



**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 10, 2010

STATE ELECTION NUMBER: E132719

CLAIMANT: Delmar R. Moore
573 Rondo Street NW
Albany, OR 97321

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 11S, Range 4W, Section 3A
Tax lots 600 and 601
Benton County

I. ELECTION

The claimant, Delmar Moore, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located at 573 Rondo Street NW, near Albany, in Benton 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 eight home site approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes eight home sites. 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, Delmar Moore, filed a Measure 37 claim, M132719, with the state on December 1, 2006. The claimant filed a Measure 37 claim, M37-06-050, with Benton 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 Benton 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, Delmar Moore is the owner of fee title to the property as shown in the Benton 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 submitted with the claim indicates that there is a claimant owner who has not consented to the claim: Marilyn A. Moore.

(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 Benton County, outside the urban growth boundary and outside the city limits of the nearest city, Albany.

(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 Exclusive Farm Use (EFU) by Benton 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 claimant’s property consists of 4 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.”

Benton County deed records indicate that the claimant acquired tax lot 601 (1 acre) on July 15, 1969, and tax lot 600 (3 acres) on April 10, 1975.

On July 15, 1969, the Measure 37 claim property consisted of tax lot 601 and was subject to Benton County’s Urban Residential (R-U) zone. Benton County’s R-U zone required at least 1 acre for the creation a new lot or parcel on which a dwelling could be established; however, the required lot area was one-half acre when an individual sewage disposal system was used in conjunction with a community water supply system. The Benton County Measure 37 report indicates that tax lot 601 was not in 1969 and is not currently served by a community water supply system. Tax lot 601 consists of 1 acre and is developed with a dwelling. Therefore, the claimant lawfully could not have established any additional home sites on tax lot 601 on when he acquired that tax lot in 1969. Accordingly, it appears that the claimant does not qualify for any additional home sites on tax lot 601.

The claimant acquired tax lot 600 of the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Benton County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On April 10, 1975, the Measure 37 claim property was zoned Exclusive Farm Use (EFU) by Benton County. Benton County’s EFU zone included a fixed minimum acreage standard of 40 acres. However, the Commission had not acknowledged that zone for compliance with the goals when the claimant acquired the property on April 10, 1975. Accordingly, in addition to the county zoning, the statewide planning goals, and in particular Goal 3 and ORS chapter 215 applied directly to the Measure 37 claim property when the claimant acquired it.

On February 22, 1984, the Commission acknowledged the application of Benton County’s Exclusive Farm Use (EFU) zone to the Measure 37 claim property. The Commission’s acknowledgement of Benton County’s EFU zone confirmed that zone’s compliance with Goal 3 and ORS chapter 215. Benton County’s acknowledged EFU zone required minimum parcel sizes as they existed on August 23, 1980, for the establishment of a dwelling on a vacant lot or parcel, and allowed a dwelling on an established parcel provided the proposed dwelling was the only dwelling on the subject property and on contiguous property in the same ownership. The claimant’s entire property consists of 4 acres and is developed with a dwelling. Therefore, on the claimant’s acquisition date, he could not have established any home sites in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations.

However, because of some 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 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 where the record does not otherwise clearly establish 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 are eligible for one home site approval, including existing development.

The Measure 37 claim property consists of 4 acres and is developed with one dwelling. Therefore, neither the local regulations in effect when the claimant acquired tax lot 600 nor Measure 49, as amended, allow any additional home sites.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimant, Delmar Moore, 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.