OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

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

April 5, 2010

STATE ELECTION NUMBER: E134340[1]

CLAIMANT: Merlene Bourasa
3788 Hope Road
Vale, OR 97918

MEASURE 37 PROPERTY IDENTIFICATION: Township 18S, Range 44E, Section 29
Tax lots 700 and 800[2]
Malheur County

I. ELECTION

The claimant, Merlene Bourasa, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on April 20, 2007, for property located at 3788 Hope Road, near Vale, in Malheur 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 AMENDED PRELIMINARY EVALUATION

Based on the department's amended preliminary analysis, it appears that the claimant is not eligible for any relief under Measure 49 because the claimants would not have been lawfully permitted to establish any additional home sites when she 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

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[1] A preliminary evaluation was issued on December 31, 2008 for this claim, which concluded preliminarily that the claimant would not qualify for relief under Measure 49. Based on comments received from the claimant on that preliminary evaluation, the department has determined that the claimant may be eligible for relief under Measure 49.
[2] The M37 claim property identified tax lots 700 and 800. These two lots have since been combined into tax lot 700.

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 two home site approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes two home sites. Therefore, the claimant may qualify for a maximum of two home site approvals under Section 6 of Measure 49.

IV. AMENDED PRELIMINARY ANALYSIS OF QUALIFICATION FOR HOME SITE APPROVAL

1. Amended 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, Merlene Bourasa, filed a Measure 37 claim, M134340, with the state on April 20, 2007. The claimant filed a Measure 37 claim, M37-09-07, with Malheur County on April 20, 2007. The state claim was filed after December 4, 2006, in accordance with the applicable provisions of OAR 660-041-0020(2)(b).

It appears that the claimant timely filed a Measure 37 claim with both the state and Malheur 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, Merlene Bourasa is the owner of fee title to the property as shown in the Malheur 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 Malheur County, outside the urban growth boundary and outside the city limits of the nearest city, Vale.

(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 two home site approvals.

The property is currently zoned. Exclusive Farm Use (EFU) by Malheur 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 74.35 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the two 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 two 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."

Malheur County deed records indicate that the claimant acquired the property on December 11, 1978.

The claimant acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Malheur County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On December 11, 1978, the Measure 37 claim property was zoned Exclusive Farm Use (EFU) by Malheur County. Malheur County's EFU zone included a fixed minimum acreage standard of 40 acres. However, the Commission had not acknowledged that zone for compliance with the goals when the claimant acquired the property on December 11, 1978. Accordingly, the statewide planning goals, and in particular Goal 3, and ORS chapter 215 applied directly to the Measure 37 claim property when the claimant acquired it.

On June 14, 1984, the Commission acknowledged the application of Malheur County's Exclusive Farm Use (EFU) zone to the Measure 37 claim property. The Commission's acknowledgement of Malheur County's EFU zone confirmed that zone's compliance with Goal 3 and ORS chapter 215. Although the Commission acknowledged Malheur County's EFU zone to be in compliance with the statewide planning goals, the zone did not include a fixed minimum acreage standard for the creation of a new lot or parcel on which a dwelling could be established. Rather, the county reviewed applications for land division and development on a case-by-case basis in order to ensure compliance with the county's farm use policies, the statewide planning goals and ORS chapter 215. The claimant's property consists of 74.35 acres and is developed with one dwelling. Therefore, on the claimant's acquisition date, she could not have established any additional home sites in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations, absent demonstrated compliance with the applicable review criteria.

However, because of uncertainty during the time period between adoption of the statewide planning goals in 1975 and each county's acknowledgment of its plan and land use regulations regarding the factual and legal requirements for establishing compliance with the statewide planning goals, the 2010 Legislative Assembly amended Measure 49. Senate Bill (SB) 1049 (2010) specifies the number of home sites considered lawfully permitted, for purposes of Measure 49, for property acquired during this period unless the record for the claim otherwise demonstrates the number of home sites that a claimant would have been lawfully permitted to establish. Those amendments provide, in relevant part, that eligibility for home site approval is subject to consistency with local land use regulations in effect when the claimant acquired the subject property.

The Measure 37 claim property was subject to Malheur County's EFU zone on the claimant's date of acquisition. That zone included a fixed minimum acreage standard of 40 acres.

The Measure 37 claim property consists of 74.35 acres and is developed with one dwelling. Therefore, based on the analysis under SB 1049 (2010), the claimant was not lawfully permitted to establish any additional home sites on the Measure 37 claim property on her date of acquisition.

2. Amended preliminary Conclusion

Based on the amended preliminary analysis, it appears that the claimant, Merlene Bourasa, does not qualify for home site approvals under Section 6 of Measure 49 because the claimant was not lawfully permitted to establish any additional home sites on her 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 amended 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 amended 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 "Amended Preliminary Evaluation Comments." Comments must be submitted in original written form only. Comments submitted electronically or by facsimile will not be accepted.