**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 22, 2009

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| **STATE ELECTION NUMBER:** | E133923A[1,2] |
| **CLAIMANT:** | Gayle S. Wilhoit<br>17275 Kings Grade Road<br>Newberg, OR 97132 |
| **MEASURE 37 PROPERTY IDENTIFICATION:** | Township 3S, Range 3W, Section 3<br>Tax lots 300, 301 and 600<br>Yamhill County |
| **AGENT CONTACT INFORMATION:** | John C. Pinkstaff<br>601 SW 2nd Avenue, Suite 2100<br>Portland, OR 97204 |

## I. ELECTION

The claimant, Gayle Wilhoit, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 4, 2006, for property located at 17275 Kings Grade Road, near Newberg, in Yamhill 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 her 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 she acquired the property.

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[1] Claim E133923 has been split into two claims, E133923A and E133923B, because the Measure 37 claim sought relief for two non-contiguous parcels. Claim E133923A addresses the claimant's eligibility for Measure 49 relief on tax lots 300, 301 and 600 and E133923B addresses her relief on tax lot 101.

[2] On July 9, 2008, the department sent the claimant a letter stating that no further action would be taken regarding this claim. That letter was sent in error. This Preliminary Evaluation supersedes the letter dated July 9, 2008, and this claim will continue to be processed under Measure 49.

## 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 three home site approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes three 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, Gayle Wilhoit, filed a Measure 37 claim, M133923, with the state on December 4, 2006. The claimant filed a Measure 37 claim, M37-270-06, with Yamhill County on December 4, 2006. The state claim was filed on December 4, 2006.

It appears that the claimant timely filed a Measure 37 claim with both the state and Yamhill 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, Gayle Wilhoit is the owner of fee title to the property as shown in the Yamhill 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

It appears that the claimant is the sole owner 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 Yamhill County, outside the urban growth boundary and outside the city limits of the nearest city, Newberg.

### (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 (EF-40) by Yamhill 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. Under ORS 215.780(2)(a), counties may adopt minimum lot sizes smaller than 80 acres, subject to approval by the Land Conservation and Development Commission (the Commission). The Commission has approved Yamhill County's EF-40 zone, which requires a minimum lot size of 40 acres.

The claimant's property consists of 31.53 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."

Yamhill County deed records indicate that the claimant acquired tax lots 301, 600 and the eastern portion of tax lot 300 (approximately 27 acres) on February 17, 1994, and the western portion of tax lot 300 (approximately 4.9 acres) on September 24, 2003.

On February 17, 1994, the Measure 37 claim property consisted of the eastern portion of tax lot 300 and tax lots 301 and 600 and was subject to Yamhill County's acknowledged Exclusive Farm Use (EF-40) zone. Yamhill County's EF-40 zone required 40 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimant's property consisted of approximately 27 acres. Therefore, the claimant lawfully could not have established any home sites on her date of acquisition.

On September 24, 2003, the Measure 37 claim property consisted of all of tax lot 300, 301 and 600 and was subject to Yamhill County's acknowledged Exclusive Farm Use (EF-40) zone. Yamhill County's EF-40 zone required 40 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimant's property consists of approximately 31.53 acres and is developed with a dwelling. Therefore, the claimant lawfully could not have established any home sites on her date of acquisition.

## 2. Preliminary Conclusion

Based on the preliminary analysis, the claimant, Gayle Wilhoit, 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.**