



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

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

June 23, 2010

STATE ELECTION NUMBER:

H119281

CLAIMANTS:

James R. and Kelly A. Brown
4691 SW Helmholtz Way
Redmond, OR 97756

Cecil Irene Perry
4691 SW Helmholtz Way
Redmond, OR 97756

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 15S, Range 12E, Section 25
Tax lot 2300
Deschutes County

I. ELECTION

The claimants, James and Kelly Brown and Cecil Irene Perry, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on January 12, 2005, for property located at 4691 SW Helmholtz Way, near Redmond, in Deschutes 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 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. However, as initially enacted in 2007, a claimant was not eligible for relief under Measure 49 if the claimant did not file a Measure 49 election within 90 days of the department mailing the election packet. James and Kelly Brown and Cecil Irene Perry were not entitled to Measure 49 relief on that basis.

However, the Oregon State Legislative Assembly subsequently amended this Measure 49 requirement through the passage of House Bill 3225 (Chapter 855 (2009 Laws)) (HB 3225). HB 3225 extends the time period during which claimants were required to elect relief under Measure 49 to 120 days. As a result, this requirement no longer prevents the claimants, James and Kelly Brown and Cecil Irene Perry, from obtaining Measure 49 relief. The claimants elected to seek relief under Measure 49, as amended by HB 3225, and submitted the \$175 fee required by Section 18 of HB 3225 in order to have the claim reviewed.

II. SUMMARY OF PRELIMINARY EVALUATION

Based on the department's preliminary analysis, it appears that claimants James and Kelly Brown are not eligible for any relief under Measure 49 because the zoning and lawfully permitted uses of the property have not changed since their acquisition date and the claimants would not have been lawfully permitted to establish any additional home sites when they acquired the property.

Based on the department's preliminary analysis, it appears that claimant Cecil Irene Perry is not eligible for any relief under Measure 49 because the claimant no longer owns 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 three home site approvals in the election material. The Measure 37 waiver describes land division and development that could have resulted in more than three home sites. 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, as amended by HB 3225, a claimant must have filed a Measure 37 claim for the property with the state before Measure 49 became effective on December 6, 2007. If the claimant filed their state Measure 37 claim after December 4, 2006, the claimant must also have either (a) filed the claim in compliance with the provisions of OAR 660-041-0020 then in effect; (b) submitted a land use application as described in OAR 660-041-0020 then in effect prior to June 28, 2007 or ;(c) filed a Measure 37 claim with the county on or before December 4, 2006.

The claimants, James and Kelly Brown and Cecil Irene Perry, filed a Measure 37 claim, M119281, with the state on January 12, 2005. The claimants filed a Measure 37 claim, 2005-061, with Deschutes County on January 11, 2005. The state claim was filed prior to December 4, 2006.

It appears the claimants filed a timely Measure 37 claim with the state along with any additional claims or applications that the claimants had to have filed in order to be eligible for review under Measure 49, as amended by HB 3225.

In addition to timely filing a state claim, to qualify for a home site approval under Section 6 of Measure 49 the claimants must also 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, James and Kelly Brown are the owners of fee title to the property as shown in the Deschutes County deed records and, therefore, are owners of the property under Measure 49.

According to the information submitted by the claimants, Cecil Irene Perry has not established her ownership of the property for the purposes of Measure 49. Cecil Irene Perry conveyed her entire ownership interest in the Measure 37 claim property to James and Kelly Brown on January 16, 2002. Because this requirement has not been met with respect to Cecil Irene Perry, the remainder of the approval criteria will be evaluated only for claimants James and Kelly Brown.

(b) All Owners of the Property Have Consented in Writing to the Claim

It appears that claimants James and Kelly Brown are the sole owners of the property. Therefore, no additional consent is required.

(c) The Majority of the Measure 37 Claim Property Is Located Outside Any Urban Growth Boundary and Outside the Boundaries of Any City or the Measure 37 Claim Property is Located within the Boundaries of A City and Entirely Outside Any Urban Growth Boundary

The Measure 37 claim property is located in Deschutes County and the property is located outside any urban growth boundary and outside the city boundary of the nearest city, Redmond.

(d) One or More Land Use Regulations Prohibit Establishing the Lot, Parcel or Dwelling

As stated in Sections III and IV(a) above, claimants James and Kelly Brown may qualify for up to three home site approvals.

The property is currently zoned Exclusive Farm Use – Tumalo, Redmond, Bend (EFU-TRB) by Deschutes 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 Deschutes County's EFU-TRB zone, which requires a minimum lot size of 23 irrigated acres

The claimants' property consists of 35 irrigated acres and 3.61 non-irrigated 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 claimants James and Kelly Brown 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."

Deschutes County deed records indicate that claimants James and Kelly Brown acquired the property on April 7, 2000.

The zoning of the Measure 37 property has not changed since the claimant acquired the property. As it is currently, on April 7, 2000, the Measure 37 claim property was zoned Exclusive Farm Use – Tumalo, Redmond, Bend (EFU-TRB) by Deschutes County in accordance with the applicable provisions of ORS chapter 215 and OAR 660, division 33. Deschutes County's EFU-TRB zone required 23 irrigated acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consists of 35 irrigated acres and 3.61 non-irrigated acres, and is developed with two dwellings. Therefore, the claimants are not qualified for Measure 49 relief on the Measure 37 claim property because the zoning and lawfully

permitted uses of the property have not changed since the claimant acquired the property and the claimants lawfully could not have established any additional home sites on their date of acquisition.

2. Preliminary Conclusion

Based on the preliminary analysis, it appears that claimants James and Kelly Brown 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 and the zoning and lawfully permitted uses of the property have not changed since its acquisition date.

Based on the preliminary analysis, it appears that claimant Cecil Irene Perry does not qualify for Measure 49 home site approvals because the claimant is not considered an owner 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 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.