OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

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

October 9, 2009

STATE ELECTION NUMBER: E132930B[1]

CLAIMANTS: Agustin and Maria Palacios
18936 Butteville Road NE
Aurora, OR 97002

MEASURE 37 PROPERTY IDENTIFICATION: Township 4S, Range 1W, Section 30C
Tax lots 100 and 200
Marion County

AGENT CONTACT INFORMATION: Patrick E. Doyle
Doyle and Wendell, LLP
429 N Water St.
Silverton, OR 97381

I. ELECTION

The claimants, Agustin and Mary Palacios, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located at 18936 Butteville Road, near Silverton, in Marion 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 qualified for up to three home site approvals on tax lot 100 of the Measure 37 claim property. The claimants' property, including both the Measure 37 claim property and all contiguous property in the same ownership, currently appears to consist of two lots or parcels, which are developed with one

[1] Claim E132930 has been split into two claims, E132930A and E132930B, because the Measure 37 claim sought relief for two non-contiguous properties. Claim E132930A addresses the claimants' eligibility for Measure 49 relief on tax lots 900 and 1400 and E132930B addresses their relief on tax lots 100 and 200.

dwelling. After taking into account the number of lots, parcels and dwellings currently located on the Measure 37 claim property and the contiguous property under the same ownership, it appears that the home site approvals will allow the claimants to establish one additional lot or parcel and two additional dwellings on tax lot 100 of the Measure 37 claim property.

Based on the department's preliminary analysis, it appears that the claimants are not eligible for any relief on tax lot 200 under Measure 49 because the claimants would not have been lawfully permitted to establish any additional home sites when they acquired that portion of the Measure 37 claim property.

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 four home site approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes residential use. 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, Agustin and Maria Palacios, filed a Measure 37 claim, M132930, with the state on December 1, 2006. The claimants filed a Measure 37 claim, M06-296, with Marion 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 Marion 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, Agustin and Maria Palacios are the owners of fee title to the property as shown in the Marion 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 Marion County, outside the urban growth boundary and outside the city limits of the nearest city, Silverton.

(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.

The property is currently zoned Exclusive Farm Use (EFU) by Marion 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 19.88 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."

Marion County deed records indicate that the claimants acquired tax lot 100 (19.44 acres) on May 14, 1968, and tax lot 200 (0.44 acres) on October 1, 1976.

On May 14, 1968, the Measure 37 claim property consisted of tax lot 100 and was subject to Marion County's Residential Agriculture (RA) zone. Marion County's RA zone did not prohibit the establishment of three home sites on a 19.44-acre property. Therefore, the claimants lawfully could have established the three home sites on their date of acquisition.

The claimants acquired tax lot 200 of the Measure 37 claim property after adoption of the statewide planning goals, but before the Commission acknowledged Marion 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 consisted of tax lots 100 and 200 and was zoned Exclusive Farm Use (EFU) by Marion County. However, the Commission had not acknowledged that zone for compliance with the goals when the claimants acquired the property on date. Accordingly, the statewide planning goals, and in particular Goal 3 and ORS chapter 215 applied directly to the Measure 37 claim property when the claimants acquired it.

On June 10, 1982, the Commission acknowledged the application of Marion County's Exclusive Farm Use (EFU) zone to the Measure 37 claim property. The Commission's acknowledgement of Marion County's EFU zone confirmed that zone's compliance with Goal 3 and ORS chapter 215. Marion County's acknowledged EFU zone required at least 40 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consists of 19.88 acres. Therefore, on the claimants' acquisition date, they could not have established any home sites in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations. It appears that the claimants do not qualify for any home

sites on tax lot 200, unless the claimants can show that a direct application of the Goals and ORS chapter 215 would have allowed the claimants to establish additional home sites.

2. Preliminary Conclusion

Based on the preliminary analysis, it appears that the claimants, Agustin and Maria Palacios, qualify for up to three home site approvals on tax lot 100 of the Measure 37 claim property under Section 6 of Measure 49.

Based on the preliminary analysis, the claimants, Agustin and Maria Palacios, do not qualify for Measure 49 home site approvals on tax lot 200 of the Measure 37 claim property because the claimants were not lawfully permitted to establish the lots, parcels or dwellings on the claimants' date of acquisition.

V. NUMBER OF LOTS, PARCELS OR DWELLINGS ON OR CONTAINED WITHIN THE PROPERTY

The number of lots, parcels or dwellings that a claimant is authorized to establish pursuant to a home site authorization is reduced by the number of lots, parcels or dwellings currently in existence on the Measure 37 claim property and any contiguous property under the same ownership according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49. However, if a claimant otherwise qualifies for relief under Section 6 of Measure 49, the claimant will be able to establish at least one additional lot, parcel or dwelling, regardless of the number of lots, parcels or dwellings currently in existence.

Based on the documentation provided by the claimants and information from Marion County, the Measure 37 claim property appears to currently include two lots or parcels and one dwelling.[2] There is no contiguous property under the same ownership. Therefore, the three home site approvals the claimants appear to qualify for under Section 6 of Measure 49 will allow the claimants to establish up to one additional lot or parcel and two additional dwellings on tax lot 100 of the Measure 37 claim property. Each dwelling must be on a separate lot or parcel, and must be contained within tax lot 100 of the Measure 37 claim property. The claimants will be required to alter the configuration of the lots or parcels currently in existence on the Measure 37 claim property and contiguous property if they intend to develop two additional dwellings, so that each additional dwelling established on the Measure 37 claim property, pursuant to these home site approvals, is sited on a separate lot or parcel, and that the total number of lots or parcels located on the Measure 37 claim property and contiguous property does not exceed three.

[2] The documentation for this claim indicates that there may be one temporary dwelling currently located on the subject property. Temporary dwellings are not considered in determining the number of dwellings currently existing on the property. The claimants may choose to convert a temporary dwelling currently located on the property on which the claimants are eligible for Measure 49 relief, to an authorized home site through the Measure 49 home site approval. Otherwise, the temporary dwelling is subject to the terms of local permit requirements under which it was approved, and is subject to removal at the end of term for which it is allowed.

VI. PRELIMINARY STATEMENT OF PROPOSED LIMITATIONS AND CONDITIONS ON THE NUMBER AND SCOPE OF HOME SITE APPROVALS

The department has identified the following limitations and conditions that may affect the number or scope of the home site approvals that the claimants would otherwise be entitled to under Section 6 of Measure 49. This list may not be comprehensive and does not preclude the possibility that other considerations, not yet identified by the department, may affect the establishment of a land division or dwelling authorized by a home site approval.

1. The establishment of a land division or dwelling based on a Measure 49 home site authorization must comply with all applicable standards governing the siting or development of the land division or dwelling. However, those standards must not be applied in a manner that prohibits the establishment of the land division or dwelling, unless the standards are reasonably necessary to avoid or abate a nuisance, to protect public health or safety, or to carry out federal law.

2. A home site authorization will not authorize the establishment of a land division or dwelling in violation of a land use regulation described in ORS 195.305(3) or in violation of any other law that is not a land use regulation as defined by ORS 195.300(14).

3. A claimant is not eligible for more than 20 home site approvals under Sections 5 to 11 of Measure 49 regardless of how many properties a claimant owns or how many claims a claimant filed.

4. The number of lots, parcels or dwellings a claimant may establish under a Measure 49 home site authorization is reduced by the number of lots, parcels and dwellings currently in existence on the Measure 37 claim property and contiguous property in the same ownership, regardless of whether evidence of their existence has been provided to the department. If, based on the information available to the department, the department has calculated the number of currently existing lots, parcels or dwellings to be either greater than or less than the number of lots, parcels or dwellings actually in existence on the Measure 37 claim property or contiguous property under the same ownership, then the number of additional lots, parcels or dwellings a claimant may establish pursuant to this home site authorization must be adjusted according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49. Statements in this preliminary evaluation regarding the number of lots, parcels or dwellings currently existing on the Measure 37 claim property and contiguous property are not a determination on the current legal status of those lots, parcels or dwellings.

5. Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimants may choose to convert any temporary dwelling currently located on the property on which the claimants are eligible for Measure 49 relief to an authorized home site pursuant to a Measure 49 home site approval. Otherwise, any temporary dwelling is subject to the terms of the local permit requirements under which it was approved, and is subject to removal at the end of the term for which it is allowed.

6. A home site approval only authorizes the establishment of a new lot, parcel or dwelling on property on which the claimants are eligible for Measure 49 relief. No additional development is authorized on contiguous property for which no Measure 37 claim was filed or on Measure 37 claim property on which a claimant is not eligible for Measure 49 relief. A lot or parcel established pursuant to a home site approval must either be the site of a dwelling that is currently in existence or be the future site of a dwelling that may be established pursuant to the home site approval.

7. The claimants may use a home site approval to convert a lot, parcel or dwelling currently located on the property on which the claimants are eligible for Measure 49 relief to an authorized home site. If the number of lots, parcels or dwellings existing on the property on which the claimants are eligible for Measure 49 relief exceeds the number of home site approvals the claimants qualify for under a home site authorization, the claimants may select which existing lots, parcels or dwellings to convert to authorized home sites; or may reconfigure existing lots, parcels or dwellings so that the number is equivalent to the number of home site approvals.

8. The claimants may not implement the relief described in a Measure 49 Home Site Authorization if a claimant has been determined to have a common law vested right to a use described in a Measure 37 waiver for the property. Therefore, if a claimant has been determined in a final judgment or final order that is not subject to further appeal to have a common law vested right as described in Section 5(3) of Measure 49 to any use on the Measure 37 claim property, then any Measure 49 Home Site Authorization for the property will be void. However, so long as no claimant has been determined in such a final judgment or final order to have a common law vested right to a use described in a Measure 37 waiver for the property, a use that has been completed on the property pursuant to a Measure 37 waiver may be converted to an authorized home site.

9. A home site approval does not authorize the establishment of a new dwelling on a lot or parcel that already contains one or more dwellings. The claimants may be required to alter the configuration of the lots or parcels currently in existence on the Measure 37 claim property and contiguous property so that each additional dwelling established on the property on which the claimants are eligible for Measure 49 relief, pursuant to a home site approval, is sited on a separate lot or parcel.

10. Because the property is located in an exclusive farm use zone, the home site authorization will not authorize new lots or parcels that exceed five acres. However, existing or remnant lots or parcels may exceed five acres. Before beginning construction in one of these zones, the owner must comply with the requirements of ORS 215.293. Further, the home site authorization will not authorize new lots or parcels that exceed two acres if the new lots or parcels are located on high-value farmland, on high-value forestland or on land within a ground water restricted area. However, existing or remnant lots or parcels may exceed two acres.

11. Because the property is located in an exclusive farm use zone, Measure 49 requires new home sites to be clustered so as to maximize suitability of the remnant lot or parcel for farm

or forest use. Further, if an owner of the property is authorized by other home site approvals to subdivide, partition, or establish dwellings on other Measure 37 claim properties, Measure 49 authorizes the owner to cluster some or all of the authorized lots, parcels or dwellings that would otherwise be located on land in an exclusive farm use zone, a forest zone or a mixed farm and forest zone on a single Measure 37 claim property that is zoned residential use or is located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone but is less suitable for farm or forest use than the other Measure 37 claim properties.

12. Once the department issues a final home site authorization, a home site approval granted under that authorization will run with the property and will transfer with the property. A home site approval will not expire, except that if a claimant who received a home site authorization later conveys the property to a party other than the claimant's spouse or the trustee of a revocable trust in which the claimant is the settlor, the subsequent owner of the property must establish the authorized lots, parcels and dwellings within 10 years of the conveyance. A lot or parcel lawfully created based on the home site authorization will remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law. A dwelling lawfully created based on a home site approval is a permitted use.

VII. 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.