



**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 16, 2010

STATE ELECTION NUMBER: D135005

CLAIMANTS: Calvin and Lois Cook
39068 Loma Drive
Scio, OR 97374

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 10S, Range 1W, Section 20
Tax lot 404
Linn County

I. ELECTION

The claimants, Calvin and Lois Cook, filed a claim with Linn County under ORS 197.352 (2005) (Measure 37) on April 11, 2005, for property located at 39068 Loma Drive and 38554 Highway 226, near Scio, in Linn County. The claimants did not file a state Measure 37 claim. ORS 195.300 to ORS 195.336 (Measure 49), as amended by Senate Bill 1049 (SB 1049) entitles claimants who filed Measure 37 claims only with the county in which the claim property is located 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 County Measure 37 claim under SB 1049, and have submitted the \$2500 fee required by Section 7(2) of SB 1049 for that review.

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, as amended by SB 1049 because the claimants would not have been lawfully permitted to establish an additional dwelling on the county Measure 37 claim property on the date they acquired the 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To qualify for approval of a dwelling under Measure 49, as amended by SB 1049, a claimant must have filed, and not withdrawn, a valid Measure 37 claim with the county in which the claim property is located before Measure 49 became effective on December 6, 2007; and the county must have provided a certified copy of the claim to the department no later than June 30, 2010.

The claimants, Calvin and Lois Cook, filed a Measure 37 claim with Linn County on April 11, 2005. Linn County provided a certified copy of that claim to the department on June 7, 2010. It appears the claimants filed a timely Measure 37 claim with Linn County in order to be eligible for supplemental review under SB 1049.

In addition to timely filing a county claim, to qualify for a dwelling approval under SB 1049, 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 to the county by the claimants, Calvin and Lois Cook are the owners of fee title to the property as shown in the Linn 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 Linn County, outside any urban growth boundary and outside the city boundary of the nearest city, Scio.

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

The property is currently zoned Rural Residential (RR-5) by Linn County, in accordance with Goal 14, which prohibits the urban use of rural land and requires local comprehensive plans to

identify and separate urbanizable from rural land in order to provide for the orderly and efficient transition from rural to urban use. State laws, namely Goal 14 and OAR 660-004-0040, prohibit the establishment of a lot or parcel less than the size established in the County rural residential zone in existence on October 4, 2000, if the zone in existence on that date had a minimum lot size of two or more acres. Linn County's RR-5 zone requires a minimum lot size of five acres.

The claimants' property consists of 5.2 acres in one parcel and is developed with one dwelling.¹ Therefore, state land use regulations prohibit the claimants from establishing one additional dwelling on the Measure 37 claim property and a parcel on which to site that dwelling.

(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."

Linn County deed records indicate that the claimants acquired the property on October 28, 1975.

The claimants acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Linn County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251.

¹ The documentation for this claim indicates that there may be one temporary medical hardship dwelling currently located on the subject property. Temporary dwellings are not considered in determining the number of dwellings currently existing on the property.

On October 28, 1975, the Measure 37 claim property was zoned Agriculture, Residential and Timber (ART-5) by Linn County, which had a fixed minimum acreage standard of five acres. Because the Commission had not acknowledged Linn County's comprehensive plan and land use regulations for compliance with the goals, when the claimants acquired the property on October 28, 1975, the statewide planning goals, and in particular Goal 14, applied directly to the Measure 37 claim property.

Following court appeal and amendments to Linn County's rural residential exception areas, the Commission acknowledged the application of Linn County's Rural Residential (RR-5) zone to the Measure 37 claim property. The Commission's acknowledgement of Linn County's RR-5 zone confirmed that zone's compliance with Goal 14. Linn County's acknowledged RR-5 zone required five acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consists of 5.2 acres. Therefore, on the claimants' acquisition date, they could not have established an additional dwelling on a separate parcel 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 claimants whose property was ultimately acknowledged as non-resource land pursuant to Goal 14 and whose property was, at acquisition, subject to a county zone that included a fixed minimum acreage standard of more than two acres, are eligible for the number of home site approvals that would have been lawfully permitted under the minimum acreage standard in that zone, including existing development.

The Measure 37 claim property consists of 5.2 acres and is developed with one lot and one dwelling. The Measure 37 claim property was subject to Linn County's ART-5 zone on the claimants' date of acquisition. That zone required a minimum of five acres for the establishment of a new parcel for residential development. Therefore, based on the analysis under SB 1049 (2010), it appears that the claimants were not lawfully permitted to establish any additional dwellings under Measure 49, as amended by SB 1049.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimants, Calvin and Lois Cook, do not qualify for relief under Measure 49, as amended by SB 1049, because the claimants were not lawfully permitted to establish an additional dwelling on a separate parcel on the claimants' date of acquisition.

IV. 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.