



**OREGON DEPARTMENT OF LAND CONSERVATION AND  
DEVELOPMENT**

**ORS 195.300 to ORS 195.336 (MEASURE 49) SUPPLEMENTAL REVIEW  
OF MEASURE 37 CLAIM  
Preliminary Evaluation**

June 26, 2009

**STATE ELECTION NUMBER:**

E131609

**CLAIMANT:**

Barry J. Butcher  
11040 SW Barbur Boulevard  
Portland, OR 97062

**MEASURE 37 PROPERTY  
IDENTIFICATION:**

Township 2S, Range 1W, Section 36A  
Tax lot 2800  
Washington County

**AGENT CONTACT INFORMATION:**

Kevin V. Harker  
Vial Fotheringham LLP  
7000 SW Varns Street  
Portland, OR 97223

## **I. ELECTION**

The claimant, Barry Butcher, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 29, 2006, for property located at 6880 SW Norse Hall Road, near Tualatin, in Washington 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 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 additional home sites when he 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 three home site approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes residential use. Therefore, the claimant 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 claimant, Barry Butcher, filed a Measure 37 claim, M131609, with the state on November 29, 2006. The claimant filed a Measure 37 claim, 37CL0671, with Washington County on November 29, 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 Washington 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, Barry Butcher is the owner of fee title to the property as shown in the Washington 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**

The deed and assessment information submitted by the claimant indicates that there are non-claimant owners who have not consented to the claim: Christine M. Butcher and Jill Louise Butcher. Without the consent of all non-claimant owners, the department is not authorized to provide any relief under Measure 49. Such consent must be provided in writing within the time periods set for comment on this claim, set forth in OAR 660-041-0090.

**(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 Washington County, outside the urban growth boundary and outside the city limits of the nearest city, Tualatin.

**(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 three home site approvals.

The property is currently zoned Agriculture and Forest – 5 (AF-5) by Washington 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 the size established in the County rural residential zone in existence on October 4, 2000, if the zone in existence on that date had a minimum lot size of two or more acres. Washington County's AF-5 requires a minimum lot size of five acres.

The claimant's property consists of 6.3 acres. Therefore, state land use regulations prohibit the claimant 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 claimant, it does not appear that the establishment of the three home sites for which the claimant 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."

Washington County deed records indicate that the claimant acquired the property on July 16, 1990.

On July 16, 1990, the Measure 37 claim property was subject to Washington County's acknowledged Agriculture and Forest - 5 (AF-5) zone. Washington County's AF-5 zone required five acres for the creation of a new lot or parcel on which a dwelling could be established. The claimant's property consists of 6.3 acres, and is developed with a dwelling. Therefore, the claimant lawfully could not have established the requested home sites on his date of acquisition.

**2. Preliminary Conclusion**

Based on the preliminary analysis, the claimant, Barry Butcher, 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 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.**



# Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

Measure 49 Development Services Division

635 Capitol Street, Suite 150

Salem, Oregon 97301-2540

Phone: (503) 373-0050

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<http://www.oregon.gov/LCD/MEASURE49>

Measure 49  
Notice of Preliminary Evaluation



June 26, 2009

**STATE ELECTION NUMBER:** E131609

**CLAIMANT:** Barry J. Butcher

**MEASURE 37 PROPERTY IDENTIFICATION:** Township 2S, Range 1W, Section 36A  
Tax lot 2800  
Washington County

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As required under OAR 660-041-0090(3), you are receiving this notice to inform you of the Department of Land Conservation and Development's (Department) Preliminary Evaluation of the supplemental review of the above-referenced claim under Measure 49.

The claimant(s) identified above filed a Measure 37 claim pursuant to ORS 197.352 (2005 edition). On November 6, 2007, the Oregon voters approved Ballot Measure 49. Under Measure 49, Measure 37 claimants may elect to have their Measure 37 claim reviewed under Measure 49. Claimants who elect review of their Measure 37 claims under Measure 49, and who meet the requirements of either Section 6 or 7 of Measure 49, are eligible for relief in the form of a specific number of home site approvals, as provided for under Section 6 (up to three home sites) or 7 (up to ten home sites) of Measure 49.

The claimant(s) in the above-referenced claim elected supplemental review of the Measure 37 claim under Section 6 of Measure 49. To determine eligibility for relief, the department must determine whether the claim meets the following requirements:

- The claimant(s) must be owners of the property, as defined in Measure 49.
- All owners of the property must have consented in writing to the claim.
- The property must be located entirely outside any urban growth boundary and entirely outside the boundaries of any city.
- One or more land use regulations must prohibit establishing the lot, parcel or dwelling.
- Establishing the lot, parcel or dwelling must not be prohibited by a regulation that was enacted before the claimant's acquisition date, or by a regulation that restricts or prohibits activities commonly and historically recognized as public nuisances, for the protection of public health or safety, or that are required to comply with federal law as described in ORS 197.352(3).
- On the claimant's acquisition date, the claimant lawfully was permitted to establish the number of lots, parcels or dwellings on the property that are authorized by either Section 6 or Section 7 of Measure 49 based on the claimant's Election.

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 additional home sites when he acquired the property.

A copy of the Preliminary Evaluation of the claim is posted on the department's website at <http://www.oregon.gov/LCD/MEASURE49/index.shtml>. You may also request a copy of the Preliminary Evaluation by calling 503-373-0050 ext. 324.

This Preliminary Evaluation is not a final decision on this claim. Any person receiving this Notice may submit written comments, evidence or information addressing the above requirements upon which the department must base its decision. All materials and written responses must be mailed or delivered to: Supplemental Measure 49 Claim Review, 635 Capitol Street NE, Suite 150, Salem, OR 97301-2540 and will be deemed timely filed if mailed or actually delivered to the department within 28 days from the date of this notice. The Department will provide a copy of all materials received to the claimant(s) and the agent for the claimant(s), who are entitled to an additional 21 days to file written responses. Please reference the claim number and claimant name and clearly mark your comments as "Preliminary Evaluation Comments." **Comments submitted electronically or by facsimile will not be accepted.**

Following receipt and evaluation of all materials and responses submitted in response to this notice, the department will issue a final decision on this claim. If the final decision determines that the claim is entitled to relief in the form of one or more home sites, the exact location of authorized parcels and/or dwellings would be determined through a local county review process.

### Subject Property (Tax Lot 2800) and Area Map

