



**OREGON DEPARTMENT OF LAND CONSERVATION AND  
DEVELOPMENT**

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

December 28, 2010

**STATE ELECTION NUMBER:** D135001

**CLAIMANT:** James Macpherson  
34962 Bond Road  
Lebanon, OR 97355

**MEASURE 37 PROPERTY  
IDENTIFICATION:** Township 11S, Range 1W, Section 19  
Tax lot 1101<sup>1</sup>  
Linn County

**I. ELECTION**

The claimant, James Macpherson, filed a claim with Linn County under ORS 197.352 (2005) (Measure 37) on July 19, 2005, for property located at 34962 and 34990 Bond Road, near Lebanon, in Linn County. The claimant 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 claimant has elected supplemental review of his Linn County Measure 37 claim under SB 1049, and has 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 claimant is qualified for one dwelling approval on the Measure 37 claim property.

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<sup>1</sup> The Measure 37 claim property consisted of tax lot 1101, comprised of 91 acres located in section 19. Tax lot 1101 was partitioned by Partition Plat 2007-04 into tax lots 1101 (173.00 acres), 1103 (5.32 acres) and 1104 (5.01 acres), however, this partition was pursuant only to a county Measure 37 waiver and not pursuant to a state Measure 37 waiver.

However, without the consent of Jacob T. Kutsch, the department is not authorized to provide any relief under Measure 49. Such consent must be provided in writing within the time periods set for comment on this claim, set forth in OAR 660-041-0090.

### **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To qualify for approval of a dwelling under Measure 49, as amended by SB 1049, a claimant must have filed, and not withdrawn, a valid Measure 37 claim with the county in which the claim property is located before Measure 49 became effective on December 6, 2007; and the county must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 claimant, James Macpherson, filed a Measure 37 claim, M37 107-05, with Linn County on July 19, 2005. Linn County provided a certified copy of that claim to the department on June 7, 2010. It appears the claimant 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 claimant 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 to the county by the claimant, James Macpherson is the owner of fee title to the Measure 37 claim property as shown in the Linn County deed records and, therefore, is an owner of the property under Measure 49.

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

The deeds by which the claimant acquired the property and information from Linn County indicate that there are two non-claimant owners. The claimant has submitted a consent form signed by non-claimant owner Mary Macpherson.

However, according to ownership information obtained from Linn County there is one non-claimant owner who has not consented: Jacob T. Kutsch. Without the consent of all non-claimant owners, the department is not authorized to provide any relief under Measure 49. Such consent must be provided in writing within the time periods set for comment on this claim, set forth in OAR 660-041-0090..

**(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, Lebanon.

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

The property is currently zoned Exclusive Farm Use (EFU) by Linn 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.

The claimant’s Measure 37 claim property consists of 91 acres in one parcel and is developed with two dwellings. Therefore, state land use regulations prohibit the claimant from establishing one additional 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 claimant, it does not appear that the establishment of the dwelling for which the claimant 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 claimant acquired the property on October 8, 1974.

On October 8, 1974, the Measure 37 claim property was subject to applicable provisions of ORS chapter 197 and Linn County's Agriculture, Residential and Timber (ART-5) zone. Linn County's ART-5 zone required at least five acres for the creation of a new lot or parcel on which a dwelling could be established and allowed a dwelling on an existing vacant lot or parcel. At the time of filing the Measure 37 claim, the claimant's Measure 37 claim property consisted of 91 acres in one parcel developed with one dwelling. Therefore, under the local zoning then in effect on his date of acquisition, the claimant lawfully could have established at least one dwelling.

However, state law in effect when the claimant acquired the property, specifically ORS 197.175(1) and 197.280 (1973 edition), required that counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). Those interim land use planning goals included: "To preserve the quality of the air, water and land resources of the state"; "To conserve prime farm lands for the production of crops"; "To provide for the orderly and efficient transition from rural to urban land use"; "To protect life and property in areas subject to floods, landslides and other natural disasters"; and "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development" ORS 215.515 (1973 edition).

The interim planning goals would not have prohibited the claimant from lawfully establishing one additional home site on the Measure 37 claim property when he acquired that property on October 8, 1974. Rather, the applicable provisions of the interim goals are furthered by provisions of Section 6 of Measure 49, as amended by SB 1049, which limits the number of dwellings authorized, and by Section 11(3), which regulates the size and location of lots or parcels on high value farm or forest land. Measure 49 Section 11(3) requires new parcels on high-value farm or forest land to be no larger than two acres and "clustered so as to maximize suitability of the remnant lot or parcel for farm or forest use."

It appears that the claimant's property is high-value farmland. Therefore, when the claimant acquired the property, the claimant lawfully could have established one additional dwelling on the property, provided it was developed in a manner that conserved the high-value or prime farmland for the production of crops. In order to meet this requirement, if the claimant establishes a parcel to site the authorized dwelling it must be no larger than two acres to maximize the suitability of the remnant lot or parcel for farm use.

## **2. Preliminary Conclusion**

Based on the preliminary analysis, it appears that the claimant, James Macpherson, qualifies for one dwelling under Section 6 of Measure 49, as amended by SB 1049.<sup>2</sup> Unless the Measure 37 claim property includes a vacant parcel, the claimant also qualifies to divide the claim property

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<sup>2</sup> The Measure 37 claim property is already developed with one dwelling and it appears that an additional unauthorized dwelling has been developed since the filing of the Measure 37 claim. The claimant may use this authorization to convert the unauthorized dwelling and parcel currently located on the property to an authorized home site. However, in order to use the relief granted on that portion of the claim property the claimants must first obtain the consent of non-claimant owner Jacob T. Kutsch.

to create one additional parcel on which to establish the dwelling. Based on the information available, it appears that the property does not include a vacant authorized parcel.<sup>3</sup> Therefore, it appears that the claimant is authorized to create a separate parcel on which to establish that dwelling.

However, without the consent of Jacob T. Kutsch, the department is not authorized to provide any relief under Measure 49. Such consent must be provided in writing within the time periods set for comment on this claim, set forth in OAR 660-041-0090.

## **VI. 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 number or scope of the dwelling approval that the claimant would otherwise be entitled to under Section 6 of Measure 49. 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 lot or parcel if applicable.

1. The establishment of a dwelling, and lot or parcel if applicable, 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 lot or parcel if applicable, 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. This authorization does not allow the establishment dwelling, and lot or parcel if applicable, 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 claimant may choose to convert a temporary dwelling currently located on the property on which the claimant is 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. This authorization only allows the establishment of a new dwelling on property on which the claimant is 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

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<sup>3</sup> Partition Plat 2007-04 was pursuant only to a county Measure 37 waiver and not pursuant to a state Measure 37 waiver.

pursuant to this authorization must site the dwelling that may be established pursuant to this authorization.

6. The claimant may use this authorization to convert a dwelling, and lot or parcel if applicable, currently located on the property on which the claimant is eligible for Measure 49 relief to an authorized home site.
7. The claimant 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 dwellings. The claimant 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 lot or parcel if applicable, established on the property pursuant to a home site approval must be located on the portion of the property outside the urban growth boundary.
10. Because the property is located on high-value farmland and was acquired during the period when the interim land use planning goals set forth in ORS 215.515 (1973) applied to the property, Measure 49 requires new home sites to be no more than two acres. Further, 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, and lot or parcel if applicable, granted under 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 if applicable, 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.

#### **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 claimant and the claimant's 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 claimant and the claimant's 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 claimant and the claimant's 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.**