



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

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

March 24, 2010

STATE ELECTION NUMBER: E132283

CLAIMANT: Gary D. Middleton¹
PO Box 811
Baker City, OR 97814

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 9S, Range 37E, Section 8
Tax lot 1300
Baker County

I. ELECTION

The claimant, Gary Middleton, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 30, 2006, for property located near Sumpter, 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 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 home sites when he acquired the property.

¹ Kathleen L. Middleton was claimant under Measure 37; however she did not elect under Measure 49 and, therefore, is not eligible for relief.

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 material; 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 one home site approval in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes one home site. Therefore, the claimant may qualify for a maximum of one home site approval 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, Gary Middleton, filed a Measure 37 claim, M132283, with the state on November 30, 2006. The claimant filed a Measure 37 claim, M37-06-050, with Baker County prior to April 25, 2007. 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 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 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, Gary Middleton is the owner of fee title to the property as shown in the Baker 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

Baker County records indicate that there is a non-claimant owner who has not consented to the claim: Kathleen L. Middleton. Without the consent of all non-claimant owners, the department is not authorized to provide any relief under Measure 49.

(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, Sumpter.

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

As stated in Section III above, the claimant may qualify for up to one home site approval.

The property is currently zoned Mineral Extraction (ME) by Baker County, in accordance with ORS chapter 215 and OAR 660, divisions 16 and 23, because the property contains “mineral and aggregate resources” as defined by Goal 5. Baker County’s ME zone does not allow the establishment of a dwelling except under a conditional use review in which an applicant is required to establish that the dwelling is “necessary and accessory” to mining and requires lots or parcels to be equal to the size of the original mining patent or 20 acres, whichever is smaller.

The claimants’ property consists of 17.07 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the one home site the claimants may qualify for under Section 6 of Measure 49.

(e) The Establishment of the 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 one home site 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 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 claimant acquired the property on January 26, 1980.

The claimant acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Baker County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On January 26, 1980, the Measure 37 claim property was zoned Agricultural (A-2) by Baker County. Baker County's A-2 zone included a fixed minimum acreage standard of 40 acres. The Measure 37 claim property consists of 17.07 acres. Therefore, the claimant was not lawfully permitted to establish any home sites on the Measure 37 claim property on his date of acquisition.

However, the Commission had not acknowledged that zone for compliance with the goals when the claimant acquired the property on January 26, 1980. Accordingly, the statewide planning goals applied directly to the Measure 37 claim property when the claimant acquired it. On May 16, 1986, the Commission acknowledged the application of Baker County's Mineral Extraction (ME) zone to the Measure 37 claim property. Baker County's acknowledged ME zone did not allow the establishment of a dwelling except under a conditional use review in which an applicant was required to establish that the dwelling was "necessary and accessory" to mining and required lots or parcels to be equal to the size of the original mining patent or 20 acres, whichever is smaller. Therefore, on the claimant's acquisition date, he could not have established a home site on the Measure 37 claim property in either the zone as applied to the property on that date or the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimant, Gary Middleton, does not qualify for Measure 49 home site approvals because the claimant was not lawfully permitted to establish any home sites 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.