



**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 23, 2008

STATE ELECTION NUMBER: E124529B¹

CLAIMANT: Thomas Marlow
1932 Woodson Loop
Eugene, Oregon 97405

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 18S, Range 1W, Section 32
Tax lot 1005
Lane County

**AGENT/
PRIMARY CONTACT INFORMATION:** Steve Cornacchia
Hershner Hunter, LLP
180 East 11th Avenue
Eugene, Oregon 97401

I. ELECTION

The claimant, Thomas Marlow, filed a claim under ORS 197.352 (2005) (Measure 37) on March 21, 2006 for property located near Fall Creek, in Lane 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 claimant has elected supplemental review of his 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 claimant is not eligible for any relief under Measure 49 because the claimant would not have been lawfully permitted to establish any home sites when he acquired the property.

¹ Claim E124529 has been divided into three claims because the claim includes multiple tax lots or parcels that are not in the same ownership. E124529B refers to tax lot 1005 and claimant Thomas Marlow. E124529A refers to tax lot 1000 and claimants Gary Marlow, Maxine Marlow, Kearney Simpson and Patricia Simpson. E124529C refers to tax lots 1001 and 1003 and claimant Jerry Dilley.

III. THE MAXIMUM NUMBER OF HOME SITE APPROVALS FOR WHICH THE CLAIMANT 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 claimant has requested three home site approvals in the election material. The Measure 37 waiver issued for this claim describes two to five-acre home sites. Therefore, the claimant 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 claimant, Thomas Marlow, filed a Measure 37 claim, M124529, with the state on March 21, 2006. The claimant filed a Measure 37 claim, PA06-5346, with Lane County on March 2, 2006. The state claim was filed prior to or on December 4, 2006.

It appears that the claimant timely filed a Measure 37 claim with both the state and Lane 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 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 submitted by the claimant, Thomas Marlow is the owner of fee title to the property as shown in the Lane County deed records and, therefore, an owner of the property under Measure 49.

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

It appears that the claimant 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 1005, is located in Lane County, outside the urban growth boundary and outside of any city near the community of Fall Creek

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

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

The property is currently zoned Exclusive Farm Use (E40) by Lane County, in accordance with ORS chapter 215 and OAR 660, division 33, because the property is “agricultural land” as defined by Goal 3.² 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. Under ORS 215.780(2)(a), counties may adopt minimum lot sizes smaller than 80 acres, subject to approval by the Land Conservation and Development Commission (the Commission). The Commission has approved Lane County’s E40 zone, which requires a minimum lot size of 40 acres.

The claimant’s property consists of 17.70 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the three homes 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 claimant, it does not appear that the establishment

² The claimant’s property is “agricultural land” because it contains Natural Resources Conservation Service Class I–IV soils and is located in western Oregon.

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.”

Lane County deed records indicate that the claimant acquired the property on March 3, 1982..

On March 3, 1982, the Measure 37 claim property was subject to state statutes, the statewide planning goals and implementing regulations. On the claimant’s date of acquisition the property was zoned Farm Forest-20 by Lane 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 3 in particular, and ORS ch. 215 applied directly to the claimant’s property.

On January 19, 1991, the Commission acknowledged the application of Lane County’s E40 zone to the Measure 37 claim property. The Commission’s acknowledgement of Lane County’s E40 zone confirmed that zone’s compliance with Goal 3 and ORS ch. 215. Lane County’s acknowledged E40 zone required 40 acres for the establishment of a dwelling on a lot or parcel. The claimant’s property consists of 17.70 acres. Therefore, the claimant lawfully could not have established any lots or parcels with dwellings on his acquisition date in the zone that was ultimately acknowledged to comply with the law that controlled the establishment of dwellings and land divisions on the property on the claimant’s date of acquisition. It appears that the claimant does not qualify for any home sites unless the claimant can show that a direct application of the Goals and ORS ch. 215 would have allowed the claimant to establish additional dwellings.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimant, Thomas Marlow, does not qualify for Measure 49 home site approvals because the claimant was not lawfully permitted to establish the requested lots, parcels or dwellings on the claimant’s 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 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.