



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

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

April 1, 2010

STATE ELECTION NUMBERS: E132307 and E132308¹

CLAIMANTS: Kenneth A. and Shirley A. Hedin
41963 SW Sandstrom Road
Gaston, OR 97119

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 1S, Range 3W, Section 19
Tax lots 700 and 701
Washington County

I. ELECTION

The claimants, Kenneth and Shirley Hedin, filed claims with the state under ORS 197.352 (2005) (Measure 37) on November 30, 2006, for property located at 41963 SW Sandstrom Road, near Gaston, 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 claimants have elected supplemental review of their Measure 37 claims 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 preliminary analysis, it appears that the claimants, Kenneth and Shirley Hedin, do not qualify for any relief under Section 6 of Measure 49 because the claimants were not lawfully permitted to establish the requested additional home sites on their acquisition dates.

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

¹ Claims E132307 and E132308 have been combined into one claim because the properties are contiguous. Per OAR 660-041-0150 the Department of Land Conservation and Development will combine multiple claims into one claim if the Measure 37 claim property contains multiple contiguous lots or parcels that are in the same ownership.

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 waivers were issued for these claims. The Measure 37 claims filed with the state describe one home site on tax lot 701 and twelve home sites on tax lot 700. Therefore, the claimants may qualify for a maximum of three home sites, only one of which may be permitted on tax lot 701.

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, Kenneth and Shirley Hedin, filed Measure 37 claims, M132307 and M132308, with the state on November 30, 2006. The claimants filed a Measure 37 claim, 37CL0706, with Washington County on November 30, 2006. The state claims were filed prior to December 4, 2006.

It appears that the claimants timely filed Measure 37 claims 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 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, Kenneth and Shirley Hedin are the owners of fee title to tax lot 701, the western 0.53-acre portion of tax lot 700, and the eastern 10-acre portion of tax lot 700, as shown in the Washington County deed records and, therefore, are owners of those portions of the Measure 37 claim property under Measure 49.

According to the land sale contract submitted by the claimants, Kenneth and Shirley Hedin are the purchasers under a recorded land sale contract in force for the middle 2-acre portion of tax lot

700 and, therefore, are owners of that portion of the Measure 37 claim property under Measure 49.

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

(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, only one of which can be located on tax lot 701 of the Measure 37 claim property.

The property is currently zoned Agriculture and Forest (AF-20) by Washington 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 13.66 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."

Washington County deed records indicate that the claimants acquired tax lot 701 (1.13 acres) on November 9, 1965, the middle 2-acre portion of tax lot 700 on December 27, 1978, the eastern 10-acre portion of tax lot 700 on June 26, 1979, and the western 0.53-acre portion of tax lot 700 on January 20, 1994.

On November 9, 1965, tax lot 701 of the Measure 37 claim property was subject to Washington County's Agricultural (F-1) zone. Washington County's F-1 zone did not prohibit the establishment of the one home site the claimants may qualify for on the 1.13 acre tax lot 701, but tax lot 701 is developed with a dwelling.² Therefore, the claimants do not qualify for any additional home sites on tax lot 701.³

The claimants acquired the middle 2-acre portion and the eastern 10-acre portion of tax lot 700 after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Washington 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 Agriculture and Forest (AF-10) by Washington County. Washington County's AF-10 zone included a fixed minimum acreage standard of ten acres. However, the Commission had not acknowledged that zone for compliance with the goals when the claimants acquired the middle 2-acre portion of tax lot 700 on December 27, 1978, and the eastern 10-acre portion of tax lot 700 June 26, 1979. Accordingly, the statewide planning goals, and in particular Goal 3 and ORS chapter 215 applied directly to those portions of tax lot 700 when the claimants acquired them.

On July 31, 1984, the Commission acknowledged the application of Washington County's Agriculture and Forest (AF-20) zone to tax lot 701, the middle 2 acre portion of tax lot 700, and the eastern 10 acre portion of tax lot 700. The Commission's acknowledgement of Washington

² Although the Washington County Director's Notice of Measure 37 Decision for this claim indicates that this zone had no minimum lot size, the decision also indicates that "TL 701 is too small to be divided into 12 lots, site development is limited by minimum health and safety standards (generally 2 acre minimum lot size for residential septic systems)."

³ On the claimants' acquisition date for tax lot 701 they may have been lawfully permitted to establish the one requested home site on the Measure 37 claim property. However, because it appears that tax lot 701 already includes at least one lot or parcel that is developed with a dwelling, an authorization of one home site approval for that portion of the property would not appear to provide the claimants with any benefit.

County's AF-20 zone confirmed that zone's compliance with Goal 3 and ORS chapter 215. Washington County's acknowledged AF-20 zone required 20 acres for the creation of a new lot or parcel on which a dwelling could be established. At acknowledgment, the Measure 37 claim property consisted of 13.13 acres. Therefore, on the claimants' acquisition date, they could not have established any additional home sites in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations.

However, because of uncertainty during the time period between adoption of the statewide planning goals in 1975 and each county's acknowledgment of its plan and land use regulations regarding the factual and legal requirements for establishing compliance with the statewide planning goals, the 2010 Legislative Assembly amended Measure 49. Senate Bill (SB) 1049 (2010) specifies the number of home sites considered lawfully permitted, for purposes of Measure 49, for property acquired during this period unless the record for the claim otherwise demonstrates the number of home sites that a claimant would have been lawfully permitted to establish. Those amendments provide, in relevant part, that subject to consistency with local land use regulations in effect when they acquired the Measure 37 claim property, claimants whose property consists of less than 20 acres were lawfully permitted to establish one home site, including existing development.

The Measure 37 claim property consisted of 13.13 acres and was developed with one dwelling. Therefore, based on the analysis under SB 1049 (2010), the claimants were not lawfully permitted to establish any additional home sites on the middle 2 acre portion and the eastern 10 acre portion of tax lot 700 on their date of acquisition for that portion of the property.

On January 20, 1994, the date claimants acquired the western 0.53 acres of tax lot 700, the Measure 37 claim property was subject to Washington County's acknowledged AF-20 zone. Washington County's AF-20 zone required 80 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consists of 13.66 acres and is developed with a dwelling. Therefore, the claimants were not lawfully permitted to establish any additional home sites on the Measure 37 claim property on their date of acquisition for the western 0.53-acre portion of tax lot 700.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimants, Kenneth and Shirley Hedin, do not qualify for Measure 49 home site approvals on the Measure 37 claim property because the claimants were not lawfully permitted to establish the requested lots, parcels or dwellings on the claimants' dates 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 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.