



**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 NUMBER: E130242

CLAIMANT: Adeline Miller
45008 Houghton Creek Road
Baker City, OR 97814

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 7S, Range 41E
Sections 23 and 24, Tax lot 33401
Baker County

I. ELECTION

The claimant, Adeline Miller, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on October 10, 2006, for property located near Medical Springs, in Baker 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 her 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 home sites when she 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. The claimant has requested two home site approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes more than three home sites.

Therefore, the claimant may qualify for a maximum of two 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 claimant, Adeline Miller, filed a Measure 37 claim, M130242, with the state on October 10, 2006. The claimant filed a Measure 37 claim, M37-05-032, with Baker County on June 7, 2005. 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 Baker 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, Adeline Miller is the owner of fee title to the property as shown in the Baker 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 Baker County, outside any urban growth boundary and outside any city limits, near the community of Medical Springs.

(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 two home site approvals.

The property is currently zoned Exclusive Farm Use (EFU) by Baker 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, or 160 acres in an EFU zone that is designated rangeland.¹ Those provisions also regulate the establishment of dwellings on new or existing lots or parcels and include the requirement that the property generate a minimum annual income from the sale of farm products.

The claimant’s property consists of 170.63 acres, of which approximately 20 acres are farmland and approximately 150 acres are designated rangeland. Therefore, the combined effect of the standards for the establishment of new lots or parcels and for the establishment of a dwelling prohibit the claimant from establishing on the Measure 37 claim property the two 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 two home sites for which the claimant may qualify on the property would be prohibited by land use regulations described in ORS 195.305(3).

¹ Baker County’s EFU zone does not identify rangeland separately from farmland. The county distinguishes its rangeland and farmland by determining whether the land is irrigated, i.e. whether the land has adjudicated water rights for irrigation. Farmland is irrigated and rangeland is non-irrigated.

(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."

Baker County deed records indicate that the claimant acquired the property on April 20, 1994.

On April 20, 1994, the Measure 37 claim property was subject to Baker County's acknowledged Exclusive Farm Use (EFU) zone. Baker County's EFU zone required 80 irrigated acres² or 160 non-irrigated acres for the creation of a new lot or parcel on which a dwelling could be established, and included the requirement that the property generate a minimum annual income from the sale of farm products. The claimant's property consists of 170.63 acres of which approximately 20 acres are irrigated and approximately 150 acres are non-irrigated. There is no evidence in the claim record that the property could have met the standard to generate the required minimum annual income from the sale of farm products. Therefore, the claimant lawfully could not have established any home sites on her date of acquisition.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimant, Adeline Miller, does not qualify for Measure 49 home site approvals because the claimant was not lawfully permitted to establish the lots, parcels or dwellings on the claimant's date of acquisition.

² On April 20, 1994, Baker County's zoning ordinance indicated 40 irrigated acres (i.e., 40 acres fully covered with adjudicated water rights); or in the alternative, a combination of irrigated acres and non-irrigated acres whereby four non-irrigated acres were considered equal to one irrigated acre, up to 160 non-irrigated acres. However, in March 1994, administrative rules adopted by LCDRC to implement HB 3661 became effective, and effectively superseded the county's zoning provisions regulating minimum lot or parcel sizes in the EFU zone. Baker County was required to apply the new administrative rule directly until it amended its zoning ordinance to be consistent with the administrative rule. Baker County's amended EFU zone requires a minimum lot or parcel size of 80 irrigated acres (i.e., 80 acres fully covered with adjudicated water rights); or in the alternative, a combination of irrigated acres and non-irrigated acres whereby two non-irrigated acres are considered equal to one irrigated acre, up to 160 non-irrigated acres.

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.