



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

**ORS 195.300 to ORS 195.336 (MEASURE 49) SUPPLEMENTAL REVIEW
OF MEASURE 37 CLAIM
Preliminary Evaluation**

November 25, 2008

STATE ELECTION NUMBER: E122162¹

CLAIMANTS: Howard L. and Judy W. Ropp
5684 NW Metge Ave.
Albany, Oregon 97321

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 10S, Range 4W, Section 34
Tax lots 100 and 103
Benton County

I. ELECTION

The claimants, Howard and Judy Ropp, filed two claims under ORS 197.352 (2005) (Measure 37) on September 1, 2005 for property located at Township 10S, Range 4W, Section 34, in Benton County. ORS 195.300 to ORS 195.336 (Measure 49) entitles claimants who filed Measure 37 claims to elect supplemental review of their claims. The claimants have elected supplemental review of their Measure 37 claim under Section 6, which allows the Department of Land Conservation and Development (the department) to authorize up to three home site approvals to qualified claimants.

II. SUMMARY OF PRELIMINARY EVALUATION

Based on the department's preliminary analysis, it appears that the claimants are qualified for up to three home site approvals on the Measure 37 claim property. The claimants' property, including both the Measure 37 claim property and all contiguous property in the same ownership, currently appears to consist of three lots or parcels, one of which is developed with one dwelling. After taking into account the number of lots, parcels and dwellings currently located on the Measure 37 claim property and the contiguous property under the same ownership, it appears that the home site approvals will allow the claimant to establish up to one additional dwelling on tax lot 103 of the Measure 37 claim property.

¹ Claimants filed a claim for tax lot 100 (M122163) and a separate claim for tax lot 103 (M122162). Since these properties are contiguous and under the same ownership these claims were combined under the claim number E122162 for review under Measure 49.

III. THE MAXIMUM NUMBER OF HOME SITE APPROVALS FOR WHICH THE CLAIMANT(S) MAY QUALIFY

Under Section 6, of Measure 49, the number of home site approvals authorized by the department cannot exceed the lesser of the following: three; the number stated by the claimant in the election materials; or the number described in a Measure 37 waiver issued by the state, or if no waiver was issued, the number of home sites described in the Measure 37 claim filed with the state. The claimants have requested two additional home site approvals in their election materials. The Measure 37 waivers issued for this claim describe two additional dwellings, one each on tax lots 100 and 103. Therefore, the claimants may qualify for a maximum of three home site approvals under Section 6.

IV. PRELIMINARY ANALYSIS OF QUALIFICATION FOR HOME SITE APPROVAL

1. Preliminary Analysis

To qualify for a home site approval under Section 6, of Measure 49, a claimant must have filed a Measure 37 claim for the property with either the state or the county in which the property is located on or before June 28, 2007, and must have filed a Measure 37 claim with both the state and the county before Measure 49 became effective on December 6, 2007. If the state Measure 37 claim was filed after December 4, 2006, the claim must also have been filed in compliance with the provisions of OAR 660-041-0020 then in effect.

The claimants, Howard and Judy Ropp, filed two Measure 37 claims, M122162 and M122163, with the state on September 1, 2005. The claimants filed a Measure 37 claim, M3705-022, with Benton County on August 31, 2005. The state claim was filed prior to December 4, 2006.

It appears that the claimants timely filed a Measure 37 claim with both the state and Benton County.

In addition to filing a claim with both the state and the county in which the property is located, to qualify for a home site approval under Section 6 of Measure 49 the claimants must establish each of the following:

(a) The Claimant is an Owner of the Property

Measure 49 defines "Owner" as: "(a) The owner of fee title to the property as shown in the deed records of the county where the property is located; (b) The purchaser under a land sale contract, if there is a recorded land sale contract in force for the property; or (c) if the property is owned by the trustee of a revocable trust, the settlor of a revocable trust, except that when the trust becomes irrevocable only the trustee is the owner."

According to the warranty deeds submitted by the claimants, Howard and Judy Ropp are the owners of fee title to the property as shown in the Benton County deed records and, therefore, are owners of the property under Measure 49.

(b) All Owners of the Property Have Consented in Writing to the Claim

It appears that the claimants are the sole owners of the property. Therefore, no additional consent is required.

(c) The Measure 37 Claim Property Is Located Entirely Outside Any Urban Growth Boundary and Entirely Outside the Boundaries of Any City

The Measure 37 claim property, tax lots 100 and 103, is located in Benton County, outside the urban growth boundary and outside the city limits of the nearest city, Albany.

(d) One or More Land Use Regulations Prohibit Establishing the Dwelling

As stated in Section III above, the claimants may qualify for up to three home site approvals.

The property is currently zoned Exclusive Farm Use (EFU) by Benton County, in accordance with ORS chapter 215 and OAR 660, division 33, because the property is “agricultural land” as defined by Goal 3. Goal 3 requires agricultural land to be zoned exclusive farm use. Applicable provisions of ORS chapter 215 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, provide standards for the establishment of a dwelling in an EFU zone. In general and subject to some exceptions, those standards require that the property be a minimum 80 acres in size in an EFU zone

The combined effect of the standards for the establishment of a dwelling in an EFU zone is to prohibit the claimants from establishing two additional dwellings on the Measure 37 claim property.

(e) The Establishment of the Dwelling Is Not Prohibited by a Land Use Regulation Described in ORS 195.305(3)

ORS 195.305(3) exempts from claims under Measure 49 land use regulations:

- (a) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law;
- (b) Restricting or prohibiting activities for the protection of public health and safety;
- (c) To the extent the land use regulation is required to comply with federal law; or
- (d) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing.

Based on the documentation submitted by the claimants, it does not appear that the establishment of home sites for which the claimants may qualify on the property would be prohibited by land use regulations described in ORS 195.305(3).

(f) On the Claimant's Acquisition Date, the Claimant Lawfully Was Permitted to Establish at Least the Number of Dwellings on the Property That Are Authorized Under Section 6 of Measure 49.

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."

The Benton County deed records indicate that the claimants acquired tax lot 103 (14.97 acres) on February 8, 1972 and tax lot 100 (34.58 acres) on May 21, 1981.

On February 8, 1972 tax lot 103 was zoned Urban Residential (UR), which allowed a dwelling as an outright permitted use. On that date, tax lot 103 was not subject to any local or state laws that would have prohibited the claimants from establishing a dwelling on that tax lot. Therefore, the claimants lawfully could have established one of the home sites the claimants may qualify for under Section 6 of Measure 49 on tax lot 103.

On May 21, 1981 tax lot 100 was subject to compliance with the statewide planning goals, applicable provisions of ORS 215 and the county's implementing regulations. On the claimants' date of acquisition tax lot 100 was zoned Exclusive Farm Use (EFU) by Benton County. That zone allowed a dwelling on an established parcel provided the proposed dwelling was the only dwelling on the subject property and on contiguous property in the same ownership. On that date, the claimants owned a dwelling on property contiguous to tax lot 100.

In addition, because the Commission had not acknowledged the county's comprehensive plan and land use regulations as being in compliance with the statewide planning goals, the statewide planning goals and Goal 3, in particular, and ORS ch. 215 applied directly to tax lot 100 on the date the claimants acquired that tax lot.

On February 22, 1984 the Commission acknowledged Benton County's EFU zone to be in compliance with Goal 3 and ORS 215. Benton County's acknowledged EFU zone confirmed that the zoning in effect when the claimants acquired tax lot 100 complied with Goal 3 and ORS 215. Specifically, that acknowledged EFU zone required minimum parcels sizes as they existed on August 23, 1980 for the establishment of a dwelling on a lot or parcel, and allowed a dwelling on an established parcel provided the proposed dwelling was the only dwelling on the subject property and on contiguous property in the same ownership. Because the claimants owned a dwelling on property contiguous to tax lot 100, they would not have been permitted to establish a dwelling on that tax lot on the date they acquired it in 1981.

2. Preliminary Conclusion

Based on the preliminary analysis, it appears that the claimants, Howard and Judy Ropp, do not qualify for a dwelling on tax lot 100, but otherwise qualify for up to two home site approvals under Section 6 of Measure 49.

V. NUMBER OF LOTS, PARCELS OR DWELLINGS ON OR CONTAINED WITHIN THE PROPERTY

The number of dwellings that a claimant is authorized to establish pursuant to the home site authorization is reduced by the number of dwellings currently in existence on the Measure 37 claim property and any contiguous property under the same ownership. However, if a claimant otherwise qualifies for relief under Section 6, the claimant will be able to establish at least one additional dwelling regardless of the number of dwellings currently in existence.

Based on the documentation provided by the claimants, the Measure 37 claim property appears to currently include two lots or parcels and no dwellings. As demonstrated by the supplemental information submitted by the claimants, the claimants also own tax lot 101 (Township 10S, Range 4W, Section 34) which is contiguous to the Measure 37 claim property. The contiguous property under the same ownership includes one parcel and one dwelling. Together, it appears that the Measure 37 claim property and the contiguous property in the same ownership include three lots or parcels and one dwelling. Therefore, the two home site approvals the claimants appear to qualify for under Section 6 of Measure 49 will allow the claimants to establish up to one additional dwelling on tax lot 103 of the Measure 37 claim property.

VI. PRELIMINARY STATEMENT OF PROPOSED LIMITATIONS AND CONDITIONS ON THE NUMBER AND SCOPE OF HOME SITE APPROVALS

The department has identified the following limitations and conditions that may affect the number or scope of the home site approvals that the claimants would otherwise be entitled to under Section 6 of Measure 49. This list may not be comprehensive and does not preclude the possibility that other considerations, not yet identified by the department, may affect the establishment of a dwelling authorized by a home site approval.

1. The establishment of a dwelling based on a Measure 49 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.
2. A 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).
3. A claimant is not eligible for more than 20 home site approvals under Sections 5 to 11 of Measure 49 regardless of how many properties a claimant owns or how many claims a claimant filed.
4. The number of dwellings a claimant may be eligible to establish under a Measure 49 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 dwellings

currently exist on the Measure 37 claim property or on contiguous property under the same ownership and the dwellings have not been disclosed to the department, then the number of additional dwellings a claimant may establish pursuant to the home site authorization must be reduced according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49.

5. Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimants may choose to convert any temporary dwelling currently located on the property on which the claimants are eligible for Measure 49 relief to an authorized home site pursuant to a Measure 49 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.
6. A home site approval only authorizes the establishment of a new dwelling on the property on which the claimants are eligible for Measure 49 relief. No additional development is authorized on contiguous property for which no Measure 37 claim was filed.
7. The claimants may use a home site approval to convert a dwelling currently located on a separate lot or parcel on the property on which the claimants are eligible for Measure 49 relief to an authorized home site. If the number of dwellings on separate lots or parcels existing on the property on which the claimants are eligible for Measure 49 relief exceeds the number of home site approvals the claimants qualify for under a home site authorization, the claimants may select which existing dwellings on separate lots or parcels to convert to authorized home sites.
8. 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.
9. Once the department issues a final home site authorization, a home site approval granted under that authorization will run with the property and will transfer with the property. A home site approval will not expire, except that if a claimant who received a 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.
10. Because the property is located in an exclusive farm use zone the owners must comply with the requirements of ORS 215.293 before beginning construction.
11. If an owner of the property is authorized by other home site approvals 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.

VII. NOTICE OF OPPORTUNITY TO COMMENT

A claimant or the claimants' authorized agent, a county and any third party may submit written comments, evidence and information in response to the preliminary evaluation. The comments, evidence and information must be filed with the department no more than twenty-eight (28) calendar days after the date this evaluation is mailed to the claimants and the claimants' agent and notice of this evaluation is mailed to third parties.

The department will mail a copy of all materials timely filed by a county or a third party with the department to the claimants and the claimants' agent. A claimant or a claimants' authorized agent may then file written comments, evidence or information in response to the materials filed by the third party or county. That response must be filed no more than twenty-one (21) calendar days after the date the department mails the materials to the claimants and the claimants' authorized agent.

All comments, evidence and information in response to the preliminary evaluation and all responses to materials filed by a third party or a county shall be delivered to Supplemental Measure 49 Claim Review, 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540 and will be deemed timely filed either (1) if actually delivered to the department before the close of business on the final eligible calendar day, or (2) if mailed on or before the final eligible calendar day.

Note: Please reference the claim number and claimant name and clearly mark your comments as "Preliminary Evaluation Comments." Comments must be submitted in original written form only. Comments submitted electronically or by facsimile will not be accepted.