



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

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

November 8, 2010

STATE ELECTION NUMBER: D129466B¹

CLAIMANTS: Richard B. and Marleen M. Carroll
10909 S Ridgetop Drive
Molalla, OR 97038

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 5S, Range 1E
Section 35, Tax lot 100
Section 36, Tax lots 400 and 500
Clackamas County

I. ELECTION

The claimants, Richard and Marleen Carroll, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on June 6, 2006, for property located at 10477 S Comer Creek Drive, near Molalla, in Clackamas County. ORS 195.300 to ORS 195.336 (Measure 49) entitled 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 7 of Measure 49. However, the claimants did not submit an appraisal consistent with the requirements in Section 8(5) of Measure 49 and did not change their election to request relief under Section 6 of Measure 49. Therefore, the claimants were not entitled to relief under Section 7 of Measure 49. ORS 195.300 to ORS 195.336 (Measure 49), as amended by Senate Bill 1049 (SB 1049) now entitles claimants who elected reviewed under Section 7 but did not submit an appraisal consistent with the requirements in Section 8(5) of Measure 49 to elect supplemental state review of their claims; and allows the Department of Land Conservation and Development (the department) to authorize one dwelling approval to qualified claimants and, if the property does not include a vacant parcel for the dwelling, a parcel on which to site the dwelling.

The claimants have elected supplemental review of their Measure 37 claim under SB 1049, and have submitted the \$2500 fee required by Section 7(2) of SB 1049 for that review.

¹ Claim E129466 was split into two claims, E129466A and D129466B, because the Measure 37 claim sought relief for non-contiguous parcels. The claimants were eligible for relief under Measure 49 for Claim E129466A which addressed tax lot 1100 (T5S R2E S22). A final order under Measure 49 on claim E129466(A) was issued on February 17, 2010. D129466B addresses their relief on tax lots 100, 400 and 500.

II. SUMMARY OF PRELIMINARY EVALUATION

Based on the department's preliminary analysis, it appears that the claimants are qualified for one dwelling approval on the Measure 37 claim property.

III. PRELIMINARY ANALYSIS OF QUALIFICATION FOR DWELLING APPROVAL

1. Preliminary Analysis

To qualify for approval of a dwelling under Measure 49, as amended by SB 1049, 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 claimants, Richard and Marleen Carroll, filed a Measure 37 claim, M129466, with the state on June 6, 2006. The claimants filed a Measure 37 claim, ZC062-06, with Clackamas County on May 4, 2006. The state claim was filed prior to December 4, 2006. It appears that the claimants timely filed a Measure 37 claim with both the state and Clackamas County.

In addition to filing a claim with both the state and the county in which the property is located, to qualify for a dwelling approval under SB1049, the claimants 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 and land sale contract submitted by the claimants, Richard and Marleen Carroll are the owners of fee title to tax lot 400 of the Measure 37 claim property as shown in the Clackamas County deed records and are the purchasers under a recorded land sale contract in force for tax lots 100 and 500 of the Measure 37 claim property 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 Clackamas County, outside any urban growth boundary and outside the city boundary of the nearest city, Molalla.

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

The property is currently zoned Exclusive Farm Use (EFU) by Clackamas 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 generate a minimum annual income from the sale of farm products.

The claimants’ property consists of 229.67 acres in three parcels and is developed with no dwellings. Therefore, the combined effect of state land use regulations on the establishment of a dwelling in an EFU zone is to prohibit the claimants from establishing one dwelling on the Measure 37 claim property.

(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 dwelling 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 One Additional Dwelling on the Property

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.”

Clackamas County deed records indicate that the claimants acquired tax lot 100 (50.66 acres) and 500 (176.61 acres) on May 13, 1977, and tax lot 400 (2.4 acres) on July 2, 1992. Combined, the Measure 37 claim property consists of 229.67 acres, and appears to currently be undeveloped.

The claimants acquired tax lots 100 and 500 of the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Clackamas County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On May 13, 1977, the Measure 37 claim property was zoned Exclusive Farm Use-20 (EFU-20) by Clackamas County. Clackamas County's EFU-20 zone required a minimum of 20 acres for the establishment of a new lot or parcel and allowed a dwelling on an existing lot or parcel. However, the Commission had not acknowledged that zone for compliance with the goals when the claimants acquired tax lots 100 and 500 of the Measure 37 claim property on May 13, 1977. Accordingly, the statewide planning goals, and in particular Goal 3, and ORS chapter 215 applied directly to tax lots 100 and 500 of the Measure 37 claim property when the claimants acquired it.

On December 21, 1982, the Commission acknowledged the application of Clackamas County's Exclusive Farm Use-20 (EFU-20) zone to the Measure 37 claim property. The Commission's acknowledgement of Clackamas County's EFU-20 zone confirmed that zone's compliance with Goal 3 and ORS chapter 215. Clackamas County's acknowledged EFU-20 zone required 20 acres for the creation of a new lot or parcel on which a dwelling could be established. Tax lots 100 and 500 of the claimants' property consist of 227.27 acres. Therefore, on the claimants' acquisition date, they could have established one dwelling on tax lots 100 and 500 of the Measure 37 claim property in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations.

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. 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 subject to consistency with local land use regulations in effect when they acquired the Measure 37 claim property, claimants whose property consists of at least 40 acres were lawfully permitted to establish up to three home sites.

When the claimants acquired tax lot 400 on July 2, 1992, the entirety of the Measure 37 claim property was subject to Clackamas County's acknowledged Exclusive Farm Use-20 (EFU-20) zone. Clackamas County's EFU-20 zone required 20 acres for the creation of a new lot or parcel on which a dwelling could be established.

The claimants' property consists of 229.67 acres and is undeveloped. Therefore, based on the analysis under SB 1049, the claimants were lawfully permitted to establish a dwelling on the Measure 37 claim property when they acquired it.

2. Preliminary Conclusion

Based on the preliminary analysis, it appears that the claimants, Richard and Marleen Carroll, qualify for one dwelling under Measure 49, as amended by SB 1049. Because the property appears to include a vacant parcel, the dwelling must be sited on the existing parcel within the Measure 37 claim property, and the claimants do not qualify to create an additional parcel on which to site the dwelling.

IV. PRELIMINARY STATEMENT OF PROPOSED LIMITATIONS AND CONDITIONS ON THE NUMBER AND SCOPE OF HOME SITE APPROVALS

The department has identified the following limitations and conditions that may affect the dwelling approval that the claimants would otherwise be entitled to under Measure 49, as amended by SB 1049. This list may not be comprehensive and does not preclude the possibility that other considerations, not yet identified by the department, may affect the establishment of a dwelling pursuant to this approval.

1. The establishment of a dwelling based on a Measure 49 authorization must comply with all applicable standards governing siting or development. However, those standards must not be applied in a manner that prohibits the establishment of the dwelling unless the standards are reasonably necessary to avoid or abate a nuisance, to protect public health or safety, or to carry out federal law.
2. An authorization under Measure 49 does not allow the establishment of a dwelling in violation of a land use regulation described in ORS 195.305(3) or in violation of any other law that is not a land use regulation as defined by ORS 195.300(14).
3. A claimant is not eligible for more than 20 home site approvals under Sections 5 to 11 of Measure 49 regardless of how many properties a claimant owns or how many claims a claimant filed.
4. Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimants may choose to convert a temporary dwelling currently located on the property on which the claimants are eligible for Measure 49 relief to an authorized home site pursuant to a Measure 49 dwelling approval. Otherwise, any temporary dwelling is subject to the terms of the local permit requirements under which it was approved, and is subject to removal at the end of the term for which it is allowed.
5. An authorization under Measure 49 only allows the establishment of a new dwelling on the property for which the claimants are eligible for Measure 49 relief. No additional development is authorized on contiguous property for which no Measure 37 claim was filed, or on Measure 37 claim property on which a claimant is not eligible for Measure 49 relief.

6. The claimants may use an authorization to convert an unauthorized or nonconforming dwelling currently located on the claim property into an allowed use.
7. The claimants may not implement the relief described in a Measure 49 authorization if a claimant has been determined to have a common law vested right to a use described in a Measure 37 waiver for the property. Therefore, if a claimant has been determined in a final judgment or final order that is not subject to further appeal to have a common law vested right as described in Section 5(3) of Measure 49 to any use on the Measure 37 claim property, then any Measure 49 authorization for the property will be void. However, so long as no claimant has been determined in such a final judgment or final order to have a common law vested right to a use described in a Measure 37 waiver for the property, a use that has been completed on the property pursuant to a Measure 37 waiver may be authorized using this approval.
8. This dwelling approval does not authorize the establishment of a new dwelling on a lot or parcel that already contains one or more authorized dwelling.
9. Because the property is located in an exclusive farm use zone, the owner must comply with the requirements of ORS 215.392 before beginning any construction on a dwelling authorized pursuant to this approval.
10. If an owner of the property is authorized by other home site approvals to subdivide, partition, or establish dwellings on other Measure 37 claim properties, Measure 49 authorizes the owner to cluster some or all of the authorized lots, parcels or dwellings that would otherwise be located on land in an exclusive farm use zone, a forest zone or a mixed farm and forest zone on a single Measure 37 claim property that is zoned residential use or is located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone but is less suitable for farm or forest use than the other Measure 37 claim properties.
11. Once the department issues a final authorization, a dwelling established pursuant to that authorization will run with the property and will transfer with the property. An authorization will not expire, except that if a claimant who received an authorization later conveys the property to a party other than the claimant's spouse or the trustee of a revocable trust in which the claimant is the settlor, the subsequent owner of the property must establish the authorized dwelling and lot or parcel, within 10 years of the conveyance. A lot or parcel lawfully created based on this authorization will remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law. A dwelling lawfully created based on this authorization is a permitted use.

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.