coast Trust transferred legal title to the Subject 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 September 1, 2015, Gretchen L. Rhyne transferred her 50% ownership into the Gretchen Lee Rhyne Revocable Living Trust (Reel 3738, 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 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.

On May 22, 2018, Justine C. Fogarty transferred her 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 (Reel 4082, Page 123).

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

The issue is whether the death of Mary Ruhl Dodds and subsequent transfer of the Subject Property to her beneficiaries started the ten-year development restriction term included in the Final Order (Section IV, Paragraph 12).

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.”

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).”

Mary Ruhl Dodds was the Claimant as indicated in the Final Order. She passed away on or about October 12, 2008. Mary Ruhl Dodds was an individual. Accordingly, the above section regarding death of a claimant applies to this case. The entitlement to prosecute the claim and the authorization to use the property is then not affected by Mary Ruhl Dodd's death and passes to the person acquiring the property by operation of law, Gretchen L. Rhyne and Justine C. Fogarty.

DLCD and others argued the deed conveying legal title the Subject 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 Final Order (Section IV, Paragraph 12). This conclusion is not supported by the text of Measure 49.

Upon the death of Mary Ruhl Dodds, Gretchen L. Rhyne and Justine C. Fogarty obtained the right to prosecute the Measure 49 orders and use those orders by operation of law as explained above. Additionally, the beneficiaries had a vested ownership interest under ORS 130.010(2). As such, the conveyance to the beneficiaries was not a conveyance from “the owner who obtained the authorization” to “the subsequent owner”. Or. Laws 2007, ch. 424, § 11(6). The beneficiaries, Gretchen L. Rhyne and Justine C. Fogarty, were both the party who obtained the authorization and the equitable owner. Applying the ten (10) year limitation on Gretchen L. Rhyne and Justine C. Fogarty is inconsistent with the plain text of Measure 49.

*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.*

As a condition of approval, the Applicant shall obtain all required permits. This criterion is met through a condition of approval.

#### IV. Alternative Findings of Fact and Conclusions of Law for Establishment of the Dwelling

The following findings are provided in alternative to the findings above, in the event we assume the ten-year development period under Measure 49 was initiated by the conveyance from the trustee to Gretchen L. Rhyne and Justine C. Fogarty on June 14, 2010.

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” (emphasis added).

As an alternative basis for approval, the Board determines that Applicant “established” the dwelling prior to the expiration of the ten-year development clock. The dwelling was established based on Applicant’s various building permits, inspections, costs towards infrastructure for a dwelling, and construction and approval of the agricultural building obtained based on the establishment of the dwelling in good faith. Applicant applied for a septic permit and received a certificate of satisfactory completion in 2019 for the proposed dwelling. Applicant received approval for a residential building



permit driveway access in 2019. Applicant applied for and got an inspection for residential plumbing in 2019. Applicant also got a public works right-of-way permit for utilities in 2019. All of these efforts occurred before the expiration of the ten-year development period. Applicant budgeted approximately \$600,000 to construct the dwelling, garage and related public and private improvements. Applicant spent approximately one-half of the expected expenditures related to the construction of the intended dwelling and related improvements prior to notice to cease and desist constructing the garage, driveway, septic, power conduit, gas line improvements, well and water treatment. All such expenses were made in furtherance of using the property as a single family dwelling. Applicant was delayed in construction because of COVID and acted according to a good faith belief that there was no deadline on completing construction until 2025, which was 10 years after he acquired title from Justine Fogarty, who had inherited the right to prosecute and use the Measure 49 right by operation of law. Applicant's efforts and expenses support that he established the dwelling before the ten-year development period expired.