



**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 22, 2008

**STATE ELECTION NUMBER:** E118590

**CLAIMANTS:** Thomas Burke  
26075 SE Hwy 212  
Boring, Oregon 97009

Educative, LLC  
14875 SE 262nd  
Boring, Oregon 97009

**MEASURE 37 PROPERTY  
IDENTIFICATION:** Township 2S, Range 3E, Section 2D  
Tax lot 100  
Clackamas County

**AGENT/  
PRIMARY CONTACT INFORMATION:** Gary Shepherd  
Oregon Land Law  
3115 SE Salmon St  
Portland, Oregon 97214

**I. ELECTION**

The claimants, Thomas Burke and Educative, LLC, filed a claim under ORS 197.352 (2005) (Measure 37) on June 13, 2005 for property located at 26075 SE Hwy 212, near Boring, in Clackamas County. ORS 195.300 to ORS 195.336 (Measure 49) entitles claimants who filed a Measure 37 claim to elect supplemental review of their claim under either Section 6 (Express option) or 7 (Conditional option) of Measure 49. The claimants have elected supplemental review of their Measure 37 claim under the Express option. The Express option authorizes the Department of Land Conservation and Development (the department) to issue 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 not eligible for any relief under Measure 49 because claimant Thomas Burke no longer owns the Measure 37

claim property, and because claimant, Educative, LLC would not have been lawfully permitted to establish any additional home sites when it acquired the property.

### **III. THE MAXIMUM NUMBER OF HOME SITE APPROVALS FOR WHICH THE CLAIMANTS MAY QUALIFY**

Under the Section 6 Express option, the number of home site approvals issued 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 three home site approvals in the election material. The claimants requested eight parcels and eight dwellings under Measure 37. Therefore, the claimants may qualify for a maximum of three home site approvals under the Section 6 Express option.

### **IV. PRELIMINARY ANALYSIS OF QUALIFICATION FOR HOME SITE APPROVAL**

#### **1. Preliminary Analysis**

To qualify for a home site approval under the Section 6 Express option, 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, Thomas Burke and Educative, LLC, filed a Measure 37 claim, M118590, with the state on June 13, 2005. The claimants filed a Measure 37 claim, ZC166-05, with Clackamas County on June 13, 2005. The state claim was filed prior to or on 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 the Express option 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 land sale contract submitted by the claimants, Educative, LLC is the purchaser under a recorded land sale and, therefore, an owner of the property under Measure 49.

According to the information submitted by the claimants, Thomas Burke has not established his ownership of the property for the purposes of Measure 49.

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

It appears that claimant Educative, LLC is the sole owner of the property. Therefore, no additional consents are 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 lot 100, is located in Clackamas County, at 26075 SE Hwy 212 (Township 2S, Range 3E, Section 2D), outside the urban growth boundary and outside the city limits of the nearest city, Boring.

**(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 three home site approvals.

The property is currently zoned EFU by Clackamas County, in accordance with ORS chapter 215 and OAR 660, division 33, because the property is “agricultural land” as defined by Goal 3.<sup>1</sup> Goal 3 requires agricultural land to be zoned exclusive farm use (EFU). Applicable provisions of ORS chapter 215 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, generally prohibit the establishment of a dwelling on a lot or parcel less than 80 acres in size in an EFU zone.

The claimants’ property consists of 17.95 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the three home sites the claimants may qualify for under Section 6 of Measure 49.

**(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.

---

<sup>1</sup> The claimants’ property is “agricultural land” because it contains Natural Resources Conservation Service Class I–IV soils and is located in western Oregon.

Based on the documentation submitted by the claimants, it does not appear that the establishment of home sites 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 Thomas Burke conveyed the property to John M. Griffin on March 8, 2005 and no longer has an ownership interest in the property.

Clackamas County deed records indicate that claimant Educative, LLC acquired the property on April 11, 2005.

On April 11, 2005 the Measure 37 claim property was subject to Clackamas County’s acknowledged EFU zone. Clackamas County’s EFU zone required 80 acres for the establishment of a dwelling on a lot or parcel. On Educative, LLC’s acquisition date, it lawfully could not have established a dwelling on a lot or parcel less than 80 acres. Claimant Educative, LLC’s property consists of 17.95 acres. Therefore, claimant Educative, LLC lawfully could not have established any home sites on its date of acquisition.

**2. Preliminary Conclusion**

Based on the preliminary analysis, the claimants, Thomas Burke and Educative, LLC, do not qualify for Measure 49 home site approvals because claimant Thomas Burke is not an owner of the Measure 37 claim property, and claimant Educative, LLC was not lawfully permitted to establish the lots, parcels or dwellings on its date of acquisition.

**V. NOTICE OF OPPORTUNITY TO COMMENT**

A claimant or the 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.

**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.**