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 31, 2009

STATE ELECTION NUMBER: E130697

CLAIMANTS:

Robert W. McCasland
11693 SW Shumway Road
Powell Butte, OR 97753

Audia-Gordon Development, LLC
61295 Mountain Breezes Court
Bend, OR 97702

MEASURE 37 PROPERTY IDENTIFICATION:

Township 16S, Range 14E, Section 9
Tax lots 100 and 101
Crook County

AGENT CONTACT INFORMATION:

Jeffrey M. Wilson
Miller Nash LLP
446 NW Third Street, Suite 230
Prineville, OR 97754

I. ELECTION

The claimants, Robert McCasland and Audia-Gordon Development, LLC, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 13, 2006, for property located at 11693 SW Shumway Road, near Powell Butte, in Crook 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 claimant Robert McCasland is not eligible for any relief under Measure 49 because the claimant no longer owns the Measure 37 claim property.

Based on the department's preliminary analysis, it appears that the claimant Audia-Gordon Development, LLC 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 it 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 three home site approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes 16 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, Robert McCasland and Audia-Gordon Development, LLC, filed a Measure 37 claim, M130697, with the state on November 13, 2006. The claimants filed Measure 37 claims, 87 and 88, with Crook County in November 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 Crook 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 recorded memorandum of contract of sale submitted by the claimants, Audia-Gordon Development, LLC 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.

According to the information submitted by the claimants, Robert McCasland has not established his ownership of the property for the purposes of Measure 49. Claimant Robert McCasland acquired an interest in the Measure 37 claim property on April 9, 1968, as reflected by a recorded contract of sale and fulfillment deed included with the claim. However, Robert McCasland transferred his interest in the Measure 37 claim property to Audia-Gordon Development, LLC on March 8, 2006, as reflected by the recorded memorandum of contract of sale included with the claim. Claimant Robert McCasland no longer owns the Measure 37 claim property. Because this requirement has not been met, the claimant is not entitled to any relief under Measure 49, and, therefore, the remaining approval criteria will not be evaluated in regards to this claimant.

(b) All Owners of the Property Have Consented in Writing to the Claim

It appears that the claimant Audia-Gordon Development, LLC 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 Crook County, outside any urban growth boundary and outside any city limits, near the community of Powell Butte.

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

As stated in Section III and IV(a) above, the claimant Audia-Gordon Development, LLC may qualify for up to three home site approvals.

The property is currently zoned Exclusive Farm Use-3 (EFU3) by Crook 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. In addition, counties may adopt larger minimum lot or parcel sizes. Crook County's EFU3 zone requires a minimum of 160 acres for the establishment of a dwelling on a lot or parcel.

The claimant's property consists of 78.20 acres. Therefore, state land use regulations prohibit the claimant, Audia-Gordon Development, LLC, from establishing on the Measure 37 claim property 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 claimants, it does not appear that the establishment of the three home sites for which the claimant, Audia-Gordon Development, LLC, 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."

Crook County deed records indicate that the claimant, Audia-Gordon Development, LLC, acquired the property on March 8, 2006.

On March 8, 2006, the Measure 37 claim property was subject to Crook County's acknowledged Exclusive Farm Use-3 (EFU3) zone. Crook County's EFU3 zone required 160 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimant's property consists of 78.20 acres, and is developed with one dwelling. Therefore, the claimant, Audia-Gordon Development, LLC, lawfully could not have established any home sites on its date of acquisition.

2. Preliminary Conclusion

Based on the preliminary analysis, claimant, Robert McCasland, does not qualify for Measure 49 home site approvals because the claimant is no longer an owner of the Measure 37 claim property.

Based on the preliminary analysis, claimant, Audia-Gordon Development, LLC, 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.

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.