



**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 6, 2010

**STATE ELECTION NUMBER:** D135038

**CLAIMANT:** Don Joyce  
226 NW Hermosa Blvd  
Portland, OR 97210

**MEASURE 37 PROPERTY  
IDENTIFICATION:** Township 2N, Range 1W, Section 20BC  
Tax lot 1700  
Multnomah County

### **I. ELECTION**

The claimant, Don Joyce filed a claim with Multnomah County under ORS 197.352 (2005) (Measure 37) on December 1, 2010, for property located on the north side of NW McNamee Road, near Portland, in Multnomah 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 Multnomah 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 Lot 6 or 7 of the Measure 37 claim property.

## **II. 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To qualify for approval of a dwelling under Measure 49, as amended by SB 1049, a claimant must have filed, and not withdrawn, a valid Measure 37 claim with the county in which the claim property is located before Measure 49 became effective on December 6, 2007; and the county must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, Don Joyce, filed a Measure 37 claim, T1-06-112, with Multnomah County on December 1, 2006. Multnomah County provided a certified copy of that claim to the department on June 24, 2010. It appears the claimant filed a timely Measure 37 claim with Multnomah 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 deed submitted to the county by the claimant, Don Joyce (identified in the deed as Don Joyce II) is the owner of fee title to Lots 6 and 7 of the claim property as shown in the Multnomah County deed records and, therefore, is an owner of Lots 6 and 7 of the claim property under Measure 49.

According to the information submitted by the claimant, Don Joyce has not established his ownership of Lots 4 and 5 of the claim property for the purposes of Measure 49. The 1954 deed submitted for Lots 4 and 5 identifies Donald H. Joyce and Margaret C. Joyce, husband and wife, as the owners. Because this requirement has not been met for Lots 4 and 5, the claimant is not entitled to any relief under Measure 49 for Lots 4 and 5, and, therefore, the remaining approval criteria will not be evaluated for Lots 4 and 5.

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

It appears that the claimant is the sole owner of Lots 6 and 7 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 Multnomah County, outside any urban growth boundary and outside the city boundary of the nearest city, Portland.

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

The property is currently zoned Commercial Forest Use (CFU-1) by Multnomah County, in accordance with ORS chapter 215 and OAR 660, division 6, because the property is “forest land” under Goal 4. Applicable provisions of ORS chapter 215 and OAR 660 division 6, enacted or adopted pursuant to Goal 4, generally prohibit the establishment of a lot or parcel less than 80 acres in size in a forest zone and regulate the establishment of dwellings on new or existing lots or parcels.

Lots 6 and 7 of the claim property consist of 0.35 acre in two parcels and is undeveloped. Therefore, state land use regulations prohibit the claimant from establishing one dwelling on Lots 6 and 7 of 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 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.”

Multnomah County deed records indicate that the claimant acquired Lots 6 and 7 of the claim property on December 8, 1978.

Lots 6 and 7 of the Measure 37 claim property consists of 0.35 acres, and appears to currently be undeveloped.

The claimant acquired Lots 6 and 7 of the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Multnomah County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On December 8, 1978, the Measure 37 claim property was zoned Multiple Use Forest (MUF-20) by Multnomah County. Multnomah County's MUF-20 zone included a fixed minimum acreage standard of 20 acres, but appears to have allowed one single family dwelling on an existing legal lot without regard to size of the lot. However, the Commission had not acknowledged that zone for compliance with the goals when the claimant acquired the property on December 8, 1978. Accordingly, the statewide planning goals, and in particular Goal 4 and ORS chapter 215, applied directly to the Measure 37 claim property when the claimant acquired it.

On November 6, 1980, the Commission acknowledged the application of Multnomah County's Commercial Forest Use (CFU) zone to the Measure 37 claim property. The Commission's acknowledgement of Multnomah County's CFU zone confirmed that zone's compliance with Goal 4 and ORS chapter 215. Multnomah County's acknowledged CFU zone required 80 acres for the establishment of a dwelling on a vacant lot or parcel. The Measure 37 claim property consists of 0.35 acre. Therefore, on the claimant's acquisition date, he could not have established a home site on Lots 6 and 7 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. Senate Bill (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, including existing development. 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 Measure 37 claim property was subject to Multnomah County's MUF-20 zone on the claimant's date of acquisition of Lots 6 and 7. That zone required a minimum of 20 acres for the establishment of a parcel on which a dwelling could be established, but appears to have allowed one single family dwelling on a legal lot without regard to the size of the lot.

Lots 6 and 7 of the Measure 37 claim property consists of 0.35 acres and are undeveloped. Therefore, based on the analysis under SB 1049 (2010), the claimant was lawfully permitted to establish a dwelling on Lots 6 and 7 of the Measure 37 claim property on his date of acquisition.

## **2. Preliminary Conclusion**

Based on the preliminary analysis, it appears that the claimant, Don Joyce, qualifies for one dwelling under Section 6 of Measure 49, as amended by SB 1049 on Lots 6 and 7 of the Measure 37 claim property. Because the property is currently undeveloped, the dwelling must be sited on Lot 6 or 7, and the claimant does 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 claimant 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 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. An authorization under Measure 49 only allows the establishment of a new dwelling on the property for 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.
6. The claimant may use an authorization to convert an unauthorized or nonconforming dwelling currently located on the claim property into an allowed use.

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. 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 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 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 a forest 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 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.**