



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

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

December 2, 2009

STATE ELECTION NUMBER: E130269

CLAIMANT: William R. Tye
25840 Alfalfa Market Road
Bend, OR 97701

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 17S, Range 14E, Section 22
Tax lots 1300 and 1302
Deschutes County

AGENT CONTACT INFORMATION: Robert S. Lovlien
PO Box 880
Bend, OR 97709

I. ELECTION

The claimant, William Tye, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on October 12, 2006, for property located at 25840 Alfalfa Market Road, near Bend, in Deschutes 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 not eligible for any relief under Measure 49 because the claimant would not have been lawfully permitted to establish any additional home sites when he acquired the 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

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. However, if the number of lots, parcels and dwellings currently in existence on the Measure 37 claim property and the contiguous property under the same ownership is equal to or greater than the maximum number of home sites a claimant could otherwise qualify for under Section 6 of Measure 49, a claimant may qualify for only one home site approval.

The claimant has requested four home site approvals in the election material. The Measure 37 waiver issued for this claim describes six home sites. However, because it appears that the Measure 37 claim property and contiguous property in the same ownership contain three or more lots or parcels that are developed with dwellings, the claimant may qualify for a maximum of one home site approval.

IV. PRELIMINARY ANALYSIS OF QUALIFICATION FOR HOME SITE APPROVAL

I. 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, William Tye, filed a Measure 37 claim, M130269, with the state on October 12, 2006. The claimant filed a Measure 37 claim, M37-06-115, with Deschutes County on October 6, 2006. 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 Deschutes 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 land sale contract submitted by the claimant, William Tye is the purchaser under a recorded land sale contract in force for the property and, therefore, is 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 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 Deschutes County, outside the urban growth boundary and outside the city limits of the nearest city, Bend.

(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 one home site.

The property is currently zoned Exclusive Farm Use (EFU-AL) by Deschutes 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 claimant's property consists of 59.22 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the one home site the claimant 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 of the one home site 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 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."

Deschutes County deed records indicate that the claimant acquired the property on December 3, 1979.

The claimant acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Commission acknowledged Deschutes 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 Exclusive Farm Use (EFU-20) by Deschutes County. Deschutes County's EFU-20 zone required 20 acres for the creation of a lot or parcel on which a dwelling could be established. However, the Commission had not acknowledged that zone for compliance with the goals when the claimant acquired the property on December 3, 1979. Accordingly, the statewide planning goals, and in particular Goal 3, and ORS chapter 215 applied directly to the Measure 37 claim property when the claimant acquired it.

On May 11, 1981, the Commission acknowledged the application of Deschutes County's Exclusive Farm Use (EFU-40) zone to the Measure 37 claim property. The Commission's acknowledgement of Deschutes County's EFU-40 zone confirmed that zone's compliance with Goal 3, and ORS chapter 215. Deschutes County's acknowledged EFU-40 zone required 40 acres for the establishment of a dwelling on a vacant lot or parcel. The claimant's property consists of 59.22 acres and is developed with 2 dwellings. Therefore, on the claimant's acquisition date, he could not have established a home site, in addition to the existing lots or parcels with dwellings, in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations. It appears that the claimant does not qualify for a home site, unless the claimant can show that the Deschutes County EFU-20 zone and a direct application of the Goals and ORS chapter 215 would have allowed the claimant to establish the one home site for which the claimant may be eligible.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimant, William Tye, does not qualify for Measure 49 home site approvals because the claimant was not lawfully permitted to establish the lot, parcel or dwelling on the claimant's 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 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.