



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

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

March 5, 2009

STATE ELECTION NUMBER: E118494B¹

CLAIMANTS: Robert W. and Margaret A. Thurman
PO Box 65
Welches, Oregon 97067

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 2S, Range 6E, Section 26AD
Tax lots 1001, 1100, 1101, 1102, 1201 and
1300
Clackamas County

I. ELECTION

The claimants, Robert and Margaret Thurman, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on May 23, 2005, for property located at or near East Cottonwood Road and East Little River Road, near Brightwood, in Clackamas 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 of Measure 49, 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 one home site approval 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 six lots or parcels, which are developed with four dwellings. The number of lots, parcels and dwellings currently in existence on the Measure 37 claim property and the contiguous property under the same ownership exceeds the maximum number of home sites claimants could qualify for under Section 6 of Measure 49. However, because the claimants

¹ Claim E118494 has been split into two claims, E118494A and E118494B, because the Measure 37 claim concerned non-contiguous parcels. E118494B addresses the claimants' relief as to tax lots 1001, 1100, 1101, 1102, 1201 and 1300, and E118494A addresses their relief as to as to tax lot 700.

otherwise qualify for relief under Section 6, the claimants appear to qualify for one home site approval on the Measure 37 claim property. 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 one home site approval will allow the claimants to authorize an existing lot or parcel and establish one additional dwelling on the Measure 37 claim property.

III. THE MAXIMUM NUMBER OF HOME SITE APPROVALS FOR WHICH THE CLAIMANTS 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. However, if the number of lots, parcels and dwellings currently in existence on the Measure 37 claim property and the contiguous property under the same ownership is equal to or greater than the maximum number of home sites a claimant may otherwise qualify for under Section 6 of Measure 49, a claimant may qualify for only one home site approval.

The claimants have elected Section 6 review in the election material. The Measure 37 waiver issued for this claim describes at least three home sites. However, because it appears that the Measure 37 claim property and contiguous property in the same ownership contain three or more lots or parcels that are developed with dwellings, the claimants may qualify for a maximum of one home site approval.

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, Robert and Margaret Thurman, filed a Measure 37 claim, M118494, with the state on May 23, 2005. The claimants filed a Measure 37 claim, ZC131-05, with Clackamas County on May 16, 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 Clackamas 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 deeds submitted by the claimants and obtained by the department, Robert and Margaret Thurman are the owners of fee title to the property as shown in the Clackamas 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 is located in Clackamas County, outside any urban growth boundary and outside of any city limits near the community of Brightwood.

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

As stated in Section III above, the claimants may qualify for up to one home site approval

The property is currently zoned Rural Residential Farm Forest (RRFF-5) by Clackamas County, in accordance with Goal 14, which prohibits the urban use of rural land and requires local comprehensive plans to identify and separate urbanizable from rural land in order to provide for the orderly and efficient transition from rural to urban use. State laws, namely Goal 14 and OAR 660-004-0040, prohibit the establishment of a lot or parcel less than the size established in the County rural residential zone in existence on October 4, 2000, if the zone in existence on that date had a minimum lot size of two or more acres. Clackamas County’s RRFF-5 requires a minimum lot size of five acres.

The claimants’ property consists of 13.83 acres. Therefore, state land use regulations prohibit the claimants from establishing, in addition to the existing lots or parcels and dwellings, the one home site the claimants may qualify for under Section 6 of Measure 49 on the Measure 37 claim property.

(e) The Establishment of the Lot, Parcel or 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 the one home site 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 Lots, Parcels or 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."

Clackamas County deed records indicate that claimant Robert Thurman acquired tax lot 1201 (2 acres), the northern portion of tax lot 1300 (approximately 1.20 acres), and the center portion of tax lot 1100 (approximately 2 acres) on August 1, 1963, and claimant Margaret Thurman acquired tax lot 1201, the northern portion of tax lot 1300, and the center portion of tax lot 1100, and tax lot 1001 on August 18, 1976. Therefore, for purposes of Measure 49, the claimants' acquisition date of tax lot 1201, the northern portion of tax lot 1300 and the center portion of tax lot 1100 is August 1, 1963.

Clackamas County deed records indicate that claimant Robert Thurman acquired tax lot 1001 (.40 acres) on November 25, 1972; and claimant Margaret Thurman acquired tax lot 1001 on August 18, 1976. Therefore, for purposes of Measure 49, the claimants' acquisition date of tax lot 1001 is November 25, 1972.

Clackamas County deed records indicate that the claimants acquired tax lots 1101 (.23 acres), 1102 (.80 acres), the northern portion of tax lot 1100 (approximately 2 acres), the southern portion of tax lot 1100 (approximately 1.2 acres), and the southern portion of tax lot 1300 (approximately 4 acres) on August 18, 1976.

On August 18, 1976, the Measure 37 claim property consisted of tax lots 1001, 1100, 1101, 1102, 1201 and 1300 and was subject to state statutes, the statewide planning goals and

implementing regulations. On August 18, 1976, the property was zoned RR by Clackamas County. However, 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 14 in particular, and ORS ch. 215 applied directly to the claimants' property.

On December 31, 1981, the Commission acknowledged the application of Clackamas County's RR zone to the Measure 37 claim property. The Commission's acknowledgement of Clackamas County's RR zone confirmed that zone's compliance with Goal 14 and ORS ch. 215. Clackamas County's acknowledged RR zone required 1 acre for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property (tax lots 1001, 1100, 1101, 1102, 1201 and 1300) consists of 13.83 acres. Therefore, the claimants lawfully could have established the one home site for which the claimants may be eligible on tax lots 1001, 1100, 1101, 1102, 1201 and 1300 on the claimants' date of acquisition.²

2. Preliminary Conclusion

Based on the preliminary analysis, it appears that the claimants, Robert and Margaret Thurman, qualify one home site approval under Section 6 of Measure 49.

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

The number of lots, parcels or dwellings that a claimant is authorized to establish pursuant to a home site authorization is reduced by the number of lots, parcels or dwellings currently in existence on the Measure 37 claim property and any contiguous property under the same ownership according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49.

Based on the documentation provided by the claimants and Clackamas County, the Measure 37 claim property appears to currently include six lots or parcels and four dwellings. There is no contiguous property under the same ownership the one home site approval the claimants appear to qualify for will allow the claimants to authorize an existing lot or parcel and establish one additional dwelling on the Measure 37 claim property. The dwelling must be located on a separate lot or parcel, and must be contained within the Measure 37 claim property.

² Because the claimants were lawfully permitted to establish on the Measure 37 claim property, the maximum number of home sites for which they may qualify based on the latest acquisition date, the department has omitted the analyses based on the earlier acquisition dates.

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 scope of the home site approval 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 land division or dwelling authorized by the home site approval.

1. The establishment of a land division or dwelling based on a Measure 49 home site authorization must comply with all applicable standards governing the siting or development of the land division or dwelling. However, those standards must not be applied in a manner that prohibits the establishment of the land division or 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 land division or 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. 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.
5. A home site approval only authorizes the establishment of a new lot, parcel or dwelling on 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 or on Measure 37 claim property on which a claimant is not eligible for Measure 49 relief. A lot or parcel established pursuant to a home site approval must either be the site of a dwelling that is currently in existence or be the future site of a dwelling that may be established pursuant to the home site approval.
6. The claimants may use a home site approval to convert a lot, parcel or dwelling currently located on the property on which the claimants are eligible for Measure 49 relief to an authorized home site.
7. 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.

8. 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 lots, parcels and dwellings within 10 years of the conveyance. A lot or parcel lawfully created based on the home site authorization will remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law. A dwelling lawfully created based on a home site approval is a permitted use.
9. 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 a claimant's 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 claimant's 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.

<p>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.</p>
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