



# Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

Measure 49 Development Services Division

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<http://www.oregon.gov/LCD/MEASURE49>

## Measure 49 Notice of Preliminary Evaluation



June 16, 2010

**STATE ELECTION NUMBERS:** E122312 and E122313<sup>1</sup>

**CLAIMANTS:** R. James and Elaine Koester

**MEASURE 37 PROPERTY:** Township 5S, Range 5W  
Section 20, Tax lot 1500  
Section 28, Tax lot 100  
Yamhill County

As required under OAR 660-041-0090(3), you are receiving this notice to inform you of the Department of Land Conservation and Development's (Department) Preliminary Evaluation of the supplemental review of the above-referenced claim under Measure 49.

The claimant(s) identified above filed a Measure 37 claim pursuant to ORS 197.352 (2005 edition). On November 6, 2007, the Oregon voters approved Ballot Measure 49. Under Measure 49, Measure 37 claimants may elect to have their Measure 37 claim reviewed under Measure 49. Claimants who elect review of their Measure 37 claims under Measure 49, and who meet the requirements of either Section 6 or 7 of Measure 49, are eligible for relief in the form of a specific number of home site approvals, as provided for under Section 6 (up to three home sites) or 7 (up to ten home sites) of Measure 49.

The claimant(s) in the above-referenced claim elected supplemental review of the Measure 37 claim under Section 6 of Measure 49. To determine eligibility for relief, the department must determine whether the claim meets the following requirements:

- The claimant(s) must be owners of the property, as defined in Measure 49.
- All owners of the property must have consented in writing to the claim.
- The property must be located entirely outside any urban growth boundary and entirely outside the boundaries of any city.
- One or more land use regulations must prohibit establishing the lot, parcel or dwelling.
- Establishing the lot, parcel or dwelling must not be prohibited by a regulation that was enacted before the claimant's acquisition date, or by a regulation that restricts or prohibits activities commonly and historically recognized as public nuisances, for the protection of public health or safety, or that are required to comply with federal law as described in ORS 197.352(3).
- On the claimant's acquisition date, the claimant lawfully was permitted to establish the number of lots, parcels or dwellings on the property that are authorized by either Section 6 or Section 7 of Measure 49 based on the claimant's Election.

<sup>1</sup> The claimants submitted a separate claim for relief under Measure 37 and Measure 49 for each of the two subject tax lots; claim E122312 for tax lot 100 and claim E122313 for tax lot 1500. The department has consolidated claims E122312 and E122313 for purposes of the preliminary evaluation because the properties are under the same ownership, are similarly situated, and the claimants requested the same relief for each property. However, the properties are not contiguous and the department has not combined the claims for review purposes. The department has conducted the analysis of the claimants' eligibility for Measure 49 relief separately for each tax lot.

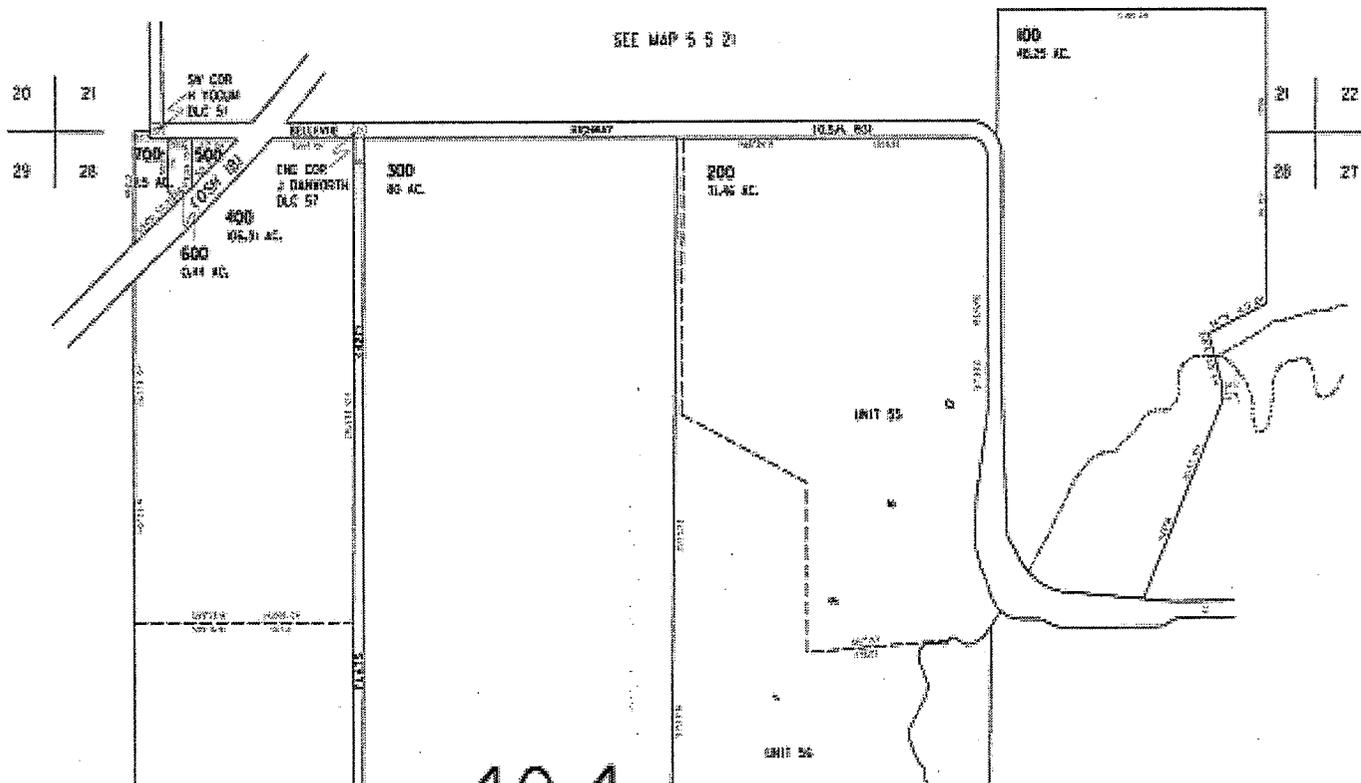
Based on the department's preliminary analysis, it appears that the claimants are qualified for one home site approval on tax lot 100, the Measure 37 claim property for claim E122312, and one home site approval on tax lot 1500, the Measure 37 claim property for claim E122313. The claimants' property, including both the Measure 37 claim property and all contiguous property in the same ownership, currently appears to consist of two lots or parcels, which are developed with no dwellings. 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 home site approvals will allow the claimants to establish one dwelling on tax lot 100 and one dwelling on tax lot 1500 of the Measure 37 claim property.

A copy of the Preliminary Evaluation of the claim is posted on the department's website at <http://www.oregon.gov/LCD/MEASURE49/index.shtml>. You may also request a copy of the Preliminary Evaluation by calling 503-373-0050 ext. 324.

This Preliminary Evaluation is not a final decision on this claim. Any person receiving this Notice may submit written comments, evidence or information addressing the above requirements upon which the department must base its decision. All materials and written responses must be mailed or delivered to: Supplemental Measure 49 Claim Review, 635 Capitol Street NE, Suite 150, Salem, OR 97301-2540 and will be deemed timely filed if mailed or actually delivered to the department within 28 days from the date of this notice. The Department will provide a copy of all materials received to the claimant(s) and the agent for the claimant(s), who are entitled to an additional 21 days to file written responses. Please reference the claim number and claimant name and clearly mark your comments as "Preliminary Evaluation Comments." **Comments submitted electronically or by facsimile will not be accepted.**

Following receipt and evaluation of all materials and responses submitted in response to this notice, the department will issue a final decision on this claim. If the final decision determines that the claim is entitled to relief in the form of one or more home sites, the exact location of authorized parcels and/or dwellings would be determined through a local county review process.

Subject Property (Tax Lot 100) and Area Map





OREGON DEPARTMENT OF LAND CONSERVATION AND  
DEVELOPMENT

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

June 16, 2010

**STATE ELECTION NUMBERS:** E122312 and E122313<sup>1</sup>

**CLAIMANTS:** R. James and Elaine Koester  
26913 Chateau Lake Drive  
Kingwood, TX 77339

**MEASURE 37 PROPERTY IDENTIFICATION:** Township 5S, Range 5W  
Section 20, Tax lot 1500  
Section 28, Tax lot 100  
Yamhill County

## I. ELECTION

The claimants, R. James and Elaine Koester, filed claims with the state under ORS 197.352 (2005) (Measure 37) on September 13, 2005, for property located near the intersection of Highway 18 and Highway 153, near Sheridan, in Yamhill 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 claims 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 one home site approval on tax lot 100, the Measure 37 claim property for claim E122312, and one home site approval on tax lot 1500, the Measure 37 claim property for claim E122313. The claimants' property, including both the Measure 37 claim property and all contiguous property in the same ownership, currently appears to consist of two lots or parcels, which are developed with no dwellings. 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

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<sup>1</sup> The claimants submitted a separate claim for relief under Measure 37 and Measure 49 for each of the two subject tax lots; claim E122312 for tax lot 100 and claim E122313 for tax lot 1500. The department has consolidated claims E122312 and E122313 for purposes of the preliminary evaluation because the properties are under the same ownership, are similarly situated, and the claimants requested the same relief for each property. However, the properties are not contiguous and the department has not combined the claims for review purposes. The department has conducted the analysis of the claimants' eligibility for Measure 49 relief separately for each tax lot. .

ownership, it appears that the home site approvals will allow the claimants to establish one dwelling on tax lot 100 and one dwelling on tax lot 1500 of 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 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 claimants have requested one home site approval in the election material for E122312 and one home site approval in the election material for E122313. The Measure 37 waivers issued for these claims describe one home site on each tax lot. Therefore, the claimants may qualify for a maximum of one home site approval on tax lot 100 and one home site approval on tax lot 1500 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, R. James and Elaine Koester, filed Measure 37 claims, M122312 and M122313, with the state on September 13, 2005. The claimants filed Measure 37 claims, M37-37-05 and M37-3805, with Yamhill County on March 11, 2005. The state claims were filed prior to December 4, 2006.

It appears that the claimants timely filed a Measure 37 claim with both the state and Yamhill 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, R. James and Elaine Koester are the settlors of a revocable trust into which they conveyed the Measure 37 claim property 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 Yamhill County, outside the urban growth boundary and outside the city limits of the nearest city, Sheridan.

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

As stated in Section III above, the claimant may qualify for one home site approval on tax lot 100 and one home site approval on tax lot 1500.

The property is currently zoned Exclusive Farm Use (EF-80) by Yamhill 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 (EFU). Applicable provisions of ORS chapter 215 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, provide standards for the establishment of a dwelling in an EFU zone. In general and subject to some exceptions, those standards require that the property be a minimum of 80 acres in size in an EFU zone and generate a minimum annual income from the sale of farm products.

The combined effect of the standards for the establishment of a dwelling in an EFU zone is to prohibit the claimants from establishing a dwelling on each tax lot of 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 claimants, it does not appear that the establishment of the one home site on each tax lot 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 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."

Yamhill County deed records indicate that the claimants acquired tax lot 100 (48.25 acres) on February 2, 1983 and tax lot 1500 (29.16 acres) on October 31, 1983.

On February 2, 1983 and October 31, 1983, the Measure 37 claim property was subject to Yamhill County's acknowledged Exclusive Farm Use (EF-40) zone. Yamhill County's EF-40 zone required 40 acres for the creation of a new lot or parcel on which a dwelling could be established and permitted a dwelling on an existing lot or parcel if certain criteria were met as determined by an administrative review process. The Measure 37 claim property consists of a 48.25 acre parcel and a 29.16 acre parcel. Pursuant to the claimants' Measure 37 claims, Yamhill County issued decisions, FD-13-06 and FD-14-06, in which the county authorized dwellings on each of the claim parcels based on the EF-40 zoning in effect on the claimants' property in 1983. Therefore, the claimants lawfully could have established one home site on each tax lot of the Measure 37 claim property on their date of acquisition.

**2. Preliminary Conclusion**

Based on the preliminary analysis, it appears that the claimants, R. James and Elaine Koester qualify for one home site approval on each tax lot of the Measure 37 claim property under Section 6 of Measure 49.

**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 claimants and information from Yamhill County, the Measure 37 claim property appears to currently include two lots or parcels and no dwellings.

There is no contiguous property under the same ownership. Therefore, the one home site approval on tax lot 100 and one home site approval on tax lot 1500 the claimants appear to qualify for under Section 6 of Measure 49 will allow the claimants to establish one dwelling on tax lot 100 and one dwelling on tax lot 1500 of the Measure 37 claim property.

## **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 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 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 dwellings a claimant may be eligible to establish under a Measure 49 home site authorization is reduced by the number of 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 dwellings to be either greater than or less than the number of dwellings actually in existence on the Measure 37 claim property or contiguous property under the same ownership, then the number of additional 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. Statements in this preliminary evaluation regarding the number of lots, parcels or dwellings currently existing on the Measure 37 claim property and contiguous property are not a determination on the current legal status of those lots, parcels or dwellings.
5. 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.

6. A home site approval only authorizes the establishment of a new dwelling on the 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.
7. The claimants may use a home site approval to convert a dwelling currently located on the property on which the claimants are eligible for Measure 49 relief to an authorized home site. If the number of dwellings existing on the property on which the claimants are eligible for Measure 49 relief exceeds the number of home site approvals the claimants qualify for under a home site authorization, the claimants may select which existing dwellings to convert to authorized home sites.
8. The claimants 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 an exclusive farm use 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 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.**