



**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 10, 2010

STATE ELECTION NUMBER: E132868¹

CLAIMANTS: Floyd J. and Mimi K. Stout
19230 Alsea Highway
Alsea, OR 97324

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 14S, Range 7W, Section 6
Tax lots 900 and 1700
Benton County

I. ELECTION

The claimants, Floyd and Mimi Stout, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located at 19230 Alsea Highway near the community of Alsea, 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 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 department's preliminary analysis, it appears that the claimants are not eligible for any relief under Measure 49 on tax lot 900 of the Measure 37 claim property because the claimants have not established their ownership of tax lot 900 for purposes of Measure 49.

Based on the department's preliminary analysis, it appears that the claimants are not eligible for any relief under Measure 49 on tax lot 1700 of the Measure 37 claim property because the claimants would not have been lawfully permitted to establish any additional home sites on tax lot 1700 when they acquired it.

¹ The claimants also have a claim, E132869, for property that is not contiguous to tax lots 900 and 1700.

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 three home site approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes more than three home sites. Therefore, the claimants 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 claimants, Floyd and Mimi Stout, filed a Measure 37 claim, M132868, with the state on December 1, 2006. The claimants filed a Measure 37 claim, M37-06-069, with Benton 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 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 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, Floyd and Mimi Stout are the owners of fee title to tax lot 1700 of the Measure 37 claim property as shown in the Benton County deed records and, therefore, are owners of tax lot 1700 of the Measure 37 claim property under Measure 49.

According to the information submitted by the claimants, Floyd and Mimi Stout have not established their ownership of tax lot 900 of the Measure 37 claim property for the purposes of Measure 49. The claimants included an unrecorded warranty deed dated April 22, 1971 for tax lot 900. Unrecorded documents do not establish ownership for purposes of Measure 49.²

Because this requirement has not been met with respect to tax lot 900 of the Measure 37 claim property, the remainder of the approval criteria will only be evaluated for tax lot 1700 of the Measure 37 claim property.

(b) All Owners of the Property Have Consented in Writing to the Claim

It appears that the claimants are the sole owners of tax lot 1700 of the Measure 37 claim 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 Benton County, outside any urban growth boundary and outside any city limits, near the community of Alsea.

(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.

Tax lot 1700 of the Measure 37 claim 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.

Tax lot 1700 of the Measure 37 claim property consists of 47.53 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.

² As is relevant here, Section 2(16)(a) of Measure 49 (2007) defines an owner as “the owner of fee title to the property as shown in the deed records of the county where the property is located”. A search of Benton County deed records did not return any ownership documents establishing the claimants’ date of acquisition of tax lot 900 of the Measure 37 claim property for purposes 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."

Benton County deed records indicate that the claimants acquired tax lot 1700 of the Measure 37 claim property on February 6, 1989.

On February 6, 1989, the Measure 37 claim property was subject to Benton County's acknowledged Exclusive Farm Use (EFU) zone. Although Benton County's EFU zone was acknowledged to comply with the Statewide Planning Goals, that zone did not establish a fixed minimum acreage standard for the creation of a lot or parcel on which a dwelling could be established. Rather, applications for division and development were evaluated on a case-by-case basis to ensure compliance with the Goals and the applicable requirements of ORS chapter 215. Because of uncertainty regarding the historic application of the county's acknowledged plan, the 2010 Legislative Assembly amended Measure 49. Senate Bill (SB) 1049 (2010) specifies that, for purposes of determining the number of home site approvals that would have been lawfully permitted when a claimant acquired Measure 37 claim property that was subject to an acknowledged resource zone that without a fixed minimum acreage standard, the minimum acreage standard is 40 acres unless the record for the claim demonstrates that the claimant was lawfully permitted to establish a home site on a lot or parcel of a different acreage. Tax lot 1700 of the Measure 37 claim property consists of 47.53 and is developed with two dwellings.

Therefore, it appears that the claimants lawfully could not have established any additional home sites on their date of acquisition of tax lot 1700.³

2. Preliminary Conclusion

Based on the preliminary analysis, it appears that the claimants, Floyd and Mimi Stout, do not qualify for Measure 49 home site approvals on tax lot 900 of the Measure 37 claim property because the claimants have not established their ownership of tax lot 900 for purposes of Measure 49.

Based on the preliminary analysis, it appears that the claimants, Floyd and Mimi Stout, do not qualify for Measure 49 home site approvals on tax lot 1700 of the Measure 37 claim property because they were not lawfully permitted to establish any additional lots, parcels or dwellings on their 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.

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