

## **Ballot Measure 37 (2004) & Proposed Ballot Measure 49**

### **Questions & Answers October 15, 2007**

The Oregon Department of Administrative Services (DAS), and the Oregon Department of Land Conservation & Development (DLCD) have received many questions from Measure 37 claimants and their neighbors about Measure 37 and Measure 49. This question & answer document provides factual information about how the state handles claims under Measure 37, and how Measure 49 would affect Measure 37 if it is approved at a special election on November 6, 2007. The questions represent some of the more frequently asked questions that DAS and DLCD are receiving. The answers are based on legal advice from the Oregon Department of Justice, but it is not intended to be legal advice to claimants or neighbors of claimants.

#### **General Questions**

##### **1. What is Measure 37?**

Measure 37 is a state law that was enacted in November of 2004. Generally, the law allows owners of property to demand compensation from state and/or local government for statutes and rules that restrict a person's use of real property and reduce its value. Instead of paying money, government may allow the claimant to use the property for a use that the claimant could have carried out when he or she acquired the property. A decision to allow a claimant to use the property in spite of statutes or rules that would otherwise restrict or prohibit that use is commonly known as a Measure 37 "waiver."

##### **2. What is Measure 49?**

Measure 49 is a proposal by the 2007 Oregon Legislature to modify Measure 37 to give landowners who have filed Measure 37 claims the right to build a limited number of homes as compensation for land use regulations imposed after they acquired their properties. Measure 49 will be voted on at a special election on November 6, 2007. The following is the legislature's explanatory statement and estimate of financial impact for Measure 49.:

#### **Explanatory Statement**

Ballot Measure 37 (2004) requires governments to pay landowners or forgo enforcement when certain land use regulations reduce their property values. This measure modifies Measure 37 to give landowners who have filed Measure 37 claims the right to build

homes as compensation for land use regulations imposed after they acquired their properties.

Claimants may build up to three homes if allowed when they acquired their properties.

Claimants may build up to 10 homes if allowed when they acquired their properties and they have suffered reductions in property values that justify the additional home sites.

This measure protects farmlands, forestlands and lands with groundwater shortages in two ways.

First, subdivisions are not allowed on high-value farmlands, forestlands and groundwater-restricted lands. Claimants may not build more than three homes on such lands.

Second, claimants may not use this measure to override current zoning laws that prohibit commercial and industrial developments, such as strip malls and mines, on land reserved for homes, farms, forests and other uses.

Also, this measure expands homebuilding rights under Measure 37 in two ways.

First, it extends homebuilding rights to surviving spouses whose claims are not eligible for compensation under Measure 37.

Second, it allows claimants to transfer their homebuilding rights to new owners, a right not clearly provided by Measure 37. The new owners must exercise their homebuilding rights within 10 years.

Claimants will be notified of their options to build homes under this measure within 120 days after this measure takes effect.

Claimants who have received land use waivers under Measure 37 are entitled to complete developments under the provisions of Measure 37 if they have established vested rights to do so.

To streamline the approval process for small claims, this measure provides that those who choose to apply for up to three homes need only show they had the right to build the homes they are requesting when they acquired their property.

To validate larger claims, this measure requires those who choose to apply for four to 10 homes to show they had the right to develop the homes they are requesting when they acquired their property and that they have suffered a loss of value from prior regulations that justifies the number of homes requested. Appraisals are required to establish such reductions in value. The costs of appraisals and other costs of preparing claims may be added to the calculation of reduced values, up to \$5,000 per claim.

This measure establishes an ombudsman to help landowners who request assistance with their claims.

This measure modifies Measure 37 for compensation claims that arise from land use regulations in the future. It authorizes such claims based on regulations that limit residential uses of property or farm and forest practices, requires documentation of reduced values and provides for proportionate compensation when such reductions in value occur. Property owners will have five years to file claims over regulations enacted after January 1, 2007.

This measure will be effective 30 days after approval by the voters.

*(This impartial statement explaining the measure was provided by the 2007 Legislative Assembly.)*

**“ESTIMATE OF FINANCIAL IMPACT:** The measure would require one-time state administrative expenditures of \$8.7 to \$12.5 million to evaluate claims received to date for adherence to measure requirements.

In the short term, the measure would require state administrative expenditures of \$1 million to \$2 million per biennium to evaluate future claims. In the long term, state administrative costs may be reduced as the measure limits the scope of potential future claims. The amount of those potential reductions cannot be determined.

Potential state litigation costs cannot be determined.

The measure authorizes compensation to landowners. The amount of state expenditures to pay claims for compensation cannot be determined.

The measure authorizes establishing a claims review fee for new claims not to exceed the actual and reasonable cost of reviewing a claim. The impact on state revenues cannot be determined.

The measure clarifies ongoing claims review processes and is expected to reduce local government claim processing costs from current levels. The amount of these potential reductions cannot be determined.

The measure authorizes compensation to landowners. The amount of local government expenditures to pay claims for compensation cannot be determined.

The effect of the measure on local government revenues cannot be determined.”

### **3. What is involved in processing a Measure 37 claim?**

Measure 37 claims to the state are filed with DAS. DAS logs information from the claim into its claims registry (which can be viewed on the internet at: <http://www.oregon.gov/DAS/SSD/Risk/M37Registry.shtml>). DAS also sends an electronic copy of each claim to DLCD and the Department of Justice (DOJ). DOJ reviews each claim and advises the agencies concerning: (a) whether the claimant is the current owner of the property; (b) when the claimant acquired the property; (c) what the claimant's desired use of the property is; and (d) which state agencies need to review the claim to determine whether they enforce state land use regulations that restrict the desired use, and that may have had the effect of reducing the fair market value of the property. In most cases, claims are then referred to DLCD for the preparation of a draft staff report.

While this initial evaluation is occurring, DAS reviews the claim and tax lot maps to prepare a list of persons who live near the property. DAS then sends notice of the claim to this list so that people who are interested in the claim can request a copy of the staff report and comment on it if they want to.

DLCD reviews each claim to determine what state land use regulations apply to the claimant's desired use, whether those regulations restrict that use, and whether there is evidence that the enactment or enforcement of the regulations have had the effect of reducing the fair market value of the property. DLCD prepares an initial draft report on each claim, which is reviewed by DOJ. The draft report, which contains the state's tentative conclusions concerning the claim (no final decision has been made at this point) is then sent to the claimant and any persons who have asked for a copy of it. After reviewing any comments on the draft report, DLCD revises the report as necessary, and issues a final report that determines what state land use regulations will not apply to the claimant's desired use of the property. Copies of DLCD's reports on claims are available at: <http://www.oregon.gov/LCD/MEASURE37/index.shtml>.

For questions about a Measure 37 claim, please first visit the website listed above. Local public libraries may be able to assist with internet access. Questions that can't be answered that way should be directed to DLCD at (503) 373-0050.

### **Questions from Neighbors of Claimants**

#### **4. Why do neighbors of claimants get a notice of a Measure 37 claim, and what does it mean?**

When the state receives a Measure 37 claim, it sends notice to all nearby property owners. This is to give neighbors an opportunity to provide information or comments on the claim to the state before it takes action on the claim. The claim is not a lawsuit, it is a demand that the state either pay the claimant for a reduction in property value resulting from land use regulations or waive those land use regulations to allow the claimant to use the property for some specific use. If the claim is approved, in almost all cases it means that the claimant will be exempted from some land use regulations if and when he or she applies for a permit to use the property for the use described in the claim.

#### **5. How can a neighbor who receives a notice of a claim find out where the property is?**

The notice often will contain a street address, but in many rural areas no street address is assigned to property until there is a residence on it. As a result, many notices do not contain a street address.

All notices do contain a reference to a Township, Range, Section, and tax lot number. If a person provides these numbers to the local county tax assessor's office, they should be able to show on a map where the property is located. In addition, with internet access, a map of the property may be viewed at the

following website: <http://www.ORMAP.com/> “Click” the link on the left to “Maps Online” and then read and accept the disclaimer. A map of Oregon, showing each county, will then appear. “Click” on the county where the property is located, a grid map of the county will then appear with a “Tax Map Search” box on the right of the screen. In the Tax Map Search Box, look for the Township (labeled as a “t”) number, followed by the Range number (labeled as an “r”) that corresponds to the notice. “Click” on that number, and a set of additional numbers will appear – which are the section numbers that are in that Township and Range. “Click” on the number that contains the section number in the notice, and a map will appear showing the tax lots in that section (Adobe Acrobat is needed). The numbers on each lot on the map are the tax lot numbers. Look for the tax lot(s) that are listed in the notice.

#### **6. Does this mean that the landowners are suing someone?**

No. It means that they are demanding that the state pay them that amount of money, or exempt them from a land use regulation so that they can carry out a particular use of their property.

#### **7. What does the amount of the claim mean? Is the state going to be paying this amount?**

The amount of the claim is the amount that the property owner claims as a reduction in fair market value resulting from the enactment or enforcement of a land use regulation. If a person has evidence that supports the amount of the claim, or evidence that the fair market value of the property has not been reduced by the enactment or enforcement of a land use regulation, they may want to provide that evidence to the state.

The Oregon legislature has not appropriated funds to pay Measure 37 claims. As a result, the state is not going to pay owners money at this time. Instead, if the claim is valid the state will exempt the owner from one or more land use regulations that were enacted after the owner acquired the property in order to allow the owner to carry out a use of the property that was allowed when the owner acquired it. That use of the property by the owner will still be subject to land use regulations that were in effect when he or she acquired it, and these regulations may not allow the use. If that is the case, when the owner applies for a permit to carry out the use, the permit will be denied.

#### **8. What is a Measure 37 waiver?**

Measure 37 requires state and local government to exempt a claimant from certain land use regulations if they wish to avoid paying compensation and attorney fees. Only statutes, rules, and local ordinances that were adopted after the claimant acquired the property are waived, and only those statutes, rules, and local ordinances that apply to the claimant's desired use of the property are

waived. A Measure 37 waiver means that the statutes, rules and local ordinances specified in the state or local order will not apply to the claimant when he or she carries out the use described in the order. As an example, if a claimant wants to divide the property and develop several homes on each resulting lot, state and local Measure 37 waivers would result in certain state and local statutes, rules and ordinances no longer applying to the land division or to the residential development of the property by the claimant. When the claimant applies for a permit for the land division and construction of the homes, only statutes, rules and local ordinances that have not been “waived” (those in effect when the claimant acquired the property, and those otherwise exempt from Measure 37) will apply to the review of the permit(s). In other words, a “waiver” changes the statutes, rules and local ordinances that apply to a use of property, it does not mean that the use itself is automatically authorized – that is still done through whatever permit process would normally be used.

### **9. What happens after a Measure 37 waiver is approved?**

If a Measure 37 waiver is approved, the claimant still will need to go through whatever permitting process would normally apply to the use that he or she wants to carry out. In most cases this will involve a land use application to the city or county where the property is located, with additional opportunity to comment on the application and (in some cases) a public hearing. The land use application will be reviewed based on what was lawful at the time the claimant acquired the property, as well as any subsequent land use regulations that have not been waived. Also, if the property is located in a rural area, the Oregon Land Use Board of Appeals has ruled that both local and state waivers are needed. A copy of that ruling is available at: <http://www.oregon.gov/LUBA/docs/Opinions/2007/03-07/06233.pdf>. See also, OAR 660-041-0040 (requiring a state waiver in certain defined situations).

### **10. Will anything said in response to this notice affect whether this claim is approved?**

Yes, it could. Information about who owns the property, when the claimant acquired the property, whether the use of the property is limited by things other than state land use regulations, and the effect of the regulations on the value of the property may affect whether the claim is approved. Information about the effects of the claimant’s desired use on surrounding properties generally can’t be considered under Measure 37.

### **11. If a Measure 37 waiver is approved, how will water issues be addressed?**

A waiver of land use regulations to allow a use of land does not authorize the claimant to use a well or another source of water to supply that land use. However, under state law a well can be used to supply one or more residences,

up to 15,000 gallons per day, without a state permit. As a result, *state* water permitting will seldom come into play for most residential developments, including those under Measure 37. However, water issues also may be addressed at the local level. To obtain a building permit, in most cases the developer of the property will need to specify how water will be provided and show some evidence that the anticipated sources are adequate. In some counties, the developer may also have to show that the new use of water will not adversely affect surrounding uses.

## Claimant Questions

### **12. After a Measure 37 claim is submitted, when will an answer be provided?**

The 2007 Legislature extended the deadline for government to respond to a claim by 360 days (to 540 days from the date of filing). Of the over 6800 claims submitted to the state so far, over half were filed in a three-week period in November and early December of last year – creating a large backlog at the state. The state is working through this backlog as quickly as possible (over 3400 claim files have been completed), and most claims that were filed before November of 2006 have been reviewed. However, many claimants will not get an answer until some time in 2008. Information on the number of claims received, and the progress being made to act on them is available at: <http://www.oregon.gov/LCD/MEASURE37> (look for the link for "Summaries of Claims Filed in the State").

### **13. Is there any way to "fast-track" a claim under Measure 37?**

No. The state is working on claims based on the date received. If claims are missing information needed to process them, they may be delayed.

### **14. May a Measure 37 claim for pre-2004 land use regulations still be filed?**

Yes. Measure 37 is still in effect, but after December 4, 2006 Measure 37 requires a claimant to show two additional things when filing a claim based on a land use regulation that was in effect on or before December 4, 2004 (the date Measure 37 took effect):

- (a) The claimant must show that they submitted an application to carry out a use of the property; and
- (b) the claimant must show that a state agency or a local government applied a land use regulation (one that the Measure 37 claim is based on) to deny the application or to condition a permit for the desired use.

In most cases, this will mean that the claimant must file a land use application with the city or county that has land use jurisdiction over the property and wait until the city or county acts on the application before filing a Measure 37 claim for an existing land use regulation. These steps are described in more detail in rules adopted by DAS and DLCD, which are available at:

DLCD Rules: [http://www.oregon.gov/LCD/rulemaking\\_2005-07.shtml](http://www.oregon.gov/LCD/rulemaking_2005-07.shtml) and  
DAS Rules: <http://www.das.state.or.us/DAS/SSD/Risk/docs/M37RulesforNotice.pdf>

### **15. May a Measure 37 claim for a *new* land use regulation be filed?**

If a person believes that their use of their property is restricted by a land use regulation that was enacted after the date Measure 37 took effect (December 4, 2004), they have two years from the date of enactment of the new regulation to file a Measure 37 claim based on that regulation. After two years, they will need to show that they have applied for the use first, and that their application was denied or conditioned (as described above) in order to file a claim for a post-2004 land use regulation.

### **16. If a Measure 37 claim has been made, but no decision on the claim has been made yet, what would happen to the claim if Measure 49 is approved? What would happen if Measure 49 isn't approved?**

#### **If Measure 49 is approved**

If a Measure 37 claim is still pending, and if Measure 49 is approved, the claim to the state would still be reviewed if it was filed on or before June 28, 2007 (if it was filed after that date, see question 17). Under Measure 49, claimants would get a notice that the claim is still being processed, and telling them whether it is the state or a city that is handling it. The notice would include a form asking the claimant whether they want to:

- Proceed under the “express lane” provisions of Measure 49 (approval for up to three new homesites in rural areas), or
- Proceed under the “conditional” provisions (approval for up to ten homesites).

If the claimant chooses the “express lane,” no additional information would be required (unless there was information missing from the claim under Measure 37). If the claimant chooses the “conditional” path, the claimant would need to have an appraisal prepared that documents that the value of the property has been reduced by land use regulations, and that the amount of the reduction is comparable to the value of the homes the claimant wishes to develop. If the property is in an urban area, the city would handle the claim and the requirements would generally be the same as the “conditional path” process described above.

### **If Measure 49 is not approved**

If Measure 49 is not approved by the voters, state and local governments would continue processing claims under Measure 37. The deadline for a response to a claim is 540 days after it was filed. Many remaining claims have a “due” date in May of 2008. However, the state is continuing to act on claims as rapidly as is can, consistent with making sure that the claims are properly documented.

#### **17. If Measure 49 is approved would new claims be allowed?**

Yes, new claims would be allowed under Measure 49, but only for certain *new* land use regulations -- those enacted after January 1, 2007. New claims for pre-2007 land use regulations would not be allowed if the claim was filed after June 28<sup>th</sup> of this year.

#### **18. In a situation where the state and the county (or city) have granted a Measure 37 waiver, but the claimant hasn't done anything to develop the property, what would happen to the waiver if Measure 49 is approved? What if the claimant has submitted a land use application? What would happen if Measure 49 isn't approved?**

### **If Measure 49 is approved**

The claim would be reviewed by state or local government, as described above, and the waiver would be replaced with an authorization to develop a certain number of homesites on the property. This is the case even if the claimant has submitted a land use application. While the application would be reviewed based on the Measure 37 waiver, the use of the property would be lawful only to the extent there is a common law vested right.

As with pending claims, if Measure 49 is approved the claimant would be given the choice of whether they want up to three new homesites, or they want more than that (up to ten). If the claimant wants more, they would need to have an appraisal prepared that shows how much the value of the property has been reduced.

Regardless of which path the claimant chooses, approval of homesites would also depend on whether they lawfully were permitted to establish those homesites when they acquired the property.

### **If Measure 49 is not approved**

If Measure 49 isn't approved, waivers would still be valid. To carry out a use of the property, the claimant would still need to go through the county, city or state permit process(es) that would normally apply to the desired use of the property.

**19. Would Measure 49 affect property that already has been developed under Measure 37?**

No, it would not. If a claimant has completed the home(s) (or other use) that they received a Measure 37 waiver for, Measure 49 states that they would have the right to continue a use that was lawfully established. If the claimant has only completed part of the development that they received a waiver for, whether they may complete the entire home, development or other use would depend on whether they have a vested right to do so. The meaning of vested rights is addressed in the next question.

**20. It's been said that if Measure 49 is approved by the voters, development that has vested under common law would not be affected. What is vesting, and when does a development vest under common law?**

In general, the right to complete a use of real property when the law changes so that the use would otherwise be unlawful, is known as a "vested right." Under decisions of the Oregon courts, whether a person has a vested right to complete a use (despite a change in law) is determined on a case-by-case basis by considering the following factors:

- The amount of money spent on developing the use in relation to the total cost of establishing the use;
- The good faith of the property owner;
- Whether the property owner had notice of the proposed change in law before beginning the development;
- Whether the improvements could be used for other uses that are allowed under the new law;
- The kind of use, location and cost of the development; and
- Whether the owner's acts rise beyond preparation (land clearing, planning, etc.).

**21. If Measure 49 is approved, does a claimant have to submit a new claim?**

No, a claimant would not have to submit a new claim if they have already submitted one under Measure 37. If Measure 49 is approved, they would have several choices for how to proceed. They would receive a notice that describes the choices, and tells the claimant whether the state or the city will handle the claim.

- *If* the claimant wants approval to develop three or fewer homesites on the property, in most cases no additional information would be required to process the claim.

- *If* the claimant wants approval to develop more than three homesites on the property, they would need to submit an appraisal that documents how much the fair market value of the property was reduced by land use regulations. An appraisal also is required if the property is in an urban area.

**22. If Measure 49 is approved, who would decide what happens with a claim?**

The state would decide what happens for claims involving properties in rural areas --unless the only regulations are county ones, in which case it would be transferred to the county. Cities would handle claims for properties in urban areas.