OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

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

Preliminary Evaluation

December 17, 2009

STATE ELECTION NUMBER:	E133888
CLAIMANTS:	David M. and Shari L. Salisbury 40779 Galloway Lane Astoria, OR 97103
MEASURE 37 PROPERTY IDENTIFICATION:	Township 8N, Range 8W, Section 23 Tax lots 300 and 608[1] Clatsop County

I. ELECTION

The claimants, David and Shari Salisbury, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 4, 2006, for property located at 40779 and 40815 Galloway Lane, near Astoria, in Clatsop 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 because the claimants would not have been lawfully permitted to establish any additional home sites when they acquired the 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

[1] The Measure 37 claim property consisted of tax lots 300 and 608. Tax lot 608 has since been re-numbered as tax lot 800 and re-mapped in Section 23AC.

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 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, David and Shari Salisbury, filed a Measure 37 claim, M133888, with the state on December 4, 2006. The claimants filed a Measure 37 claim, M37-06-78, with Clatsop County on December 4, 2006. The state claim was filed on December 4, 2006.

It appears that the claimants timely filed a Measure 37 claim with both the state and Clatsop 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, David and Shari Salisbury are the settlors of a revocable trust into which they conveyed the Measure 37 claim property 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 Clatsop County, outside the urban growth boundary and outside the city limits of the nearest city, Astoria.

(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 300 (19.66 acres) of the Measure 37 claim property is currently zoned Agriculture-Forestry (AF-80) by Clatsop County, in accordance with Goals 3 and 4, as implemented by OAR 660-006-0050. State land use regulations, including applicable provisions of ORS chapter 215 and OAR 660, divisions 6 and 33, generally prohibit the establishment of a lot or parcel less than 80 acres in size in a mixed farm/forest zone and regulate the establishment of dwellings on new or existing lots or parcels.

Tax lot 608 (2.25 acres) of the Measure 37 claim property is currently zoned Residential Agriculture (RA-2) by Clatsop 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. Clatsop County's RA-2 zone requires a minimum lot size of two acres.

The claimants' property consists of 19.66 acres zoned AF-80 and 2.25 acres zone RA-2. 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."

Clatsop County deed records indicate that the claimants acquired tax lot 608 (2.25 acres) on March 2, 1982, and tax lot 300 (19.66 acres) on October 26, 1994.

The claimants acquired tax lot 608 of the Measure 37 claim property after adoption of the statewide planning goals, but before the Commission acknowledged Clatsop 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, tax lot 608 of the Measure 37 claim property was zoned Residential Agriculture (RA-2) by Clatsop County, which required a minimum parcel size of two acres for the creation of a new lot or parcel. On August 3, 1984, the Commission acknowledged the application of Clatsop County's RA-2 zone to tax lot 608. However, the Commission had not acknowledged Clatsop County's comprehensive plan and land use regulations for compliance with the goals, when the claimants acquired tax lot 608 on March 2, 1982. Accordingly, the statewide planning goals, and in particular Goal 14, applied directly to tax lot 608 of the Measure 37 claim property when the claimants acquired it.

On March 2, 1982, Goal 14 required counties "[t]o provide for an orderly and efficient transition from rural to urban land use * * *." The Goal required the creation of urban growth boundaries to "identify and separate urbanizable land from rural land," and prohibited the location of "urban uses" outside urban growth boundaries without the approval of a Goal 2 exception to Goal 14.In general, and consistent with subsequent judicial interpretation and LCDC rules implementing Goal 14, urban uses included residential lots or parcels less than two acres in size. Ultimately, the County's acknowledged plan zoned the subject property to require a minimum of two acres for the creation of a new lot or parcel. Therefore, the establishment of a new lot or parcel of two acres on the subject property would have complied with Goal 14 on the claimants' date of acquisition. However, based on evidence in the record and consistent with judicial and regulatory authority, under a direct application of the goals, prior to acknowledgement, a lot or parcel of two acres or more could also have complied with the requirements of Goal 14.

Tax lot 608 of the Measure 37 claim property consists of 2.25 acres and is developed with a dwelling. Therefore, it appears that the claimants do not qualify for any home sites.

On October 26, 1994, tax lot 300 of the Measure 37 claim property was subject to Clatsop County's acknowledged Agriculture-Forestry (AF-20) zone. Clatsop County's AF-20 zone required 20 acres for the creation of a new lot or parcel on which a dwelling could be established. Tax lot 300 consists of 19.66 acres and is developed with a dwelling. Therefore, the claimants lawfully could not have established any additional home sites on tax lot 300 on their date of acquisition.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimants, David and Shari Salisbury, do not qualify for Measure 49 home site approvals because the claimants were not lawfully permitted to establish the lots, parcels or dwellings on the claimants' 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.