



OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT

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

September 10, 2009

STATE ELECTION NUMBER:

E118495

CLAIMANT:

Albert Dilnik¹
17666 NW Shorewood Drive
Beaverton, OR 97006

MEASURE 37 PROPERTY
IDENTIFICATION:

Township 2N, Range 2W, Section 24D
Tax lots 2300 and 2400
Township 2N, Range 1W, Section 19C
Tax lots 1700 and 1701²
Multnomah County

I. ELECTION

The claimant, Albert Dilnik, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on May 23, 2005, for property located at 15725 NW Sheltered Nook Road, near Portland, in Multnomah 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 claimant has elected supplemental review of his 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 claimant is qualified for up one home site approval on the reconfigured tax lot 1700, tax lots 1701 and 2300 of the Measure 37 claim property, if determined by Multnomah County that the property is served by an approved public or private water supply and an approved individual sewage disposal system. The Measure 37 claim property in the ownership of the claimant and contiguous property in the same ownership, currently appears to consist of three lots or parcels, which are undeveloped. After

¹ Deane Dilnik was also a Measure 37 claimant; however, she passed away since the filing of the Measure 37 claim.

² The Measure 37 claim property consisted of tax lots 1700, 1701, 2300, and 2400. The claimant did not elect supplemental review for tax lot 1701; however, a claim cannot be amended to remove claim property. Tax lot 1700 (5 acres) and tax lot 2400 (5 acres) have since been partitioned into tax lot 1700 (4.38 acres), tax lot 1702 (.5 acres), and tax lot 2400 (4.74 acres). Tax lot 1702 and tax lot 2400 have been sold.

taking into account the number of lots, parcels and dwellings currently located on the Measure 37 claim property and the contiguous property under the ownership of the claimant, it appears that the home site approvals will allow the claimant to establish one dwelling on tax lot 1701, 2300, or reconfigured tax lot 1700 of the Measure 37 claim property provided that the tax lot is served by an approved public or private water supply and approved individual sewage disposal system. The claimant may choose on which of these tax lots to locate the authorized dwelling.

The claimant is not eligible for any relief under Measure 49 on tax lot 1702 (.5 acres) and tax lot 2400 (4.74 acres) because the claimant no longer owns those portions of the Measure 37 claim property.

III. THE MAXIMUM NUMBER OF HOME SITE APPROVALS FOR WHICH THE CLAIMANT 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 material; 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 claimant has requested three home site approvals in the election material. The Measure 37 waiver issued for this claim describes three home sites. Therefore, the claimant may qualify for a maximum of three home site approvals under Section 6 of Measure 49.

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 claimant, Albert Dilnik, filed a Measure 37 claim, M118495, with the state on May 23, 2005. The claimant filed a Measure 37 claim, T1-05-042, with Multnomah County on July 12, 2005. The state claim was filed prior to December 4, 2006.

It appears that the claimant timely filed a Measure 37 claim with both the state and Multnomah 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 claimant 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 deed obtained by the Department, Albert Dilnik is the settlor of a revocable trust into which he conveyed tax lots 1700, 1701, and 2300 of the Measure 37 claim property and, therefore, is an owner of tax lot 1700, tax lot 1701, and tax lot 2300 of the property under Measure 49.

According to the information submitted by the claimant, Albert Dilnik has not established his ownership of tax lot 1702 (.5 acres) and tax lot 2400 (4.74 acres) for the purposes of Measure 49 because he is no longer an owner of the property.

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

It appears that the claimant Albert Dilnik is the sole owner of the reconfigured tax lot 1700, tax lots 1701 and 2300. 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 Multnomah County, outside the urban growth boundary and outside the city limits of the nearest city, Portland.

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

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

The property is currently zoned Commercial Forest Use (CFU-2) by Multnomah County, in accordance with ORS chapter 215 and OAR 660, division 6, because the property is “forest land” under Goal 4. Applicable provisions of ORS chapter 215 and OAR 660 division 6, enacted or adopted pursuant to Goal 4, provide standards for the establishment of a dwelling in a forest zone. In general and subject to some exceptions, those standards require that the property be a minimum of 80 acres and generate a minimum annual income from the sale of forest products.

The combined effect of the standards for the establishment of a dwelling in a forest zone is to prohibit the claimant from establishing a dwelling 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 claimant, it does not appear that the establishment of the three home sites for which the claimant 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."

Multnomah County deed records indicate that the claimant acquired the Measures 37 claim property on April 5, 1966.

On April 5, 1966, the Measure 37 claim property was subject to Multnomah County's Suburban Residential District (SR) zone. Multnomah County's SR zone required up to 40,000 square feet for the establishment of a dwelling on a vacant lot or parcel if the property was served by an approved public or private water supply and approved individual sewage disposal system. If the property was not served by an approved public water supply and public sewer, the lot area was increased to conform to the requirements of the Multnomah County Health Department. The reconfigured tax lot 1700 now consists of 4.38 acres, tax lot 1701 consists of 4.59 acres and tax lot 2300 consists of 4.74 acres. Therefore, the claimant lawfully could have established three home sites on the Measure 37 claim property on his date of acquisition provided that property is served by an approved public or private water supply and approved individual sewage disposal system.

2. Preliminary Conclusion

Based on the preliminary analysis, it appears that the claimant, Albert Dilnik qualifies for three home site approvals on the reconfigured tax lot 1700, tax lots 1701 and 2300 of the Measure 37 claim property under Section 6 of Measure 49.

Based on the preliminary analysis, the claimant does not qualify for Measure 49 home site approvals on tax lots 1702 and 2400 because Albert Dilnik is not an owner of that portion of the Measure 37 claim property.

Because the Measure 37 claim property includes two lots or parcels, that have been transferred to a different owner, the number of home site approvals that the claimant qualifies for on the portion of the property that he currently owns is reduced to one.

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 a 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 according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49. However, if a claimant otherwise qualifies for relief under Section 6 of Measure 49, the claimant will be able to establish one additional dwelling, regardless of the number of dwellings currently in existence.

Based on the documentation provided by the claimant and information from Multnomah County, the Measure 37 claim property that the claimant currently owns appears to currently include three lots or parcels and no dwellings. There is no contiguous property under the same ownership. Therefore, the one home site approval the claimant appears to qualify for under Section 6 of Measure 49 will allow the claimant to establish one dwelling on tax lot 1701, 2300, or reconfigured tax lot 1700 of the Measure 37 claim property. The claimant may choose on which of these three tax lots to locate the one authorized dwelling.

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 claimant 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 lots, parcels or dwellings a claimant may establish under a Measure 49 home site authorization is reduced by the number of lots, parcels and dwellings currently in existence on the Measure 37 claim property and contiguous property in the same ownership, regardless of whether evidence of their existence has been provided to the department. If, based on the information available to the department, the department has calculated the number of currently existing lots, parcels or dwellings to be either greater than or less than the number of lots, parcels or dwellings actually in existence on the Measure 37 claim property or contiguous property under the same ownership, then the number of additional lots, parcels or dwellings a claimant may establish pursuant to this home site authorization must be adjusted according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49.
5. Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimant may choose to convert any temporary dwelling currently located on the property on which the claimant is eligible for Measure 49 relief to an authorized home site pursuant to a 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 claimant is eligible for Measure 49 relief. No additional development is authorized on contiguous property for which no Measure 37 claim was filed.
7. The claimant may use a home site approval to convert a dwelling currently located on the property on which the claimant is eligible for Measure 49 relief to an authorized home site. If the number of dwellings existing on the property on which the claimant is eligible for Measure 49 relief exceeds the number of home site approvals the claimant qualifies for under a home site authorization, the claimant may select which existing dwellings to convert to authorized home sites.
8. The claimant may not implement the relief described in a Measure 49 Home Site Authorization if a claimant has been determined to have a common law vested right to a use described in a Measure 37 waiver for the property. Therefore, if a claimant has been determined in a final judgment or final order that is not subject to further appeal to have a common law vested right as described in section 5(3) of Measure 49 to any use on the Measure 37 claim property, then any Measure 49 Home Site Authorization for the property will be void. However, so long as no claimant has been determined in such a final judgment or final order to have a common law vested right to a use described in a Measure 37 waiver for the property, a use that has been completed on the property pursuant to a Measure 37 waiver may be converted to an authorized home site.
9. 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.
10. Because the property is located in a forest zone, the owner 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.
12. 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.

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 claimant and the claimant's 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 claimant and the claimant's 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 claimant and the claimant's 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.