



**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 21, 2009

STATE ELECTION NUMBER: E131154A¹

CLAIMANTS: James and Carol Wampler
4990 Surf Pines Lane
Waldport, Oregon 97394

Kenneth D. and Janis A. Werth
2490 SW Williams Road
Powell Butte, Oregon 97753

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 15S, Range 14E
Section 11, Tax lot 110
Section 14, Tax lot 101
Crook County

AGENT CONTACT INFORMATION: Edward P. Fitch
Bryant Everson and Fitch
P.O. Box 457
Redmond, Oregon 97756

I. ELECTION

The claimants, James and Carol Wampler and Kenneth and Janis Werth, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 24, 2006, for property located along SW Ayers Lane, 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.

¹ Claim E131154 has been split into three claims, E131154A, E131154B and E131154C, because the Measure 37 claim sought relief for three non-contiguous parcels and includes multiple tax lots or parcels that are not in the same ownership. Claim E131154A addresses the claimants' eligibility for Measure 49 relief on tax lot 101 (T15S, R14E, S14) and tax lot 110 (T15S, R14E, S11), E131154B addresses the claimants' eligibility for relief on tax lot 600 (T15S, R14E, S11) and E131154C addresses the claimants' eligibility for relief on tax lot 108 (T15S, R14E, S11).

II. SUMMARY OF PRELIMINARY EVALUATION

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

Based on the preliminary analysis, claimants James and Carol Wampler are not eligible for any relief under Measure 49 because they have not established their ownership of the Measure 37 claim property for the purposes of Measure 49.

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 more than 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, James and Carol Wampler and Kenneth and Janis Werth, filed a Measure 37 claim, M131154, with the state on November 24, 2006. The claimants filed a Measure 37 claim, *Wampler and Werth*, with Crook County on November 24, 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 deed submitted by the claimants, Kenneth and Janis Werth are the settlors of a revocable trust into which they conveyed tax lots 101 and 110 of the Measure 37 claim property and, therefore, are owners of the property under Measure 49.

According to the information submitted by the claimants, James and Carol Wampler have not established their ownership of the property for the purposes of Measure 49. James and Carol Wampler conveyed their interest in the property to Kenneth and Janis Werth as trustees of the Janis A. Werth Revocable Trust on February 21, 1996, and therefore, are no longer owners under Measure 49.

Because this requirement has not been met for claimants James and Carol Wampler, they are not entitled to any relief under Measure 49 for tax lots 101 and 110, and, therefore, the remaining approval criteria will be evaluated only for claimants Kenneth and Janis Werth.

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

It appears that claimants Kenneth and Janis Werth 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 Crook County, outside the urban growth boundary and outside the city limits of the nearest city, Prineville.

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

As stated in Section III above, claimants Kenneth and Janis Werth may qualify for up to three home site approvals.

The property is currently zoned Exclusive Farm Use (EFU-3) 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 160 acres in size in an EFU zone that is designated rangeland, and regulate the establishment of dwellings on new or existing lots or parcels.

The claimants' property consists of 93.84 acres. Therefore, state land use regulations prohibit claimants Kenneth and Janis Werth 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 claimants Kenneth and Janis Werth 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 claimants Kenneth and Janis Werth acquired the property on May 4, 1994.

On May 4, 1994, the Measure 37 claim property was subject to Crook County's acknowledged Exclusive Farm Use (EFU-3) zone. Crook County's EFU-3 zone required 160 acres to establish a dwelling on an existing lot or parcel and 160 acres for the creation of a new lot or parcel on which a dwelling could be established. Crook County's acknowledged EFU-3 zone allowed for the establishment of a dwelling on a vacant lot or parcel of less than 160 acres but greater than 80 acres if certain discretionary criteria were met as determined by an administrative review process. However, the claimants have not submitted any evidence or documentation to establish that they would have satisfied the criteria then in effect, which would have permitted approval of a dwelling on less than 160 acres. The claimants' property consists of 93.84 acres. Therefore, the claimants lawfully could not have established any home sites on their date of acquisition.

2. Preliminary Conclusion

Based on the preliminary analysis, claimants Kenneth and Janis Werth do not qualify for Measure 49 home site approvals because they were not lawfully permitted to establish the lots, parcels or dwellings on their date of acquisition.

Based on the preliminary analysis, claimants James and Carol Wampler do not qualify for Measure 49 home site approvals because they have not established their ownership of the Measure 37 claim property for the purposes of Measure 49.

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.