



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

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

January 5, 2010

STATE ELECTION NUMBER: E134107

CLAIMANT: Arthur L. McFadden
401 SW Alder Street
Portland, OR 97204

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 11S, Range 5W, Section 25
Tax lot 1300¹
Benton County

AGENT CONTACT INFORMATION: Michael J. Lilly
Attorney at Law
6600 SW 92nd Avenue, Suite 280
Portland, OR 97223

I. ELECTION

The claimant, Arthur McFadden, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 4, 2006, for property located at 1521 NE. Highway 20, near Corvallis, 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.

¹ The Measure 37 claim property consists of tax lots 1300 and 1308. The claimant did not elect supplemental review for tax lot 1308. While a claim cannot be amended to remove claim property, analysis of a claimant's eligibility for relief on a portion of claim property may, in some cases, be immaterial. In this case whether the claimant is eligible for relief on tax lot 1308 is not relevant to the analysis of whether the claimants are eligible for relief on tax lot 1300. Therefore, although tax lot 1308 is part of the Measure 37 claim property, review of the claimant's eligibility for relief on tax lot 1308 is omitted and all references to Measure 37 claim property refer only to tax lot 1300.

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 three home site approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes 220 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, Arthur McFadden, filed a Measure 37 claim, M134107, with the state on December 4, 2006. The claimant filed a Measure 37 claim, M37-06-100, with Benton 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 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 obtained by the department, Arthur McFadden 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

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

(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 135.94 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 the property on October 13, 1989.²

On October 13, 1989, the Measure 37 claim property was subject to Benton County's acknowledged Exclusive Farm Use (EFU) zone. Benton County's 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 property consists of 135.94 acres and is developed with a dwelling. Therefore, the claimant lawfully could not have established any additional home sites on his date of acquisition.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimant, Arthur McFadden, 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.

² The deed records indicate that the claimant re-acquired tax lot 1300 on October 13, 1989 after having conveyed the tax lot to another person. Regarding re-acquisition of subject property, Measure 49 Section 21(3) provides: "If a claimant conveyed the property to another person and re-acquired the property, whether by foreclosure or otherwise, the claimant's acquisition date is the date the claimant re-acquired ownership of the property."

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.