

February 16, 2022

VIA EMAIL AND U.S. MAIL

Portland City Council
1221 SW 4th Avenue, Room 130
Portland, OR 97204

Re: **E Zone Map Correction Project**

Dear Mayor and City Council:

We appreciate the opportunity to submit this testimony for the February 16, 2022 City Council public hearing on the E Zone Map Correction Project. This letter is submitted on behalf of numerous property owners in the R20 residential zones. Please place this letter in the land use record, and provide me with written notice of the City Council's final decision.

Our clients are careful stewards of their residential properties, and have always protected the sensitive riparian areas thereon. However, the proposed maps expand the environmental zones far beyond those areas. We ask that the City Council remove the current and expanded environmental zones from each of these properties, because the proposed ordinance includes several legal flaws. The ordinance conflicts with state laws and rules for the protection of natural resources, state and local laws for the protection of housing, and constitutional provisions. Following review of the client properties, each of these concerns is described below.

The property at 4640 SW Ormandy Way is owned by Marisa and Kevin Ebner. The current E Zone maps only cover part of the back yard. The proposed maps cover all of the back yard, all of both side yards, about half of the house, most of the front yard, and most of the driveway and garage. The city should not be adopting such obviously inaccurate maps, and should not put the burden on the property owners to fix the city's mistakes. This new overlay would create unreasonable costs for a residential property because removal of five dead cedar trees is urgently needed, and with the new proposed plan, removal would cost \$9,000 in permit fees alone.

The property at 4710 SW Hewett Blvd (tax lots 1900 and 2000) is owned by Scott and Margaret Terrall and is 1.6 acres. The current E Zone covers only the area west of the house, but the proposed E Zones would cover about a third of the house, and everything in the south, east and northeast yards. Much of this area is non-native landscaping, which should not be classified as a protected natural resource. The proposed maps, in themselves and cumulatively with existing PCC 33.430 regulations, impose unreasonable costs and delays and thereby discourages the development of housing.

The property at 4715 SW Hewett Blvd is owned by Susan and Rob Torch. The current E Zone covers only the northwest corner of the property, but the proposed E Zones would cover about 90 percent of the property, even part of the house, and most of the driveway. The trees and landscaping are almost all non-native, and this type of landscaping should not be classified as a protected natural resource. The property has enough area for approximately 6 lots. With the proposed maps, it might be possible to have one more lot, but it will cost tens of thousands of dollars just to determine if that one extra lot might be possible. For example, after one consultant marks the apparent resource zone boundaries on the site, the surveyor's bid just to map the E Zone boundaries is \$8000. Other survey costs are \$7000 for the tree survey, \$17,000 for the topographic map, \$3000 for the existing conditions map, and \$1500 for a map and legal description of the required environmental tract. That is a total of \$36,500 in survey expenses alone, just to get the project started, even if the project is limited to one accessory dwelling. These costs are unreasonable and discourage housing.

The property at 4855 SW Hewett Blvd is owned by Mike Axley and Kim Malek. The current E Zone covers only the southeast edge of the property, but the proposed E Zones would cover more than half of the property. Instead of being able to develop four more lots, perhaps one more is possible; however, the city fees and consultant fees will consume most if not all of the value of the lot. This is an unreasonable cost to impose on housing development, and a major downzone of the property with a consequent large financial loss to their family.

The property at 4700 SW Humphrey Blvd is owned by 4700 SW Humphrey, LLC. The current Conservation Zone covers only the southwest corner of the property. It is being converted to the Protection Zone, and then new Conservation Zone areas are added on both sides. This represents a new restriction on the residential use of the property by reducing the number of residential lots, and unreasonably increases the cost of developing housing on them, which together substantially reduce the property value.

The adjacent properties at 1215 SW Hessler Drive and 4545 SW Northwood Ave (tax lots 1300, 1400, 701, and 702) are owned by the Jordan D. Schnitzer Living Trust and Mr. Schnitzer. Following a recent site visit with the owner's consultant, the city staff informally agreed that the proposed E Zone maps are not accurate, because they would expand the zones where no significant natural resources are present. This demonstrates that without site visits to each property to inventory the purported natural resources that are being rezoned, there is no way for any party to know whether the maps are accurate, and is substantial evidence that the maps are not accurate. The City cannot place the burden on property owners to hire consultants and corral city staff simply to determine where the E Zone boundaries are in the field, and then compel property owners to hire a surveyor to create accurate those boundaries together with the property boundaries. This is an unreasonable cost that discourages housing.

With that summary of our clients and their properties, we now turn to the legal reasons the City is prohibited from adopting the proposed E Zone Map Correction ordinance.

Statewide Goal 5 and its Implementing rule OAR 660-023

To designate natural resources for protection under Goal 5, the City must first create an inventory of the natural resources as described in OAR 660-023-0010(4) and 660-023-0030(2). The inventory

prepared to date is inadequate because the City has not even visited most of the properties under consideration. Rather, it relied on aerial surveillance, and erroneously mapped many non-native types of vegetation as natural resources, including blackberry patches. Therefore, the information regarding our clients' properties is not sufficient to determine whether a resource exists on a particular site, in violation of OAR 660-023-0030(3)(a).

The Protection Zone is applied along stream corridors; however, the inventory is not based on any field survey of the actual location of streams; it is only based on assumptions about where a stream could be. Therefore, the proposed ordinance lacks an adequate factual base and is not supported by substantial evidence. Instead, the City intends to adopt the general map, and then shift the burden to the property owner to survey and map the location of the protected resources. See PCC 33.430.130 and 33.430.240.

The staff reports note that in response to site visits, the staff has in some cases reduced the area of the proposed environmental zones. This proves the point that the maps are subjective and inaccurate, and thus not clear and objective within the meaning of ORS 197.307(4). If the zone boundaries were accurate, no special site visits or map editing would be required, and applicants would not be compelled to survey the natural resources themselves.

The completed Goal 5 inventory must then be evaluated through the ESEE process. OAR 660-023-0040. The proposed ESEE analysis is inadequate because it fails to account for the economic, social and energy costs of the expanded environmental zones. The analysis to date does not evaluate how the potential conflicting residential uses would interact with the purported natural resources, in part because many of the proposed environmental zones cover non-native species, invasive species, and nuisance plants. For example, the City has not adequately delineated the impact area; that is, where the housing may impact natural resources. It merely assumes that all existing and proposed environmental zone areas include natural resources. Where no actual resources are present, those areas must be excluded from the ESEE analysis. See OAR 660-023-0040(3). Again, the fact that the maps are constantly changing in response to actual site visits by city staff demonstrates the subjectivity and inaccuracies of the proposed maps.

Second, the ESEE social analysis completely ignores the social effects of eliminating the ability to develop housing in the current and expanded environmental zones. The housing shortage has profound social consequences which are apparently not of concern in this program. Similarly, the energy analysis ignores the energy effect of locating the lost housing units in the suburbs or exurbs instead of in the City. It only refers to maintaining employment in close proximity to housing, as if commute trips were the only thing that affected energy consumption. If Portland is serious about containing sprawl, it must address the social and energy consequences of forcing new housing out to the suburbs and exurbs.

Third, the ESEE document is inconsistent with the proposed maps that expand the environmental zones. For example, the ESEE General Recommendation is to limit conflicting uses only within areas of significant forest. However, the definition of significant forest is apparently any tree canopy, even when the canopy consists of non-native and invasive species, including blackberry patches. In other words, the mapping far exceeds the text. The text indicates that conflicting uses are only limited in some areas, but when you ask the Bureau of Development Services for a permit for those limited uses,

the answer under the code is usually a firm no. The ESEE text conflicts with PCC 33.430.017, the purpose statement of the Environmental Conservation Zone, which “conserves important resources and functional values in areas where the resources and functional values can be protected while allowing environmentally sensitive urban development.” In other words, the city subjectively determines whether each application is sufficiently environmentally sensitive, including all applications for housing development. See PCC 33.430.070.A; 33.430.120.A and B. Even a 10 square foot addition to an existing house to add a bay window is not exempt under PCC 33.430.080.C.4 and 33.430.140.D.2.b. which also impose unreasonable costs and delay because they require consultants to prepare detailed plans for city review, and require applicants to provide expensive mitigation. See PCC 33.430.140.I and J, and Table 430-2. Relandscaping with native plants and paying a revegetation fee are unreasonable costs for the development of housing in the City, and conflict with the ESEE General Recommendation.

The City Council must recognize the effective prohibitions on development in environmental zones that exist in the real world, and not be persuaded by the reassuring platitudes in the draft ESEE recommendation.

The proposed 376-acre expansion is primarily in the residential zones. Assuming an average of four lots per acre, that is a loss of 1504 housing units, even before accessory dwelling units, duplexes, triplexes and quads are considered. While the City’s official housing crisis continues year after year, the City cannot eliminate these housing opportunities. The economic effect of that reduced supply of residential land has not been calculated by a housing economist. Nor have the social effects been considered, including the equity and racial justice aspects of eliminating the potential for new housing in areas that are predominantly occupied by people of color, when no similar aggressive natural resource programs are implemented in neighborhoods of color. The energy consequences are straightforward. Every dwelling that cannot be constructed in Portland is one that will be constructed in an outlying suburb or exurb that is more auto-dependent, with a resultant increase in energy consumption. There is no substantial evidence in the record that these consequences have been fully considered, or mitigated.

Finally, the City Council should bear in mind that there is no obligation to expand the environmental zones to protect the resources under Goal 5. OAR 660-023-0040(5) expressly authorizes the City to “to allow some or all conflicting uses for a particular site.” The City Council should not be misled by the argument that these resources must be protected under Goal 5. Housing capacity is what must be protected, and is protected, by state law.

State Laws Protecting Housing

BPS urges the City Council to adopt a local ordinance to expand the environmental zones on numerous properties that are zoned for residential use. The ordinance would effectively downzone those properties and effectively eliminate, by BPS’s own estimate, many hundreds of houses. We question whether this estimate accounts for the ability to develop up to four dwelling units on each single family lot under (2019) House Bills 2001 and 2003. The inaccurate estimate of lost housing capacity means the ordinance lacks an adequate factual base.

The state has adopted three primary statutes to protect future housing development, which supersede Goal 5, OAR 660-023, PCC 33.430, and related Title 33 provisions. We urge the City Council to avoid violating these laws, described below, which will create legal liability and adverse consequences to the City budget.

State Claims for Compensation ORS 197.300 et seq

The legislature acted to preserve housing potential. It found that “in some situations, land use regulations unfairly burden particular property owners” and that “to address these situations, it is necessary to amend Oregon’s land use statutes to provide just compensation for unfair burdens caused by land use regulations.” ORS 195.301(1). In sum, by statutory definition, the legislature has confirmed that downzoning of residential land creates an unfair burden, which proves that the proposed downzoning through expansion of the environmental zones imposes an unreasonable cost and delay on affected properties. ORS 197.307(4)(b).

The law requires the City to pay compensation for downzoning of residential property when the City enacts land use regulations that restrict the residential use of private real property that reduce the fair market value of the property. ORS 195.305(1). The expansion of the environmental zones on our clients’ properties restricts residential use of the properties. See, for example, PCC 33.430.060 and 33.430.160. The staff report admits the loss of many hundreds of potential dwelling units, which confirms that the proposed maps downzone the residential properties in Southwest Portland.

We recognize there is a procedure for the City to waive the regulations instead of paying cash for the just compensation. ORS 195.310(5)(b). But before obtaining a waiver of the regulations, a property owner first must follow the elaborate claim procedures in ORS 195.312, which require two property appraisals. Of course there are many other state and local procedural requirements. ORS 195.310(2)(a). The claim costs are assumed to run at least up to \$5000. ORS 195.310(2). The City’s claim instruction document alone is five and half-pages, and the processing costs discourage housing and are an unreasonable cost and delay for the development of housing, in themselves and cumulatively with other City environmental zone regulations, in violation of ORS 197.307(4)(b).

The proposed ordinance does not include any funding for the payment of compensation claims. The City Council should refrain from downzoning these residential properties and compelling itself to either pay claims or waive the regulations through a cumbersome process; rather, it should refrain from adopting the regulations in the first instance.

The Needed Housing Statute ORS 197.303 et seq.

The legislature has also determined that “a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing” and that those regulations “may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.” ORS 197.307(4) and (4)(b). The proposed ordinance is not a clear and objective standard or procedure. The expanded environmental zone maps will, by themselves and cumulatively with the regulations of PCC 33.430 and other Title 33 provisions, discourage needed housing through unreasonable costs and delay.

The potential housing in the single family R20 zone qualifies as needed housing under ORS 197.303(1) because it is on land zoned for residential use and meets “the need shown for housing within an urban growth boundary.” Portland’s Housing Needs Analysis evaluated the need for eight different household types in West Portland, concluding there is a need for housing for many types of households, including for “movers and shakers”, “successful middle aged” and “fast track families”. It also concluded this need, including the need for households with both lower and higher incomes “is projected to continue into the future.” See Housing Demand and Supply Projections Background Report, page 34. The housing that will be lost if the proposed ordinance is adopted is statutory “needed housing”.

The proposed ordinance would adopt new environmental zone maps under criteria that are not clear and objective, because the criteria for adoption of an environmental overlay zone are subjective and value-laden. “The Environmental Protection overlay zone is applied wherever the City determines that highly significant resources and functional values are present.” “The Environmental Conservation overlay zone is applied wherever the City determines that significant resources and functional values are present.” PCC 33.430.040.A and B. There are no standards, much less clear and objective standards, for determining when resources and functional values are present. Nor are there clear and objective standards for determining whether those resources and functional values are significant, or highly significant. Therefore, the City is prohibited from adopting the new maps by state law. ORS 197.307(4).

In addition, the proposed overlay maps discourage needed housing through unreasonable costs and delay. PCC 33.430.130, Permit Application Requirements, expressly admits that “A building permit or development permit application that is reviewed for compliance with the standards of this chapter requires more information than a permit not affected by these provisions.” That additional information must be prepared by expert consultants, including arborists, biologists and surveyors, which present, in themselves and cumulatively with other existing regulations, unreasonable costs and delays from development of housing on every site that includes any environmental zone, even when no development is proposed in an environmental zone. ORS 197.307(4)(b).

More specifically, the City effectively requires each applicant to hire a team of professionals to map the environmental zone boundary, the location of trees over 6” diameter, the location of streams, and the top of bank thereof. This effectively requires every applicant for development in a residential zone on a site that includes any environmental zone to hire a professional team, including arborists, biologists, and surveyors to determine the location of the natural resource, at great expense, even when the applicant does not intend to develop within or near the environmental protection zones. For sites with a stream, the applicant must also survey the top of the bank consistent with an elaborate and expensive procedure that must be performed by a professional surveyor. See PCC 33.430.130.A.3 and 33.930.150. Again, on the Torch property, the surveyor’s fees alone are \$36,500, even if the only proposed development is a small accessory dwelling.

Moreover, when the City, in its sole, subjective discretion, “finds that outside expertise is needed due to exceptional circumstances” it compels the applicant to pay the cost for the City to hire its own preferred expert(s) to provide a “special evaluation”. PCC 33.430.270. This creates additional unreasonable cost and delay in violation of ORS 197.307(4)(b).

Some of our clients' properties are mostly or entirely covered by the proposed environmental zones, and thus any new housing development, including expansion of existing houses and outbuildings, must follow the even more elaborate procedures of a formal environmental review. See PCC 33.430.220 *et seq.* The natural resource and survey professionals must then coordinate with an applicant's conventional consultants, such as the architect, landscape architect, civil engineer, and general contractor. See PCC 33.430.240.A.2-4. The costs run into the many tens of thousands of dollars, as demonstrated by the attached estimate for the Torch property at 4715 SW Hewitt. The proposed environmental zone expansions, in themselves and cumulatively with of the PCC 33.430 regulations cited in this letter, create unreasonable costs and unreasonable delays for the development of housing. ORS 197.370(4)(b).

The City Council should be aware that state law also provides for the payment of an applicant's attorney fees in the event of a successful appeal to LUBA on this issue, and that LUBA has not hesitated to order payment of those fees. ORS 197.835(10)(b).

To summarize, the needed housing statute prohibits the adoption of housing regulations that are not clear and objective. The City's criteria for application of the environmental zones are astonishingly brief and totally subjective. Wherever the City decides significant resources are present, it adopts and applies the overlay zones. The proposed, inaccurate environmental zone maps, in themselves and cumulatively with existing maps and regulations are also extraordinarily expensive and time consuming for property owners to survey, and unreasonably increase the cost of housing, and delay its development.

Constitutional Issues

The proposed ordinance expands the environmental zones on our clients' properties, often dramatically. In so doing, it prevents those properties from being developed for housing consistent with the R10 and R20 zoning, because adoption of the expanded map effectively adopts PCC 33.430 for these properties as well. The proposed ordinance thereby imposes several requirements that take portions of our clients' properties in a manner that exceeds the City's legal authority under the 5th amendment to the US Constitution. There are several constitutional defects.

First, for those projects on properties where all development activity is located outside an environmental zone, the City takes the rights to use the property within the zones, and mandates that those areas be separated into a conservation tract, where future development is prohibited. See PCC 33.430.160.C and E; and 33.430.250.A.4. This violates the nexus requirement articulated in *Nollan v. California Coastal Commission*, 83 U.S. 825 (1987) because there is no direct connection between the development of housing outside the environmental zones and the City's desire to protect natural resources on a different portion of the subject property. That is, development outside the environmental zones does not impede the City's interest in protecting natural resources. *Nollan*, 483 US at 835-36.

Second, the complex technical requirements and the requirement to convey property interests violate the rough proportionality standard of *Dolan v. City of Tigard*, 512 US 374 (1994), as recently articulated by the Oregon Court of Appeals in *Hill v. City of Portland*, 293 Or App 283, 428 P3d 986 (2018). The City lost that case when Court of Appeals confirmed that Title 33 cannot obviate the City's obligation to

provide the nexus and rough proportionality analyses. 293 Or App at 289-91. Before adopting these maps, the City must demonstrate how development on each of these properties with expanded environmental zones, including development that is entirely outside the environmental zone boundaries, will so impede the City's interest in protecting natural resources that the City has a valid basis to deny the application, and then demonstrate the costs of compliance are roughly proportional to the natural resource impacts. The proposed ordinance and supporting documents fail to satisfy these requirements.

The costs of natural resources surveys and the conventional survey to establish the precise area of a resource tract, in addition to the value of the real estate interests conveyed, are disproportional to the impact on the City, both when no encroachments into the environmental zone are proposed, and also when encroachments do occur.

It is important to note that the City is inflexible with regard to these demands. PCC 33.430.160.C and E; and 33.430.250.A.4 demand the survey work and the conveyance of property interests, without any regard for nexus or rough proportionality. If a property owner does not consent to the taking, then the application is denied. ("All of the standards must be met." PCC 33.430.160) This invokes the doctrine of unconstitutional conditions, which the US Supreme Court clarified applies to permit denials as well as permit approvals that impose unconstitutional conditions. *Koontz v. St. John's River Water Management District*, 570 US 595, 606-07 (2013).

If a "regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415. Again, the Oregon legislature found that "in some situations, land use regulations unfairly burden particular property owners" and that "to address these situations, it is necessary to amend Oregon's land use statutes to provide just compensation for unfair burdens caused by land use regulations." ORS 195.301(1). The legislature has already recognized that downzoning of residential property goes too far, and therefore requires just compensation. This is further proof that the proposed downzoning through expansion of the environmental zones imposes an unreasonable cost and delay on affected properties. ORS 197.307(4)(b).

In *Hill*, the Court of Appeals rejected the City's customary rigid application of Title 33, and emphasized the City must analyze the nexus and rough proportionality aspects of Title 33 code requirements for exactions of private property. In this instance, the City Council needs to question whether the adoption of these maps, and consequent application of PCC 33.430 to expanded areas on our clients' properties, is contrary to the constitutional principles the Court of Appeals explained in *Hill*.

Said another way, the City Council should ask the affected bureaus what steps they have taken to ensure compliance with these constitutional mandates. With respect, from this lawyer's perspective, the proposed environmental zone expansions demonstrate the answer is none. Wherever the City determines a significant natural resource is located, in its sole, subjective discretion, the City will take, and regularly does take, property rights that would otherwise allow the development of needed housing.

Conclusion

Our clients, like most Portland residents and property owners, cherish our natural resources and protect them every day. Unfortunately, in this instance, the proposed environmental zone expansions would apply environmental zoning regulations to displace needed housing, even where natural resources are not present. Instead of carefully evaluating where those resources are present, the City maps everything that looks like it might possibly include a stream or a tree grove, and then unlawfully shifts the burden to the property owner to identify and survey the resources, at great expense. It then takes valuable property rights, without any apparent concern for the loss of housing or the City's legal liability.

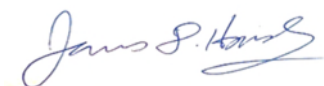
Oregon laws on just compensation for downzoning of residential properties, and for prohibiting subjective, costly and time-consuming regulations on land zoned for housing, expressly proscribe the proposed environmental zone expansions because the legislature has made a judgment that housing cannot be obstructed in this manner. We therefore ask that the environmental zones be removed from our clients' properties.

The City Council must choose between preserving housing capacity, versus triggering large legal liabilities in violation of state and federal law. We urge the City Council walk the housing talk, and reject the proposal.

Thank you for your courtesies in reviewing our testimony.

Very truly yours,

JORDAN RAMIS PC



Jamie D. Howsley
Admitted in Oregon and Washington



CHASE, JONES & ASSOCIATES INC.

FORMERLY BOOTH & WRIGHT
LAND SURVEYORS & ENGINEERS SINCE 1885

530 NE Couch St. | Portland | Oregon 97232
(503) 228-9844 | info@chasejonesinc.com

February 11, 2022
Project #16200

Susan & Rob Torch

C\O: Joseph Schaefer (joseph.schaefer@jordanramis.com)

Dear Susan and Rob,

We understand that you are contemplating development of additional housing on your property at 4715 SW Hewett Blvd, which will be extensively covered by the proposed expansion of the E Zones, and subject to PCC 33.430. We will provide surveys suitable for use by your civil engineer and architect for housing development in an environmental zone.

We will provide a topographic survey for the site at one-foot contours, which will include delineation of the top of the banks of the stream areas in the northwest (one bank) and southeast portions of the site (both banks) using the methodology in PCC 33.930.150 ("Topographic Survey Map"). All elevations will be based on a static GPS Observation that is post processed. This will be what is needed for the environmental review application and for your civil engineer to determine the locations on the property that have a slope greater or less than a specific grade.

We will survey the location of all trees over 6 inches in diameter, after your arborist or landscape architect has marked and numbered all such trees in the field ("Tree Survey Map"). (Your arborist or landscape architect will need to provide the diameter and species of each tree in table or map form.) The field work for this portion will have to be done at the same time as the Topographic Survey.

We will survey the location of the environmental zone boundaries, including the boundaries of the resource areas and transition areas, consistent with Figure 430-1 in PCC 33.430, after your other consultants have identified those boundaries on the site with flags ("Environmental Zone Survey Field Work"). These zones will approximate what you have sent and are shown on the attached.

The trees and environmental zone boundaries will be located within a surveyed perimeter boundary, with dimensions showing the distances of the environmental boundaries and existing development including fences, the house, two garages and the driveway in relation to the site perimeter ("Existing Conditions Map"). This will serve as a base map for your architect and civil engineer.

After you decide what the development plan will be, and the city issues a land use approval, the city requires that any undeveloped environmental resource areas be set aside in an environmental tract. For each environmental tract, we will provide a legal description and exhibit map suitable for recording, based on site flagging by your consultants ("Environmental Tract Legal Description and Exhibit Map").

Our fees will be as follows:

Topographic Survey Map	\$ 17,000.00
Tree Survey Map	\$ 7,000.00
Environmental Zone Survey Field Work	\$ 8,000.00
Existing Conditions Map	\$ 3,000.00
Environmental Tract Legal Description and Exhibit Map:	\$ 1,500.00 each

In the event that the City requires any amendments to the surveying or legal descriptions the fees will increase.

These fees do not include surveys or plats for a partition or subdivision; surveys or legal descriptions for current or proposed easements; review of title; or recording of any surveys.

If you have any questions about this proposal, feel free to email me at info@chasejonesinc.com or call at 503.228.9844.

Sincerely,

Erric Jones, PLS PE

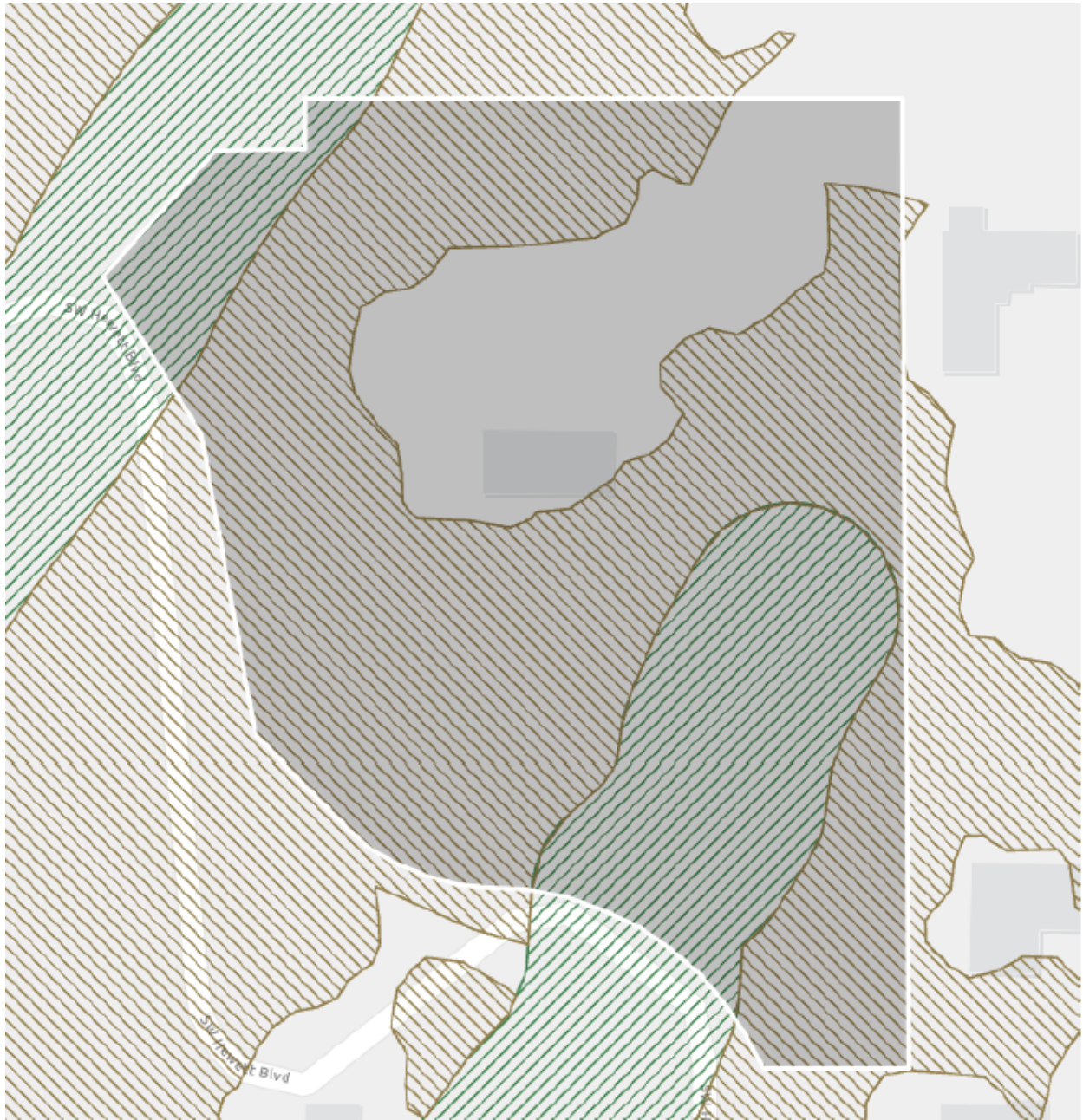
Authorization to Proceed:

Name: _____

Signature: _____

Date: _____

Environmental Zone Survey Field Work





City of Portland, Oregon • Measure 49 Services

1900 SW Fourth Avenue, Suite 5000 • Portland, Oregon 97201

Phone: 503-823-7300 • TTY: 503-823-6868 • www.portlandoregon.gov/bds

Measure 49 Claim Instruction Packet

Measure 49

This information applies to new Measure 49 claims filed after June 28, 2007.

Eligibility for Claims

Claims may be submitted for land use regulations restricting establishment of single family residential units. Under Measure 49, claims may not be submitted for commercial, industrial, or billboard uses or development.

If the City of Portland approves a claim, under Measure 49 the City may either compensate the claimant for the reduction in the property's fair market value or allow the claimant to use the property without applying the challenged land use regulation to the extent necessary to offset the reduction in the property's fair market.

In order to file a claim, the property owner must have owned the property in question at the time the regulation was enacted.

The City of Portland will only accept Measure 49 claims that are located in whole or in part within the Urban Growth Boundary.

Regulation Enactment Date

Claims must show that a property owner's use of the property is restricted by one or more non-exempt land use regulations that were enacted after January 1, 2007 and after the property was annexed to the City.

Claim Filing Date

Claims must be filed within five years of the date of enactment of the land use regulation that is the basis for the claim.

To Qualify for Measure 49 Claim

Measure 49 requires that a claimant establish that:

- (a) The claimant is an owner of the property;
- (b) All owners of the property have consented in writing to the claim;
- (c) The property is zoned for residential use;
- (d) One or more land use regulations restrict the establishment of single-family dwellings;
- (e) The specific residential use of the property the claimant wishes to carry out, but can't because of the land use regulation(s) identified in the claim;
- (f) The land use regulation(s) identified in the claim has reduced the fair market value of the property as shown in an appraisal that satisfies the requirements of Section 12(2) of Measure 49;
- (g) The highest and best use of the property at the time the regulation(s) was enacted was residential use.

Development Standards and Transferability

Section 12(6) of Measure 49 provides that a use authorized by an approved Measure 49 claim "has the legal status of a lawful nonconforming use in the same manner as provided by ORS 215.130." When the use is lawfully established, it may be "continued lawfully in the same manner as provided by ORS 215.130."

Claim Review Process

A Claim is deemed filed on the date the completed Measure 49 Claim Form and the \$250 fee is received by the City of Portland. Once a claim is received, the City of Portland will review the claim to ensure that it contains all of the required information.

Within 60 days of receiving the claim, the City will notify the claimant in writing of the information that is missing. The claimant will then have 60 days from the date of the incomplete notice to provide the missing information. If the claimant does not respond, the claim is considered withdrawn.

Once the claim is deemed complete, the City of Portland will provide written notice of the claim to the following:

- All owners identified in the claim
- Owners of record of property within 100 feet of claim site (for sites within the Urban Growth Boundary)
- Neighborhood and business organizations recognized by the City of Portland and whose boundaries include the site
- The Department of Land Conservation and Development
- Metro, if the property is located within the urban growth boundary of Metro
- The County in which the property is located

The City of Portland will issue a staff report, schedule a City Council hearing date, and make a final decision within 180 days of the date the claim is deemed complete. Upon scheduling the City Council hearing a notice will be provided to all owners of the property and all persons described in ORS 197.763(2) indicating the time and location of the City Council hearing. The notice will be mailed at least 30 days before the public hearing on the claim or, if there will not be a public hearing, at least 30 days before the deadline for submission of written comments. Two weeks prior to the scheduled City Council hearing the staff report will be available for public review. The City of Portland will accept public comments thru the City Council hearing or the deadline described in the public notice.

Where to Research, Get Information, or File a Claim

If you are unsure whether your desired development is allowed under current regulations, please contact the Bureau of Development Services for assistance. We are available to help you understand what is required and to assist you in navigating the City's permit and land use processes.

You can conduct land use research at 1900 SW 4th Avenue, 1st Floor in the Development Services Center (DSC). Some of the information you can research yourself at the Research Station. Planning Staff can assist you with zoning information and history. We can also assist you to obtain copies of older regulations that are not available electronically, or to review land use history on a specific piece of property.

Development Services Center (DSC)
1900 SW 4th Avenue, 1st Floor
Portland, OR 97201
503-823-7526

Hours

Monday, Tuesday, Wednesday and Friday, 7:30 a.m. – 3:00 p.m.
Thursday, 7:30:00 a.m. – 12:00 p.m.

Claim Application Instructions

Follow the directions for each section of the Claim Form as outlined in this instruction packet. If you need additional space, you may attach additional sheets. On each attached sheet, please identify the section of the claim form to which it relates.

The fee for filing a claim for compensation under Measure 49 is \$250. A check or money order for the claim fee must accompany the completed claim form and must be submitted at the time the claim is filed with the City of Portland. The claim will not be considered complete until the filing fee has been paid.

Mail or deliver your completed claim to:

City of Portland
Development Services Center – Measure 49 Claims
1900 SW 4th Avenue, 1st Floor
Portland, OR 97201

The City of Portland will not accept claims submitted by facsimile or electronically.

The instructions below refer to the claim form.

Section 1. Name and Contact Information of the Claimants

A claimant must be an “owner” of the real property that is the subject of the claim. Measure 49 defines an owner as:

- The owner of fee title of the property as shown in the deed records of the county where the property is located;
- The purchaser under a land sale contract, if there is a recorded land sale contract in force for the property; or
- 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.

Each person or entity (such as a corporation or partnership) must be identified separately, even if ownership is jointly held. If an owner is an entity, the claim form must be executed by an individual who has the authority to act on behalf of the entity. If the property has been placed in a trust, the claimant should be the trustee(s) of the trust.

In addition to providing the name and contact information of all non-claimant owners of the property, Measure 49 states that, all non-claimant owners of the property are required to consent to the filing of a claim, even if the owner does not wish to be a claimant. For all non-claimant owners please provide, in writing, consent to the filing of the claim.

Each owner must decide whether he, she or it wants to be a claimant. In deciding whether or not to be a claimant, owners should be aware that only one claim may be filed for the same property regarding the same regulation. Therefore, if an owner chooses not to be a claimant, that owner will not be able to file another claim for the same property regarding the same regulation.

Section 2. Name and Contact Information of Primary Contact or Agent

If the claim is submitted by two or more claimants, designate one of the claimants as the primary contact. If the claim is submitted by an agent on behalf of the claimant (s), identify the name and contact information of the agent and attach a written notarized statement or a Power of Attorney signed by all claimants authorizing the agent to act on behalf of each claimant.

Section 3. Identification of Property and Acquisition

In this section of the claim form, identify the private real property that is the subject of the claim and all contiguous real property owned by the same owner(s). Contiguous real property is any real property that shares a common boundary (including across a road and common corner) with the real property that is subject of the claim.

Acquisition Date

A claimant’s acquisition date is the date the claimant became the owner of the property as shown in the deed records of the county in which the property is located. If there is more than one claimant for the same property under the same claim and the claimants have different acquisition dates, the acquisition date is the earliest of those dates.

If the claimant is the surviving spouse of a person who was an owner of the property, the claimant’s acquisition date is the date the claimant was married to the deceased spouse or the date the spouse acquired the property, whichever is later.

If a claimant conveyed the property to another person and reacquired the property, the claimants acquisition date is the date the claimant reacquired the property.

In addition to the information required in section 3 of the claim form, you must submit with your claim a title report and a deed card, consistent with the below requirements

Title Report

The claim must include a title report prepared by a title insurer holding a certificate of authority issued by the Director of the Department of Consumer and Business Affairs. The title report must:

1. Identify all owners of fee title and all purchasers under a land sale contract, if any, as of the date of the report as shown in the deed records of the County where the property is located; and

2. Identify the date that each claimant acquired fee title or the date each claimant became a purchaser under a land sale contract, if any, as shown in the deed records of the county where the property is located; and
3. Include a chain of title from the date of the enactment of each land use regulation identified in the claim to the date of the title report, as shown in the deed records of the county where the property is located.

The title report must be accompanied by copies of all deeds, land sale contracts, and other recorded documents that establish the fee title of all owners or the owner as a purchaser under a land sale contract, that establish the date that each claimant acquired fee title or the date each claimant became a purchaser under a land sale contract, and that are referred to in the chain of title. If the claim involves more than one tax lot, the title report must identify and include the information required above for each tax lot.

Deed Card or Plat Card

The claim must include a copy of the deed card or plat card maintained by the county in which the property is located for each tax lot that is the subject of the claim. A deed card or plat card is a written or electronic record maintained by the county for each tax lot containing references to recorded transactions affecting ownership of the tax lot. You may obtain a copy of the deed card or plat card from the assessor of the county in which the property is located.

Section 4. Desired Use

Please describe briefly the desired residential use for the property that has been restricted by the land use regulation or regulations which is the basis for this claim. The desired use must be a residential use.

Section 5. City of Portland Land Use Regulations Restricting Desired Use

The Measure 49 Claim must be based on one or more new land use regulations enacted after January 1, 2007, that restrict the desired use of the property. Claims must be filed within five years of the date of enactment of the land use regulation.

Please identify each land use regulation that restricts the use of the property and the date each regulation was enacted. Describe how each regulation restricts the desired use of the property.

Attach additional sheets if you need more space.

Section 6. Reduction in Fair Market Value of the Property

In this section, please state the amount of reduction in fair market value of the property caused by the City's land use regulations that restrict the desired use of the subject property.

Appraisal

The reduction in fair market value must be established by a written appraisal consistent with the requirements of Measure 49 Section 12(2):

- A claimant must provide an appraisal showing the fair market value of the property one year before the enactment of the land use regulation and the fair market value of the property one year after the enactment. The reduction in the fair market value of the property caused by the enactment of one or more land use regulations that are the basis for the claim is equal to the decrease, if any, in the fair market value of the property from the date that is one year before the enactment of the land use regulation to the date that is one year after the enactment, plus interest.
- If the claim is based on the enactment of more than one land use regulation enacted on different dates, the reduction in the fair market value of the property caused by each regulation shall be determined separately and the values added together to calculate the total reduction in fair market value.
- Interest shall be computed under this subsection using the average interest rate for a one-year United States Government Treasury Bill on December 31 of each year of the period between the date the land use regulation was enacted and the date the claim was filed, compounded annually on January 1 of each year of the period.
- The actual and reasonable cost of preparing the claim, including the cost of the appraisal, not to exceed \$5,000, may be added to the calculation of the reduction in fair market value under this subsection.

The appraisal must:

- (a) Be prepared by a person certified under ORS chapter 674 or a person registered under ORS chapter 308;
- (b) Comply with the Uniform Standards of Professional Appraisal Practice, as authorized by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989; and
- (c) Expressly determine the highest and best use of the property at the time the land use regulation was enacted.

Claims that are submitted without a written appraisal will be considered incomplete and will not be processed. (ORS chapter 195. sec. 13)

Section 7. Other

Please indicate if you have submitted another Measure 49 claim to another governmental entity regarding the property listed in this claim.

Section 8. Signature(s)

All claimants and owners must execute the claim form.



Measure 49 Claim for New Claims

FILE NUMBER:

FOR INTAKE, STAFF USE ONLY

Date received _____
 Received by _____
 Quarter section map(s) _____
 Plan district _____

Neighborhood _____
 Business association _____
 Zoning _____
 Fee paid _____

**SECTION 1 — Name and contact information of all claimants and owners.
 List each claimant separately. Provide attachment if more than 3 claimants.**

Claimant owner (individual, business entity, or trustee of trust)
 Non-claimant owner (individual, business entity, or trustee of trust)

1 Name _____
 Name of representative of business entity or name of trust _____
 Mailing address _____
 City _____ State _____ Zip _____
 Telephone _____ FAX _____
 Email _____

Claimant owner(individual, business entity, or trustee of trust)
 Non-claimant owner (individual, business entity, or trustee of trust)

2 Name _____
 Name of representative of business entity or name of trust _____
 Mailing address _____
 City _____ State _____ Zip _____
 Telephone _____ FAX _____
 Email _____

Claimant owner(individual, business entity, or trustee of trust)
 Non-claimant owner (individual, business entity, or trustee of trust)

3 Name _____
 Name of representative of business entity or name of trust _____
 Mailing address _____
 City _____ State _____ Zip _____
 Telephone _____ FAX _____
 Email _____

SECTION 2 — Name and contact information of primary contact/authorized representative.

Name _____
Mailing address _____
City _____ State _____ Zip _____
Telephone _____ FAX _____
Email _____

SECTION 3 — Identification of property and date of acquisition. List each tax lot separately and attach additional sheets if needed. Attach title report and copy of county deed records.

1 Street address (if any) or nearest intersection _____

Tax account number R _____
Claimant 1: Date of acquisition _____
Claimant 2: Date of acquisition _____
Claimant 3: Date of acquisition _____

2 Street address (if any) or nearest intersection _____

Tax account number R _____
Claimant 1: Date of acquisition _____
Claimant 2: Date of acquisition _____
Claimant 3: Date of acquisition _____

3 Street address (if any) or nearest intersection _____

Tax account number R _____
Claimant 1: Date of acquisition _____
Claimant 2: Date of acquisition _____
Claimant 3: Date of acquisition _____

4 Street address (if any) or nearest intersection _____

Tax account number R _____
Claimant 1: Date of acquisition _____
Claimant 2: Date of acquisition _____
Claimant 3: Date of acquisition _____

SECTION 4 — Describe the desired residential use of the property that has been restricted by the City of Portland’s land use regulation(s).

SECTION 5 — City of Portland land use regulation(s) that restrict desired residential use. List each regulation separately.

Regulation:	Date of enactment:	Impact of regulation on desired use:
Regulation:	Date of enactment:	Impact of regulation on desired use:
Regulation:	Date of enactment:	Impact of regulation on desired use:
Regulation:	Date of enactment:	Impact of regulation on desired use:

SECTION 6 — Reduction in fair market value of the property. Attach appraisal.

Amount of reduction in fair market value as determined by appraisal \$ _____

SECTION 7 — Other claim submittals.

Have you submitted a Measure 49 claim to another governmental entity regarding the property listed in this claim?

Yes No Date Submitted _____ To whom _____

SECTION 8 — Signature and consent of all owners.

I/We hereby declare under penalties of false swearing (ORS 162.075 and ORS 162.085) that the above information and all of the statements, documents, and attachments submitted with this claim are true and correct. I am the owner of the real property described above in this claim form. I have reviewed the claim prepared by the above named claimant(s) relative to the property identified above. I hereby consent to the filing of a claim for relief under Measure 49.

1 Signature _____
Print name _____ Date _____

2 Signature _____
Print name _____ Date _____

3 Signature _____
Print name _____ Date _____

4 Signature _____
Print name _____ Date _____

5 Signature _____
Print name _____ Date _____

6 Signature _____
Print name _____ Date _____