



**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 11, 2010

STATE ELECTION NUMBER: E132706

CLAIMANTS: Gary V. and Loretta M. Whipple
15166 Highway 62
Eagle Point, OR 97524

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 35S, Range 1W, Section 15
Tax lot 800
Jackson County

AGENT CONTACT INFORMATION: Erik J. Glatte
Kellington, Krack, Richmond, et al.
PO Box 1583
Medford, OR 97501

I. ELECTION

The claimants, Gary and Loretta Whipple, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located at 15166 Highway 62, near Eagle Point, in Jackson 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.

II. SUMMARY OF PRELIMINARY EVALUATION

Based on the preliminary analysis, it appears that the claimant is not eligible for any relief under Measure 49 because the claimant was not lawfully permitted to establish any additional lots, parcels or dwellings on the claimant's date of acquisition.

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 two home site approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes two home sites. Therefore, the claimants may qualify for a maximum of two 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, Gary and Loretta Whipple, filed a Measure 37 claim, M132706, with the state on December 1, 2006. The claimants filed a Measure 37 claim, M37 2006-00353, with Jackson County on December 1, 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 Jackson 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, Gary and Loretta Whipple are the owners of fee title to the property as shown in the Jackson County deed records and, therefore, are owners of the 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 Jackson County, outside the urban growth boundary and outside the city limits of the nearest city, Eagle Point.

(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 two home site approvals.

The property is currently zoned Rural Residential (RR-5) by Jackson 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. Jackson County's RR-5 zone requires a minimum lot size of five acres.

The claimants' property consists of 6.25 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the two 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 two 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."

Jackson County deed records indicate that the claimants acquired the property on June 3, 1975.

The claimants acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Jackson County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On June 3, 1975, the Measure 37 claim property was zoned Open Space Development (OSD-5) by Jackson County, which included a fixed minimum acreage standard of five acres. Because the Commission had not acknowledged Jackson County's comprehensive plan and land use regulations for compliance with the goals when the claimants acquired the property on June 3, 1975, the statewide planning goals, and in particular Goal 14, applied directly to the Measure 37 claim property when the claimants acquired it.

On May 16, 1983, the Commission acknowledged the application of Jackson County's Rural Residential (RR-5) zone to the Measure 37 claim property. The Commission's acknowledgement of Jackson County's RR-5 zone confirmed that zone's compliance with Goal 14. Jackson County's acknowledged RR-5 zone required five acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consists of 6.25 acres. Therefore, on the claimants' acquisition date, they could have established one home site 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. 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 claimants whose property was ultimately acknowledged as non-resource land pursuant to Goal 14 and whose property was, at acquisition, subject to a county zone that included a fixed minimum acreage standard of more than two acres, are eligible for the number of home site approvals that would have been lawfully permitted under the minimum acreage standard in that zone, including existing development.

The Measure 37 claim property consists of 6.25 acres and is developed with one dwelling. The Measure 37 claim property was subject to Jackson County's OSD-5 zone on the claimants' date

of acquisition. That zone had a fixed minimum acreage standard of five acres. Therefore, based on the analysis under SB 1049 (2010), the claimants were not lawfully permitted to establish any additional home sites on the Measure 37 claim property on their date of acquisition.

2. Preliminary Conclusion

Based on the preliminary analysis, it appears that the claimants are not eligible for any relief under Measure 49 because the claimants were not lawfully permitted to establish any additional 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 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.