



OREGON DEPARTMENT OF LAND CONSERVATION AND  
DEVELOPMENT

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

November 12, 2009

STATE ELECTION NUMBERS: E131615, E131616, E131807A, E131808<sup>1,2</sup>

CLAIMANT: Schreiner's Gardens, Inc.  
3625 Quinaby Road NE  
Salem, OR 97303

MEASURE 37 PROPERTY IDENTIFICATION: Township 6S, Range 2W  
Section 19, Tax lots 400 and 500<sup>3</sup>  
Section 19B, Tax lots 300, 400, 500, 600,  
700, 1100 and 1200  
Section 19C, Tax lots 200, 300 and 800

Township 6S, Range 3W  
Section 24A, Tax lots 100 and 200  
Section 24D, Tax lot 1200 and 1700  
Marion County

AGENT CONTACT INFORMATION: Alan M. Sorem  
Saalfeld Griggs PC  
PO Box 470  
Salem, OR 97308

**I. ELECTION**

The claimant, Schreiner's Gardens, Inc., filed claims with the state under ORS 197.352 (2005) (Measure 37) on November 29, 2006, and November 30, 2006, for property located west of

<sup>1</sup> Claims E131615, E131616, 131807A and E131808 have been combined into one claim because the properties are contiguous. Per OAR 660-041-0150 the Department of Land Conservation and Development will combine multiple claims into one claim if the Measure 37 claim property contains multiple contiguous lots or parcels that are in the same ownership.

<sup>2</sup> The claimant also has a claim, E131807B, for property that is not contiguous to the property subject to these claims.

<sup>3</sup> The Measure 37 claim property consisted of tax lots 100, 200 (S19C), 200 (S24A), 300 (S19B), 300 (S19C), 400 (S19), 400 (S19B), 500 (S19), 500 (S19B), 600, 700, 800, 1100, 1200 (S19B), 1200 (S24D) and 1700. The claimant did not elect supplemental review for tax lots 200 (S24A), 300 (S19C), 800, 1100, 1200 (S19B) and 1200 (S24D); however, a claim cannot be amended to remove claim property.

Interstate 5 on Perkins Street NE and Quinaby Road NE, near Salem, in Marion 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 its 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 claimant is qualified for one home site approval on the portion of the Measure 37 claim property consisting of tax lot 200 (S24A), tax lot 300 (S19B), tax lot 300 (S19C), tax lot 400 (S19B), tax lot 500 (S19B), tax lot 600, tax lot 700, tax lot 800, tax lot 1100 and tax lot 1200 (S19B). The claimant's property, including both the Measure 37 claim property and all contiguous property in the same ownership, currently appears to consist of seventeen lots or parcels, which are developed with five dwellings. 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 exceeds the maximum number of home sites the claimant could qualify for under Section 6 of Measure 49. However, because the claimant otherwise qualifies for relief under Section 6, the claimant appears to qualify for one home site approval on the Measure 37 claim property. 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 one home site approval will allow the claimant, Schreiner's Gardens, Inc., to establish one additional dwelling on the portion of the Measure 37 claim property consisting of tax lots 200 (S24A), 300 (S19B), 300 (S19C), 400 (S19B), 500 (S19B), 600, 700, 800, 1100 and 1200 (S19B).

Based on the preliminary analysis, the claimant, Schreiner's Gardens, Inc., does not qualify for any relief under Measure 49 on the portion of the property consisting of tax lots 100, 200 (S19), 400 (S19), 500 (S19), 1200 (S24D) and 1700 because the claimant was not lawfully permitted to establish the requested home site when the claimant acquired those portions of 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 section 6 review in the election material. No waivers were issued for these claims. The Measure 37 claims filed with the state describe more than three home sites. 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**

##### **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 claimant, Schreiner's Gardens, Inc., filed Measure 37 claims, M131615, M131616, M131807 and M131808, with the state on November 29, 2006, and November 30, 2006. The claimant filed Measure 37 claims, M06-212, M06-213, M06-255 and M06-256, with Marion County on November 11, 2006, November 29, 2006, and November 30, 2006. The state claims were filed prior to December 4, 2006.

It appears that the claimant timely filed Measure 37 claims with both the state and Marion 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 deeds submitted by the claimant, Schreiner's Gardens, Inc. is the owner of fee title to the property as shown in the Marion 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 Marion County, outside the urban growth boundary and outside the city limits of the nearest city, Salem.

**(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) by Marion 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. Those provisions also regulate the establishment of dwellings on new or existing lots or parcels and include restrictions on establishing more than one dwelling on a single tract.

The claimant’s property consists of more than 300 acres that make up a single tract. 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."

Marion County deed records indicate that the claimant acquired tax lots 300 (S19B), 300 (S19C), 400 (S19B), 500 (S19B), 600, 700, and 1100 on January 7, 1961, tax lot 800 on August 12, 1964, tax lot 1200 (S19B) on April 1, 1971, tax lot 200 (S24A) on December 2, 1974, tax lot 1700 on August 10, 1975, tax lot 400 (S19) on October 9, 1981, tax lots 100 and 500 (S19) on December 3, 1983, tax lot 200 (S19C) on June 22, 1988, and tax lot 1200 (S24D) on September 20, 2007.

On January 7, 1961, and August 12, 1964, the Measure 37 claim property consisted of 110.83 acres and was not subject to any local or state laws that would have prohibited the claimant from establishing the one home site for which the claimant may be eligible. Therefore, the claimant lawfully could have established the one home site for which the claimant may be eligible on its dates of acquisition of tax lots 300 (S19B), 300 (S19C), 400 (S19B), 500 (S19B), 600, 700, 800 and 1100.

On April 1, 1971, the Measure 37 claim property consisted of 116.41 acres that are currently developed with 2 dwellings on separate lots or parcels, and was subject to Marion County's Residential Agriculture (RA) zone. Marion County's RA zone required at least 6,000 square feet for the creation of a new lot or parcel on which a dwelling could be established. Therefore, the claimant lawfully could have established the one home site for which the claimant may be eligible on its date of acquisition of tax lot 1200 (S19B).

On December 2, 1974, the Measure 37 claim property consisted of 136.77 acres that are currently developed with 2 dwellings on separate lots or parcels, and was subject to state statutes and Marion County's RA zone. Marion County's RA zone required at least 6,000 square feet for the creation of a new lot or parcel on which a dwelling could be established. Therefore, under the local zoning then in effect, the claimant lawfully could have established the one home site for which the claimant may be eligible on its date of acquisition of tax lot 200 (S24A).

However, state law in effect when the claimant acquired tax lot 200 (S24A) of the Measure 37 claim property, specifically ORS 197.175(1) and 197.280 (1973 edition), required that counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). Those interim land use planning goals included: "To preserve the quality of the air, water and land resources of the state"; "To conserve prime farm lands for the production of crops"; "To provide for the orderly and efficient transition from rural to urban land use"; "To protect life and property in areas subject to floods, landslides and other natural disasters"; and "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development" ORS 215.515 (1973 edition).

The applicable provisions of the interim goals are furthered by provisions of Section 6 of Measure 49, which limits the number of home sites authorized, and by Section 11(3), which regulates the size and location of lots or parcels on high-value farm or forest land. Measure 49 Section 11(3) requires new parcels on high-value farm or forest land to be no larger than two acres and “clustered so as to maximize suitability of the remnant lot or parcel for farm or forest use.”

The claimant acquired tax lots 1700 and 400 (S19) of the Measure 37 claim property after adoption of the statewide planning goals, but before the Commission acknowledged Marion 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) by Marion County. In both 1975 and 1981, Marion County's EFU zone did not allow more than one dwelling on a single tract. However, the Commission had not acknowledged that zone for compliance with the goals when the claimant acquired tax lot 1700 on August 10, 1975, and tax lot 400 (S19) on October 9, 1981. 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 tax lots 1700 and 400 (S19).

On October 18, 1981, the Commission acknowledged the application of Marion County's EFU zone to the Measure 37 claim property. The Commission's acknowledgement of Marion County's EFU zone confirmed that zone's compliance with Goal 3 and ORS chapter 215. Marion County's acknowledged EFU zone required 60 acres for the creation of a lot or parcel on which a dwelling could be established and did not allow more than one dwelling on a single tract. The claimant's property consisted of 213.07 acres that are currently developed with 3 dwellings on separate lots or parcels. Therefore, the claimant lawfully could not have established the one home site, in addition to the existing lots or parcels with dwellings, on the claimant's date of acquisition of tax lots 1700 and 400 (S19).

On December 3, 1983, and June 22, 1988, the Measure 37 claim property was subject to Marion County's acknowledged EFU zone. Marion County's EFU zone required 60 acres for the creation of a new lot or parcel on which a dwelling could be established and did not allow more than one dwelling on a single tract. On December 3, 1983, the claimant's property consisted of 277.59 acres that are currently developed with 4 dwellings on separate lots or parcels. On June 22, 1988, the claimant's property consisted of 288.39 acres that are currently developed with 5 dwellings on separate lots or parcels. Therefore, the claimant lawfully could not have established the one home site, in addition to the existing lots or parcels with dwellings, on its dates of acquisition of tax lots 100, 500 (S19) and 200 (S19C).

On September 20, 2007, the Measure 37 claim property was subject to Marion County's acknowledged EFU zone. Marion County's EFU zone required 80 acres for the creation of a new lot or parcel on which a dwelling could be established and did not allow more than one dwelling on a single tract. The claimant's property consists of 307.35 acres and is developed with five dwellings on separate lots or parcels. Therefore, the claimant lawfully could not have established a home site, in addition to the existing lots or parcels with dwellings, on its date of acquisition of tax lot 1200 (S24D).

## **2. Preliminary Conclusion**

Based on the preliminary analysis, it appears that the claimant, Schreiner's Gardens, Inc., qualifies for one home site approval under Section 6 of Measure 49 on the portion of the Measure 37 claim property consisting of tax lots 200 (S24A), 300 (S19B), 300 (S19C), 400 (S19B), 500 (S19B), 600, 700, 800, 1100 and 1200 (S19B).

Based on the preliminary analysis, the claimant, Schreiner's Gardens, Inc., does not qualify for a Measure 49 home site approval on the portion of the property consisting of tax lots 100, 200 (S19C), 400 (S19), 500 (S19), 1200 (S24D) and 1700 because the claimant was not lawfully permitted to establish the requested home site when the claimant acquired those portions of the property.

## **V. NUMBER OF LOTS, PARCELS OR DWELLINGS ON OR CONTAINED WITHIN THE PROPERTY**

The number of lots, parcels or dwellings that a claimant is authorized to establish pursuant to a home site authorization is reduced by the number of lots, parcels or 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. If a claimant otherwise qualifies for relief under Section 6 of Measure 49, the claimant will be able to establish at least one additional lot, parcel or dwelling, regardless of the number of dwellings currently in existence.

Based on the documentation provided by the claimant and information from Marion County, the Measure 37 claim property appears to currently include 16 lots or parcels and five dwellings.<sup>4</sup> As demonstrated by the supplemental information submitted by the claimant, the claimant also owns tax lot 1600 (T6S R3W S24D) which is contiguous to the Measure 37 claim property. The contiguous property under the same ownership appears to include one parcel and no dwellings. Together, it appears that the Measure 37 claim property and the contiguous property in the same ownership include seventeen lots or parcels and five dwellings. Therefore the one home site approval the claimant appears to qualify for will allow the claimant to establish one additional dwelling on the Measure 37 claim property. The dwelling must be on a separate lot or parcel, and must be contained within tax lot 200 (S24A), tax lot 300 (S19B), tax lot 300 (S19C), tax lot 400 (S19B), tax lot 500 (S19B), tax lot 600, tax lot 700, tax lot 800, tax lot 1100 or tax lot 1200 (S19B) of the Measure 37 claim property.

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<sup>4</sup> The documentation for this claim indicates that there may be two temporary dwellings currently located on the subject property. Temporary dwellings are not considered in determining the number of dwellings currently existing on the property. The claimant may choose to convert a temporary dwelling currently located on the property on which the claimant is eligible for Measure 49 relief, to an authorized home site through the Measure 49 home site approval. Otherwise, the temporary dwellings are subject to the terms of local permit requirements under which they were approved, and are subject to removal at the end of term for which they are allowed.

## **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 scope of the home site approval that the claimant 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 land division or dwelling authorized by the home site approval.

1. The establishment of a land division or dwelling based on a Measure 49 home site authorization must comply with all applicable standards governing the siting or development of the land division or dwelling. However, those standards must not be applied in a manner that prohibits the establishment of the land division or 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 land division or 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. 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 claimant may choose to convert any temporary dwelling currently located on the property on which the claimant is 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 lot, parcel or dwelling on property on which the claimant is eligible for Measure 49 relief. No additional development is authorized on contiguous property for which no Measure 37 claim was filed or on Measure 37 claim property on which a claimant is not eligible for Measure 49 relief. A lot or parcel established pursuant to a home site approval must either be the site of a dwelling that is currently in existence or be the future site of a dwelling that may be established pursuant to the home site approval.
7. The claimant may use a home site approval to convert a lot, parcel or dwelling currently located on the property on which the claimant is eligible for Measure 49 relief to an authorized home site.

8. The claimant 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 home site authorization will not authorize new lots or parcels that exceed five acres. However, existing or remnant lots or parcels may exceed five acres. Before beginning construction in one of these zones, the owner must comply with the requirements of ORS 215.293. Further, the home site authorization will not authorize new lots or parcels that exceed two acres if the new lots or parcels are located on high-value farmland, on high-value forestland or on land within a ground water restricted area. However, existing or remnant lots or parcels may exceed two acres.
11. Because the property is located in an exclusive farm use zone, Measure 49 requires new home sites to be clustered so as to maximize suitability of the remnant lot or parcel for farm or forest use. Further, 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 lots, parcels and dwellings within 10 years of the conveyance. A lot or parcel lawfully created based on the home site authorization will remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law. 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 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.**