



**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 18, 2010

**STATE ELECTION NUMBER:** D135014

**CLAIMANTS:** James F. and Muriel K. Hoag  
16789 SE River Road  
Oak Grove, OR 97267

**MEASURE 37 PROPERTY  
IDENTIFICATION:** Township 2S, Range 3E, Section 19  
Tax lot 2404  
Clackamas County

**AGENT CONTACT INFORMATION:** Thomas H. Cutler  
Harris Berne Christensen LLP  
5000 SW Meadows Road, Suite 400  
Lake Oswego, OR 97035

**I. ELECTION**

The claimants, James and Muriel Hoag, filed a claim with Clackamas County under ORS 197.352 (2005) (Measure 37) on March 29, 2006, for property located near Carver, in Clackamas 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 Clackamas 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 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To qualify for approval of a dwelling under Measure 49, as amended by SB 1049, a claimant must have filed, and not withdrawn, a valid Measure 37 claim with the county in which the claim property is located before Measure 49 became effective on December 6, 2007; and the county must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, James and Muriel Hoag, filed a Measure 37 claim, ZC026-06, with Clackamas County on March 29, 2006. Clackamas County provided a certified copy of that claim to the department on June 30, 2010. It appears the claimants filed a timely Measure 37 claim with Clackamas 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 deeds submitted to the county by the claimants, James and Muriel Hoag are the owners of fee title to the property as shown in the Clackamas 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 Clackamas County, outside any urban growth boundary and outside any city boundary, near the community of Carver.

#### **(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, provide standards for the establishment of a dwelling in an EFU zone. In general, and subject to some exceptions, those standards currently require that the property be a minimum of 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 8.41 acres in one parcel and is undeveloped. Therefore, the standards for the establishment of a dwelling in an EFU zone prohibit the claimants from establishing a 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 a 5.63-acre portion of tax lot 2404 on November 8, 1979, and the northwestern 2.78-acre portion of tax lot 2404 on November 15, 1993.

The claimants acquired the 5.63 acre portion 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 November 8, 1979, the Measure 37 claim property was zoned General Agricultural District (GAD) by Clackamas County. Clackamas County's GAD zone required a minimum of 40 acres

for the establishment of a new lot or parcel and generally allowed a dwelling on an existing lot or parcel of at least five acres. However, the Commission had not acknowledged that zone for compliance with the goals when the claimants acquired the 5.63 acre portion of the property on November 8, 1979. Accordingly, the statewide planning goals, and in particular Goal 3, and ORS chapter 215 applied directly to the 5.63 acre portion of the Measure 37 claim property when the claimants acquired it.

On December 21, 1982, the Commission acknowledged the application of Clackamas County's General Agriculture District (GAD) zone to the Measure 37 claim property. The Commission's acknowledgement of Clackamas County's GAD zone confirmed that zone's compliance with Goal 3 and ORS chapter 215. Clackamas County's acknowledged GAD zone required 40 acres for the creation of a new lot or parcel on which a dwelling could be established, and allowed a dwelling on an existing lot or parcel only after review and approval of a farm-management plan. The claimants' property acquired on November 8, 1979 consists of 5.63 acres. Therefore, on the claimants' acquisition date, they could not have established a dwelling in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations without approval of a farm management plan.

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 eligibility for home site approval is subject to consistency with local land use regulations in effect when the claimant acquired the subject property.

The portion of Measure 37 claim property the claimants acquired on November 8, 1979 consists of 5.63 vacant acres, and was zoned GAD at that time. Therefore, based on the analysis under SB 1049 (2010), the claimants appear to have been lawfully permitted to establish a dwelling on the 5.63-acre portion of the Measure 37 claim property on the date they acquired that portion of the property.

On November 15, 1993, at the time the claimants acquired the northwestern 2.78-acre portion of the Measure 37 claim property, the entire property was subject to Clackamas County's acknowledged General Agriculture District (GAD) zone. Clackamas County's GAD zone required 40 acres for the creation of a new lot or parcel on which a dwelling could be established and allowed a dwelling on an existing lot or parcel only after review and approval of a farm management plan. The claimants' property at that point consisted of 8.41 vacant acres. There is no evidence in the record that the property was subject to an approved farm-management plan at that time. Therefore, the claimants lawfully could not have established a dwelling on the northwestern 2.78-acre portion of the Measure 37 claim property on the date they acquired that portion of the property.

## **2. Preliminary Conclusion**

Based on the preliminary analysis, it appears that the claimants, James and Muriel Hoag, qualify for one dwelling under Section 6 of Measure 49, as amended by SB 1049. Because the property is currently undeveloped, the dwelling must be sited on the existing parcel within the Measure 37 claim property on the 5.63-acre portion acquired in 1979, 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. 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 that is established on the property pursuant to an authorization must be located on the portion of the property outside the urban growth boundary.
10. Because the property is located in an exclusive farm use zone, the owner must comply with the requirements of ORS 215.293 before beginning construction
11. 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 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 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.**