



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

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

July 15, 2009

STATE ELECTION NUMBER:

E119723

CLAIMANTS:

Danny L. and Mary E. Erwert
24275 South Highway 213
Mulino, OR 97042

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 4S, Range 2E, Section 4B
Tax lot 1101
Clackamas County

I. ELECTION

The claimants, Danny and Mary Erwert, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on February 11, 2005 for property located at 24275 South Highway 213, near Mulino, 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 not eligible for any relief under Measure 49 because the claimants would not have been lawfully permitted to establish any additional home sites when they acquired the 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. The claimants have requested three home site approvals in the election material. The Measure 37

waiver issued for this claim describes six home sites. Therefore, the claimants 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 claimants, Danny and Mary Erwert, filed a Measure 37 claim, M119723, with the state on February 11, 2005. The claimants filed a Measure 37 claim, ZC027-05, with Clackamas County on February 10, 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, Danny and Mary Erwert 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 near the community of Mulino.

(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 Exclusive Farm Use (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. 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, generally prohibit the establishment of a lot or parcel less than 80 acres in size in an EFU zone, and regulate the establishment of dwellings on new or existing lots or parcels.

The claimants’ property consists of 5.74 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.

Based on the documentation submitted by the claimants, it does not appear that the establishment of the three 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 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 Danny Erwert acquired the property on December 5, 1975, and claimant Mary Erwert acquired the property on December 18, 1996. Therefore, for purposes of Measure 49, the claimants’ acquisition date is December 5, 1975.

The claimants acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Commission acknowledged Clackamas County’s comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. At that time, the Measure 37 claim property was zoned Rural Agricultural Residential-1 (RA-1) by Clackamas County. However, the Commission had not acknowledged that zone for compliance with the goals when the claimants acquired the property on December 5, 1975. Accordingly, the statewide planning goals, and in particular Goal 3 and ORS chapter 215 applied directly to the Measure 37 claim property when the claimants acquired it.

To determine whether a use of property that was not subject to an acknowledged zone at the time the claimant acquired it would have complied with Goal 3 and ORS 215, OAR 660-041-0110 provides that DLCD will apply the first acknowledged local land use regulations, unless the evidence in the record, including but not limited to, county Measure 37 waivers or local land use determinations issued at the time the property was acquired, establishes that a greater number of lots, parcels or dwellings would have been lawfully permitted.

In 1976, Goal 3 was “to preserve and maintain agricultural lands. It required the adoption of exclusive farm use zones pursuant to ORS chapter 215, and required that “[s]uch minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area.”

On December 21, 1982, the Commission acknowledged the application of Clackamas County’s Exclusive Farm Use (EFU-20) zone to the Measure 37 claim property. The Commission’s acknowledgement of Clackamas County’s EFU-20 zone confirmed that zone’s compliance with Goal 3 and ORS chapter 215. Clackamas County’s acknowledged EFU-20 zone required 20 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants’ property consists of 5.74 acres which is developed with one dwelling. Division of the property would thus necessarily result in a new parcel of less than 3 acres.

There is no evidence in the record that establishes that the creation of new parcels of less than 3 acres for the development of a dwelling would have satisfied Goal 3 or ORS chapter 215 prior to acknowledgement. Specifically, there is no evidence in the record to establish that a less than 3-acre parcel with a dwelling would serve to “preserve and maintain agricultural lands” or that such small lot sizes would “be appropriate for the continuation of the existing commercial agricultural enterprise within the area.” Unless the claimant is able to show that a division of the claimant’s property into less than 3-acre parcels for residential development would have satisfied the requirements of Goal 3 and ORS chapter 215 it appears that the claimant does not qualify for the requested home sites.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimants, Danny and Mary Erwert do not qualify for Measure 49 home site approvals because the claimants were not lawfully permitted to establish any additional lots, parcels or dwellings on the claimants' date of acquisition.

V. 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.

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.