



**OREGON DEPARTMENT OF LAND CONSERVATION AND  
DEVELOPMENT**

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

October 8, 2009

**STATE ELECTION NUMBER:** E132924

**CLAIMANTS:** Gary E. and Patricia Tryon  
Robert Tryon  
Vernon Tryon  
PO Box 975  
Waldport, OR 97394

**MEASURE 37 PROPERTY  
IDENTIFICATION:** Township 13S, Range 11W, Section 7BC  
Tax lot 800  
Lincoln County

**AGENT CONTACT INFORMATION:** Dennis L. Bartoldus  
PO Box 1510  
Newport, OR 97365

### **I. ELECTION**

The claimants, Gary, Patricia, Robert and Vernon Tryon, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located at the intersection of NW Solhatliu Trail and Highway 101, near Waldport, in Lincoln 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 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 claimants are not eligible for any relief under Measure 49 because the claimants would not have been lawfully permitted to establish the requested home sites when they acquired the 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 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 claimants have requested Section 6 review in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes three home sites. Therefore, the claimants 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**

#### **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, Gary, Patricia, Robert and Vernon Tryon, filed a Measure 37 claim, M132924, with the state on December 1, 2006. The claimants filed a Measure 37 claim, 119-LURCC-06, with Lincoln County on December 4, 2006. The state claim was filed prior to December 4, 2006.

It appears that the claimants timely filed a Measure 37 claim with both the state and Lincoln 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 deed submitted by the claimants, Gary, Patricia, Robert and Vernon Tryon are the owners of fee title to the property as shown in the Lincoln County deed records 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 Lincoln County, outside the urban growth boundary and outside the city limits of the nearest city, Waldport.

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

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

The property is currently zoned Rural Residential (RR-2) by Lincoln 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. Lincoln County's RR-2 zone requires a minimum lot size of two acres.

The claimants' property consists of 3.21 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property two of the three home sites 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 claimants, it does not appear that the establishment of the three home sites 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 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."

Lincoln County deed records indicate that the claimants acquired the southern approximately 2.9-acre portion of tax lot 800 on January 21, 1976, and the northern approximately 0.3-acre portion of tax lot 800 on June 7, 1995.

The claimants acquired the southern approximately 2.9-acre portion of the Measure 37 claim property after adoption of the statewide planning goals, but before the Commission acknowledged Lincoln 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 Rural Residential (R-4) by Lincoln County. However, the Commission had not acknowledged that zone for compliance with the goals when the claimants acquired the property on January 21, 1976. Accordingly, the statewide planning goals, and in particular Goal 14 and ORS chapter 215 applied directly to that portion of the Measure 37 claim property when the claimants acquired it.

On January 21, 1976, Goal 14 required counties "[t]o 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.

On January 21, 1983, the Commission acknowledged the application of Lincoln County's R-4 zone to the Measure 37 claim property. The Commission's acknowledgement of Lincoln County's R-4 zone confirmed that zone's compliance with Goal 14 and ORS chapter 215. Lincoln County's acknowledged R-4 zone required 2 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consisted of approximately 2.9 acres. Therefore, on the claimants' acquisition date for southern portion of tax lot 800, they could not have established two of the three requested home sites in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations. Without additional evidence to establish that, as applied to the subject property, the requested parcels of less than two acres would have satisfied the requirements of Goal 14, the claimants lawfully could have created on their acquisition date, no more than the one residential lot or parcel that they may already establish under current law. Unless additional evidence can establish that, in this instance, a direct application of Goal 14 would have allowed the claimants to establish smaller lots or parcels, it appears that the claimants do not qualify for any home sites on the southern approximately 2.9-acre portion of tax lot 800.

On June 7, 1995, the Measure 37 claim property consisted of 3.21 acres and was subject to Lincoln County's acknowledged Rural Residential (RR-2) zone. Lincoln County's RR-2 zone required two acres for the creation of a new lot or parcel on which a dwelling could be established. Therefore, the claimants lawfully could not have established the requested home sites on the Measure 37 claim property on the date of acquisition of the northern approximately 0.3-acre portion of tax lot 800.

## **2. Preliminary Conclusion**

Based on the preliminary analysis, the claimants, Gary, Patricia, Robert and Vernon Tryon, do not qualify for Measure 49 home site approvals because the claimants were not lawfully permitted to establish the lots, parcels or dwellings on the claimants' dates 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 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.**