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 29, 2009

STATE ELECTION NUMBER: E131148E[1]

CLAIMANTS: Tim L. and Janice L. Kerns
45917 Quail Road
Haines, OR 97833

MEASURE 37 PROPERTY IDENTIFICATION: Township 8S, Range 38E
Sections 13 and 14, Tax lot 2500
Baker County

I. ELECTION

The claimants, Tim and Janice Kerns, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 24, 2006, for property located near Haines, 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 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 any additional home sites when they acquired the property.

[1] This claim has been divided due to non-contiguous property in the same ownership. E131148A addresses the claimants relief for tax lots 100 (T8S R38E), 400, 500, 600 and 700 (T8S R38E S2), 2000 and 2200 (T8S R38E 11) and 2300 (T8S R38E), and 200 (T8S R38E S14). E131148B addresses the claimants relief for tax lots 2700 (T8S R38E), 200, 300 and 400 (T8S R39E S18), 100 and 200 (T8S R39E S19). E131148C address the claimants' relief for tax lot 1700 T8S R38E). E131148D addresses the claimants' relief for tax lot 2300 (T8S R39E S7). E131148E addresses the claimants' relief for tax lot 2500 (T8S R38E).

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 18 home sites.[2] 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, Tim and Janice Kerns, filed a Measure 37 claim, M131148, with the state on November 24, 2006. The claimants filed a Measure 37 claim, M37-06-038, with Baker County prior to January 18, 2007. 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 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 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 deeds submitted by the claimants, Tim and Janice Kerns are the owners of fee title to the property as shown in the Baker County deed records and, therefore, are owners of the property under Measure 49.

[2] The Measure 37 claim described the use for all tax lots included in the claim for M131148.

(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 Baker County, outside the urban growth boundary and outside the city limits of the nearest city, Haines.

(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 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 and regulate the establishment of dwellings on new or existing lots or parcels.

The claimants' property consists of 157.89 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property 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."

Baker County deed records indicate that the claimants acquired the property on June 2, 1992.

On June 2, 1992, the Measure 37 claim property was subject to Baker County's acknowledged Exclusive Farm Use (EFU) zone. Baker County's EFU zone required 40 irrigated or 160 non-irrigated acres[3] for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consists of 157.89 non-irrigated acres. Therefore, the claimants lawfully could not have established any home sites on their date of acquisition.

2. Preliminary Conclusion

Based on the department's preliminary analysis, it appears that the claimants, Tim and Janice Kerns, are not eligible for any relief under Measure 49 because the claimants would not have been lawfully permitted to establish any additional home sites when they acquired the property.

[3] Baker County's EFU zone required 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.

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.