



**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 11, 2009

STATE ELECTION NUMBER: E130536

CLAIMANTS: Brett W. Johanson
2157 West Burnside #25
Portland, OR 97210

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 2S, Range 7E, Section 23D
Tax lot 1902¹
Clackamas County

I. ELECTION

The claimant, Brett Johanson, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 2, 2006, for property located at 20491 East Lolo Pass Road, near Brightwood, 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 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 is not currently prohibited from establishing the one home site the claimant qualifies for under Measure 49.

**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

¹ The Measure 37 claim was originally for tax lots 1902 (Township 2S, Range 7E, Section 23D) and 800 (Township 2S, Range 7E, Section 26AA). The claimant did not indicate that he would like the department to review his eligibility for relief on tax lot 800. Tax lot 800 is not under the same ownership as tax lot 1902. Therefore, while a claimant cannot amend claim property, this Preliminary Evaluation addresses only the claimant's eligibility for relief on tax lot 1902, and all references to the Measure 37 claim property refer only to tax lot 1902.

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 five home sites. Therefore, the claimant 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

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, Brett Johanson, filed a Measure 37 claim, M130536, with the state on November 2, 2006. The claimant filed a Measure 37 claim, ZC189-06, with Clackamas County on September 13, 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 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 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, Brett Johanson is the owner of fee title to the property as shown in the Clackamas County deed records 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 Clackamas County, outside any urban growth boundary and outside of any city limits, near the unincorporated community of Brightwood.

(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 Rural Residential Farm/Forest (RRFF-5) by Clackamas County, in accordance with Goal 14, which prohibits the urban use of rural land and requires local comprehensive plans to identify and separate urbanizable from rural land in order to provide for the orderly and efficient transition from rural to urban use. State laws, namely Goal 14 and OAR 660-004-0040, prohibit the establishment of a lot or parcel less than the size established in the County rural residential zone in existence on October 4, 2000, if the zone in existence on that date had a minimum lot size of two or more acres. Clackamas County's RRFF-5 requires a minimum lot size of five acres and allows establishment of one dwelling on a pre-existing vacant lot or parcel of record less than five acres.

The claimant's property consists of 2.8 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property two of the three home sites 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 three home sites 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."

Clackamas County deed records indicate that the claimant acquired the property on April 8, 1977.

The claimant 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 Recreational Residential (RR) by Clackamas County, which required a minimum parcel size of one acre for the creation of a new lot or parcel. However, the Commission had not acknowledged Clackamas County's comprehensive plan and land use regulations for compliance with the goals when the claimant acquired the property on April 8, 1977. Accordingly, the statewide planning goals, and in particular Goal 14, applied directly to the property when the claimant acquired it.

On April 8, 1977, Goal 14 required counties "to provide for an orderly and efficient transition from rural to urban land use." The Goal required the creation of urban growth boundaries to "identify and separate urbanizable land from rural land," and prohibited the location of "urban uses" outside urban growth boundaries without the approval of a Goal 2 exception to Goal 14. In general, and consistent with subsequent judicial interpretation and LCDC rules implementing Goal 14, urban uses included residential lots or parcels less than two acres in size. Ultimately, the County's acknowledged plan zoned the subject property to require a minimum of five acres for the creation of a new lot or parcel. Therefore, the establishment of a new lot or parcel of five acres on the subject property would have complied with Goal 14 on the claimant's date of acquisition. However, based on evidence in the record and consistent with judicial and regulatory authority, under a direct application of the goals, prior to acknowledgment, a lot or parcel of two acres or more could also have complied with the requirements of Goal 14.

The claimant's property consists of 2.8 acres. Therefore, the claimant's request to create three home sites would result in parcels smaller than two acres. Without additional evidence to establish that, as applied to the subject property, the requested smaller parcels would have satisfied the requirements of Goal 14, the claimant lawfully could have established no more than one home site when he acquired the property. The claimant, therefore, appears to be qualified for up to one home site under Section 6 of Measure 49, unless additional evidence can establish that, in this instance, a direct application of Goal 14 would have allowed the claimant to establish smaller lots or parcels. State land use regulations do not currently prohibit the claimant from establishing one home site on the Measure 37 claim property.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimant, Brett Johanson, does not qualify for Measure 49 home site approvals because the claimant is not currently prohibited from establishing the one home site the claimant may otherwise qualify for under Measure 49.

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.