



**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 9, 2009

**STATE ELECTION NUMBER:** E131531

**CLAIMANTS:** Robert D. Burns  
PO Box 239  
Seaside, Oregon 97138

**MEASURE 37 PROPERTY  
IDENTIFICATION:** Township 2S, Range 2E, Section 27A  
Tax lot 1800  
Clackamas County

**I. ELECTION**

The claimant, Robert Burns, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 29, 2006, for property located at 16007 S Holcomb Boulevard, near Oregon City, in Clackamas 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 his Measure 37 claim under Section 7 of Measure 49, which allows the Department of Land Conservation and Development (the department) to authorize up to ten 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. The appraisal submitted by the claimant failed to comply with the requirements of Section 7 of Measure 49.

**III. THE MAXIMUM NUMBER OF HOME SITE APPROVALS FOR WHICH THE  
CLAIMANT MAY QUALIFY**

Under Section 7 of Measure 49, the number of home site approvals authorized by the department cannot exceed the lesser of the following: ten; the number stated by the claimant in the election materials; 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; or the number of home site approvals with a total value that represents just compensation for the reduction in fair market value caused by the enactment of one or more land use regulations that

were the basis for the claim. The claimant has requested ten home site approvals in the election material. The appraisal submitted by the claimant attempts to support the assertion that the value of ten home site approvals is equal to or less than the loss of value caused by the enactment of land use regulations. No waiver was issued for this claim. The Measure 37 claim filed with the state describes seventeen (17) home sites. Therefore, the claimant may qualify for a maximum of ten home site approvals under Section 7.

#### **IV. PRELIMINARY ANALYSIS OF QUALIFICATION FOR HOME SITE APPROVAL**

##### **1. Preliminary Analysis**

In order to be eligible for relief under Section 7 of Measure 49, the Measure 37 claim property must not be high-value farmland or high-value forestland, nor in a ground water restricted area.

It appears that the property is not high-value farmland or high-value forestland, and is not in a ground water restricted area.

To qualify for a home site approval under Section 7 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 December 4, 2006, 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, Robert Burns, filed a Measure 37 claim, M131531, with the state on November 29, 2006. The claimant filed a Measure 37 claim, ZC381-06, with Clackamas County on November 28, 2006. 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 Clackamas 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 7 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 claimant, Robert Burns 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.

**(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 Clackamas County, outside the urban growth boundary and outside the city limits of the nearest city, Oregon City.

**(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 ten home site approvals.

The property is currently zoned Rural Residential Farm/Forest (RRFF-5) by Clackamas 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 20 acres for property within a mile of the UGB for the Portland metropolitan area. Because the claimant's property is within a mile of the Portland metropolitan area UGB, all new lots or parcels must be at least 20 acres in size.

Based on Clackamas County Assessor's data, the claimant's property consists of 17.59 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the ten home sites the claimant is requesting under Section 7 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 ten home sites that the claimant is requesting 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 7 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."

Clackamas County deed records indicate that the claimant acquired the property on November 20, 1979.

The claimant acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Commission acknowledged Clackamas 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 Agriculture/Residential (RA-1) by Clackamas County. However, while the property was ultimately acknowledged as non-resource land pursuant to Goal 14 (Urbanization), the Commission had not acknowledged Clackamas County's RA-1 zone for compliance with the goals. Therefore, when the claimant acquired the property on November 20, 1979, the statewide planning goals, and in particular Goal 14, applied directly to the Measure 37 claim property.

The property was rezoned RRFF-5 on June 19, 1980. On December 21, 1982, the Commission acknowledged the application of Clackamas County's Rural Residential Farm/Forest (RRFF-5) zone to the Measure 37 claim property. Clackamas County's acknowledged RRFF-5 zone required five acres for the creation of a new lot or parcel on which a dwelling could be established. The Commission's acknowledgement of Clackamas County's RRFF-5 zone confirmed that zone's compliance with Goal 14.

On November 20, 1979, 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. Therefore, while the Commission ultimately acknowledged Clackamas County's zoning of the subject property to require a minimum of five acres for the creation of a new lot or parcel, a lot or parcel of two acres or more would have complied with the requirements of Goal 14 when the claimants acquired the property on November 20, 1979. The claimant's property consists of 17.59 acres. Therefore, the claimant's request to create ten home sites would result in parcels smaller than two acres. Without additional evidence to establish that, as applied to the subject property, the requested smaller parcels would have satisfied the requirements of Goal 14, the claimant lawfully could have created no more than eight residential lots or parcels when he acquired the property. The claimant, therefore, lawfully could have established up to eight of the home sites the claimant is requesting under Section 7 of

Measure 49, unless additional evidence can establish that, in this instance, a direct application of Goal 14 would have allowed the claimant to establish smaller lots or parcels.

**(g) The enactment of one or more land use regulations that are the basis for this claim, caused a reduction in the fair market value of the Measure 37 claim property that is equal to or greater than the fair market value of the home site approvals requested**

Sections 7 and 8 of Measure 49 require that the reduction in the fair market value of the property be demonstrated through an appraisal that meets the following requirements:

**1) The appraisal must be submitted within 180 days after the Measure 49 election is filed with the department.**

The claimant submitted his election on April 4, 2008, and his appraisal on July 11, 2008. Therefore, the appraisal was submitted within 180 days of the election filing.

**2) The appraisal must be prepared by a person certified under ORS chapter 674 or a person registered under ORS chapter 308.**

The appraiser signing the submitted appraisal, Jonathan J. Deskin, is a state-certified general appraiser; therefore this requirement appears to have been met.

**3) The appraisal must comply with the Uniform Standards of Professional Appraisal Practice (USPAP), as authorized by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.**

An appraisal review commissioned by DLCD has determined that the claimant's appraisal filed for the Measure 37 claim property does meet the threshold requirements for Uniform Standards of Professional Appraisal Practice compliance, relative to the information and conclusions developed in the report. Therefore this requirement appears to have been met.

**4) The appraisal must expressly determine the highest and best use of the property at the time the land use regulation was enacted and the highest and best use must be determined to be residential use.**

The appraisal submitted determines that the highest and best use of the Measure 37 claim property at the time the land use regulations were enacted was a single-family dwelling in 1981 and multiple single-family dwellings in 2000. Therefore, this requirement appears to have been met.

**5) The appraisal must show the fair market value of the property one year before and one year after the enactment of the regulation(s) the claimant asserts have resulted in a reduction of the fair market value of the Measure 37 claim property.**

The claimant asserts that the enactment of Clackamas County's RRFF-5 zone and OAR 660-004-0040 reduced the fair market value of the Measure 37 claim property. The appraisal submitted by the claimant values the property on June 19, 1979, one year before Clackamas County changed the property's zoning to RRFF-5 and on June 19, 1981, one year after the zone change. The appraisal also values the property on October 4, 1999, one year before OAR 660-004-0040 was enacted, and on October 4, 2001, one year after the state regulation was enacted. Therefore, this requirement appears to have been met.

**6) The reduction in fair market value of the Measure 37 property determined by the appraisal shall be adjusted by any ad valorem property taxes not paid, any severance taxes paid and any recapture of additional tax liability that the claimant has paid or will pay for the property if the property is disqualified from special assessment under ORS 308A.703 as required by Section 7(6) and (7).**

Section 7(6) of Measure 49 requires that: "The **reduction in the fair market** value of the property caused by the enactment of one or more land use regulations that were the basis for the claim *is equal to the decrease, if any, in the fair market value of the property from the date that is one year before the enactment of the land use regulation to the date that is one year after the enactment, plus interest.* If the claim is based on the enactment of more than one land use regulation enacted on different dates, the reduction in the fair market value of the property caused by each regulation shall be determined separately and the values added together to calculate the total reduction in fair market value." And "Interest shall be computed under this subsection using the average interest rate for a one-year United States Government Treasury Bill on December 31 of each year of the period between the date the land use regulation was enacted and the date the claim was filed, compounded annually on January 1 of each year of the period." The appraisal submitted by the claimant contains no calculations of reductions in fair market value. Instead, the appraisal provides individual values of fair market value for given dates. Using these individual values, it appears there was an increase in fair market value for the Measure 37 claim property between June 19, 1979, and June 19, 1981.<sup>1</sup> The difference in the fair market values provided for October 4, 1999, and October 4, 2001, is \$22,400. This apparent reduction in fair market value has not been adjusted for interest nor reduced by tax savings adjusted for interest. The differences in fair market value caused by each regulation also were not added together to calculate the total reduction in fair market value. Therefore, this requirement has not been met.

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<sup>1</sup> State law, specifically Goal 14, applied to the property when the claimant purchased it. Therefore, as stated above in section (f), on the claimant's acquisition date two acre home sites would have been the highest density development consistent with Goal 14 at that time. The department does not agree that prior to the acknowledgment of Clackamas County's RRFF-5 zone to the property in 1980 the claimant could have developed less than two-acre home sites. However, because the appraisal submitted shows that the property increased in value during this time, this point is not material to the resolution of this claim.

**7) The appraisal must show the present fair market value of each lot, parcel or dwelling that the claimant is seeking under section 7(2) of Measure 49.**

The appraisal values the present market value of eight additional, buildable, home sites and two existing home sites at approximately \$1,285,000. However, this value was not discounted for the cost of developing the raw property into the eight, buildable, home sites. Therefore, this requirement has not been met.

**8) The enactment of one or more land use regulations, other than land use regulations described in ORS 197.352 (3), that are the basis for the claim *caused a reduction in the fair market value of the property that is equal to or greater than the fair market value of the home site approvals* that may be established on the property under subsection (2) of this section, with the reduction in fair market value measured as set forth in subsection (6) of this section.**

If the information provided in the appraisal is used to calculate a reduction in the fair market value of the property caused by OAR 660-004-0040, that reduction is \$22,400. The appraisal provides a present fair market value of \$1,285,000 for the ten home site approvals that the claimant requested under Measure 49. Therefore, the reduction in the fair market value of the property is significantly *less* than the fair market value of the home site approvals. Therefore, this requirement has not been met.

## **2. Preliminary Conclusion**

Based on the preliminary analysis, the claimant, Robert Burns, does not qualify for Measure 49 home site approvals because the appraisal submitted by the claimant does not meet all of the qualification standards described in Section 7 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 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.**