



**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: D135007

CLAIMANTS: Thomas and Phyllis Fencil
48278 Kingwood Avenue, SW
Mill City, OR 97360

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 9S, Range 3E, Section 31
Tax lot 1003
Linn County

I. ELECTION

The claimants, Thomas and Phyllis Fencil, filed a claim with Linn County under ORS 197.352 (2005) (Measure 37) on October 19, 2006, for property located at 48278 Kingwood Avenue, SW, near Mill City, 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 Linn 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 qualified for one dwelling approval and one parcel on which to site that dwelling on the approximate 94.2 acre portion of the Measure 37 claim property located outside the Mill City urban growth boundary.

Based on the department's preliminary analysis, it further appears that the claimants are not eligible for any relief under Measure 49, as amended by SB 1049 for that portion of the property located at the northeast corner (approximately 0.40-acre) and northwest corner (approximately

1.40-acres located north of Kingwood Avenue) of the claim property because that portion of the property is located inside the Mill City urban growth boundary.

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To qualify for approval of a dwelling under Measure 49, as amended by SB 1049, a claimant must have filed, and not withdrawn, a valid Measure 37 claim with the county in which the claim property is located before Measure 49 became effective on December 6, 2007; and the county must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, Thomas and Phyllis Fencel, filed a Measure 37 claim with Linn County on October 19, 2006. Linn County provided a certified copy of that claim to the department on June 7, 2010. Therefore, it appears the claimants filed a timely Measure 37 claim with Linn County in order to be eligible for 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 warranty deed submitted to the county by the claimants, Thomas and Phyllis Fencel 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 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, and the majority of the property is located outside any urban growth boundary and outside the city boundary of the nearest city, Mill City.

Based on information provided by Linn County, the northeast corner (approximately 0.40 acres) and northwest corner (approximately 1.40 acres located north of Kingwood Avenue) portions of the property are located inside the Mill City urban growth boundary. Section 14 of HB 3225 prohibits establishment of lots parcels or dwellings pursuant to a Measure 49 authorization on property within an urban growth boundary. The remaining criteria will, therefore, not be evaluated for these portions of the claim property within the urban growth boundary.

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

The property is currently zoned Farm/Forest (F/F) by Linn 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 and regulate the establishment of dwellings on new or existing lots or parcels.

The claimants' property outside the urban growth boundary consists of approximately 94.2 acres in one parcel and is developed with one dwelling. Therefore, state land use regulations prohibit the claimants from establishing one additional dwelling and a parcel on which to site that 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 an additional dwelling and a lot or parcel on which to site the dwelling for which the claimants may qualify 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 February 23, 1981.

The Measure 37 claim property located outside the urban growth boundary consists of approximately 94.2 acres, and appears to currently be developed with one dwelling.

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. On February 23, 1981, the Measure 37 claim property was zoned Farm/Forest by Linn County. Linn County's Farm/Forest zone required a minimum of 40 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 the property. Accordingly, the statewide planning goals, and in particular Goals 3 and 4 and ORS chapter 215 applied directly to the Measure 37 claim property when the claimants acquired it.

On July 18, 1985, the Commission acknowledged the application of Linn County's Farm/Forest zone to the Measure 37 claim property. The Commission's acknowledgement of Linn County's Farm/Forest zone confirmed that zone's compliance with Goals 3 and 4, and ORS 215. Linn County's acknowledged Farm/Forest zone required 40 acres for the establishment of a dwelling on a new or existing parcel.¹ The portion of claimant's property located outside the urban growth boundary consists of approximately 94.2 acres. Therefore, on the claimants' acquisition date, they could have partitioned the property into two parcels and established one additional dwelling in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations.

2. Preliminary Conclusion

Based on the preliminary analysis, it appears that the claimants, Thomas and Phyllis Fencel, qualify for one dwelling under Measure 49, as amended by SB 1049 on the portion of the claim property located outside the urban growth boundary. Because it appears that the Measure 37 claim property includes only one parcel that is already developed with one dwelling, the claimants also appear to qualify to divide the claim property to create one additional parcel on which to establish the dwelling.

Based on the preliminary analysis, the claimants, Thomas and Phyllis Fencel, do not qualify for Measure 49 relief on the portion of the property located at the northeast corner (approximately 0.40-acre) and the northwest corner (approximately 1.40-acres located north of Kingwood Avenue) because those portions of the claim property are located inside an urban growth boundary.

¹ While the F/F zone did not generally have a specific minimum lot size, the zone did specify a minimum acreage requirement of 40 acres for the development of a farm dwelling on a lot or parcel.

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 and a lot or parcel on which to site that dwelling.

1. The establishment of a dwelling and a lot or parcel for that 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, and the lot or parcel for that 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, and lot or parcel for that 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, and lot or parcel for that dwelling, on property on 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. A lot or parcel established pursuant to this authorization must site the dwelling that may be established pursuant to this authorization.
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. An authorization under Measure 49 does not allow the establishment of a new dwelling on a lot or parcel that already contains one or more dwellings. The claimants may be required to partition a lot or parcel currently in existence on the Measure 37 claim property so that the authorized dwelling established on the property is sited on a separate lot or parcel.
9. If the property described in a claim is divided by an urban growth boundary, any new dwelling, and the lot or parcel for that dwelling that is established on the property pursuant to this authorization must be located on the portion of the property outside the urban growth boundary.
10. Because the property is located in a mixed farm and forest zone, the new lot or parcel created for an authorized dwelling cannot exceed five acres. However, existing or remnant lots or parcels may exceed five acres. Before beginning construction in one of these zones, the owner must comply with the requirements of ORS 215.293. Further, an authorization will not allow a new lot or parcel that exceeds two acres if the new lot or parcel is located on high-value farmland, on high-value forestland or on land within a ground water restricted area. However, existing or remnant lots or parcels may exceed two acres.
11. Because the property is in a mixed farm and forest zone, Measure 49 requires new the lot or parcel to be located so as to maximize suitability of the remnant lot or parcel for farm or forest use. 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.
12. Once the department issues a final authorization, a dwelling and the lot or parcel for that 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.