



**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 15, 2010

**STATE ELECTION NUMBER:**

H134298<sup>1</sup>

**CLAIMANTS:**

Donald O. Bieber  
41-016 Hilu Street  
Waimanalo, HI 96795

Robert W. Graham  
2140 Home Avenue  
Klamath Falls, OR 97601

**MEASURE 37 PROPERTY  
IDENTIFICATION:**

Township 38S, Range 11E  
Section 17, Tax lots 1000, 1100, 1200, 1400  
and 1500  
Section 18, Tax lots 600 and 700  
Section 20, Tax lots 1700, 1800, 1900 and  
2000  
Section 21, Tax lots 2100 and 2200  
Klamath County

**I. ELECTION**

The claimants, Donald Bieber and Robert Graham, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on March 2, 2007, for property located at 5800 Happy Hollow Lane, near Bonanza, in Klamath 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.<sup>2</sup> However, as initially enacted in 2007, a claimant was not eligible for relief under Measure 49 if the claimant filed a Measure 37 claim with the state after December 4, 2006 but did not comply with the provisions of OAR 660-

<sup>1</sup> On January 14, 2009, the department issued a preliminary evaluation based on Measure 49 election E134298 in which the department indicated that the claimants would not be eligible for Measure 49 relief. This preliminary evaluation supersedes the preliminary evaluation for E134298.

<sup>2</sup> The claimants elected review under Section 7 of Measure 49. However, under HB3225 the department may only review claim H134298 under Section 6 of Measure 49.

041-0020, then in effect. Donald Bieber and Robert Graham 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). As a result, this requirement no longer prevents the claimants, Donald Bieber and Robert Graham, 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 the claimants 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.

## **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 ten home site approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes 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, Donald Bieber and Robert Graham, filed a Measure 37 claim, M134298, with the state on March 7, 2007. The claimants filed a Measure 37 claim, 64-06 with Klamath County on November 29, 2006. The state claim was filed after December 4, 2006 and the claimants also filed a county Measure 37 claim on or before 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 deeds submitted by the claimants, Donald Bieber and Robert Graham are the owners of fee title to the property as shown in the Klamath County deed records 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 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 Klamath County and the property is located outside any urban growth boundary and outside the city boundary of the nearest city, Bonanza.

**(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.

The property is currently zoned Forestry Range (FR) by Klamath 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. Those provisions also regulate the establishment of dwellings on new or existing lots or parcels and include restrictions on establishing more than one dwelling on a single tract.

The claimants' property consists of 1,220.14 acres that make up a single tract. 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."

Klamath County deed records indicate that the claimants acquired the property on April 30, 2004.<sup>3</sup>

The zoning of the Measure 37 property has not changed since the claimants acquired the property. As it is currently, on April 30, 2004, the Measure 37 claim property was zoned Forestry Range (FR) by Klamath County in accordance with the applicable provisions of ORS chapter 215 and OAR 660, divisions 6 and 33. The FR zone requires a minimum of 80 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants were not lawfully permitted to establish more than one dwelling on a tract on their date of acquisition. The claimants' property consists of 1,220.14 acres and is developed with five dwellings. It appears that 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 claimants acquired the property, and the claimants lawfully could not have established any home sites on their date of acquisition.

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<sup>3</sup> A recorded warranty deed dated April 30, 2004, conveyed the claim property from Hungry Hollow Youth Ranch, a partnership, to the claimants as individuals.

## **2. Preliminary Conclusion**

Based on the preliminary analysis, it appears that the claimants, Donald Bieber and Robert Graham, do not qualify for Measure 49 home site approvals because the zoning and lawfully permitted uses of the property have not changed since their acquisition date and 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.**