

Footnotes To: “An Unbiased Comparison of Measure 37 and Measure 49”

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¹ No legal advice is expressed or implied by this comparison. Claimants and all interested parties are encouraged to seek competent professional advice regarding specific claims.

² Or. Rev. Stat. § 197.352 (2004) [hereinafter “Measure 37”]. Measure 37 will remain in effect without amendment if Measure 49 (H.B. 3540, 74th Or. Gen. Assem., Reg. Sess. (Or. 2007)) [hereinafter “Measure 49”] does not pass.

³ Measure 49 as presented on the November 6, 2007 ballot. Measure 49, if passed, will take effect and replace Measure 37, effective December 6, 2007.

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⁵ A determination of whether or not a Measure 37 claimant is vested must be made, under Oregon case law, on a case by case basis due to the complexity of legal and factual issues that must be analyzed to make the determination. Some of the factors considered include, but are not limited to, “(1) the ratio of prior expenditures to the total cost of the project, (2) the good faith of the landowner in making the prior expenditures, (3) whether the expenditures have any relationship to the completed project or could apply to various other uses of the land, and (4) the nature of the project, its location and ultimate cost.” *Eklund v. Clackamas County*, 36 Or. App. 73, 81 (1978), overruled on other grounds by *Forman v. Clatsop County*, 63 Or. App. 617 (1983), *aff’d* 297 Or. 129 (1984).

Measure 37 rights may accrue under Final Orders issued by the State and respective local government. Under § 5(3) of Measure 49, claimants are entitled to “just compensation” to the extent that (1) the claimant’s use of the property complies with a valid waiver issued before the effective date of Measure 49 (Measure 49 will be effective 30 days after the November 6, 2007 vote if it passes) by both the State and the applicable County, **and** (2) the claimant has a common law vested right on the effective date of Measure 49 to complete and continue the use described in the waiver.

⁶Under *Corey v. DLCD*, 210 Or. App. 542, 152 P.3d 933 (2007), Measure 37 claimants who have received a waiver from a governmental entity, specifically the DLCD, have a protected property interest in that waiver, even if it is a disputed or conditional waiver. *Id.* *Corey* held that in issuing the waiver, the DLCD determined that the current laws and rules reduced the FMV of a petitioner’s property when compared with how the property could have been used at the time that petitioner or a family member acquired the property. *Id.* The Court held that such a determination is an acceptance of the petitioner’s claim, creating an entitlement to benefits. *Id.*

Therefore, under *Corey*, since a claimant acquires a constitutionally protected property interest when a final order is issued on a Measure 37 claim, the claimant also receives “all of the benefit for which he or she qualifies”, and has a right to a full contested hearing as to the extent of the benefit under the Oregon Administrative Procedures Act. *Emmel v. DLCD*, 213 Or. App. 681(2007) (emphasis added). As such, it logically follows that those claimants are also entitled to a full contested hearing before that benefit can be denied or altered by the government.

Therefore, one school of thought is that although Measure 49 only expressly allows Measure 37 claimants with “vested rights” to avoid re-filing their claims, under *Corey* all Measure 37 claimants with a final order may be entitled to a full contested case hearing before their waivers are altered to determine the extent of their benefits.

Given this potential, such claims with final orders have been included in this column even though Measure 49 does not expressly acknowledge the *Corey* decision, and instead requires all claimants to re-file depending on the location of their property (inside or outside of the UGB). Conversely, it may also be determined, if Measure 49 passes, that since Measure 49 was enacted by the

legislature and was affirmed by the executive branch, that action satisfies the Constitutional procedural due process requirements, furthered by the fact that Measure 49 provides for judicial review. Ultimately, the issue will be one for the Oregon courts to decide.

Please also note that, as of this writing, the *Corey* decision has been appealed to the Oregon Supreme Court, though the Court has not decided whether it will hear the case. If it does hear the case and overturns the decision that a waiver/ final order is a protected property interest granted by the State, the foregoing analysis may change.

⁷ Urban Growth Boundary.

⁸ Measure 49 §§ 6 or 7 applies. Measure 37 claimants may not opt out of Measure 49 and continue under Measure 37. *But see discussion supra note 6.*

⁹ Measure 49 § 9 applies. Measure 37 claimants may not opt out of Measure 49 and continue under Measure 37. *But see discussion supra note 6.*

¹⁰ Only Measure 49 applies, and is effective December 6, 2007.

¹¹ ORS § 197.352(1).

¹² *Id.*

¹³ *See generally* Measure 49 § 9.

¹⁴ For Example: Combined uses such as Industrial and Commercial Use or Residential and Commercial Use.

¹⁵ Under Measure 49 § 2(10), "High-value farmland" is land that is in an exclusive farm use zone or a mixed farm and forest zone, or land west of U.S. Highway 101 that is composed of the specific soils described in ORS § 215.719 and Measure 49 § 2(10)(b), land within an irrigation district, or land that contains not less than five acres planted in wine grapes. *See* Measure 49 §2(10)(a-f) for further details. Note that there is no mention of "High-value farmland" in Measure 37; the class of land at issue is not relevant under Measure 37.

¹⁶ Claimants who have filed a Measure 37 claim before June 28, 2007 may be eligible for up to 3 home sites under § 6 of Measure 49. A "home site approval" is defined as the "approval of the subdivision or partition of property or approval of the establishment of a dwelling on property." Measure 49 § 2(12). Under Measure 49 § 6, the number of lots on property for these claimants, **may not exceed the lesser of:**

- The lots, parcels or dwellings described in a waiver issued by the State before June 28, 2007, OR
- The number of lots, parcels or dwellings described in the Measure 37 claim that was filed with the State if a waiver has yet to be granted by the State; OR
- Three, unless there are already existing dwellings on the property or the property contains more than one lot or parcel, then the total number of lots, parcels or dwellings may not exceed three.
- However, a claimant qualifying under § 6 of Measure 49 may establish at least one additional lot, parcel or dwelling on the property.
- Existing Measure 37 claimants, with or without receipt of a waiver, may amend their claim to reduce the number to no more than three. Measure 49 § 6(3).
- A Measure 37 claimant whose claim was for something other than a subdivision or partition of property, or other than approval for establishing a dwelling on the property, they too may amend their claim to make it comply with Measure 49 § 6(4).
- If multiple claims and waivers were have been received for the same property, the number of lots, parcels or dwellings that may be established under § 6 of Measure 39 is the number allowed in the most recent waiver issued by the State before the effective date of Measure 49. Measure 49 § 6(5)
- To qualify for a home site approval under § 6(6) the claimant must establish that they:
 - Filed their claim with both the state and the county in which the property is located;
 - Are the owner of the property (as defined in § 2 of Measure 49);
 - All owners of the property have consented in writing to the claim;
 - The property is entirely outside of the UGB and the boundaries of any city;
 - One or more land use regulations prohibit establishing the lot, parcel or dwelling;
 - The development is not prohibited under 197.352; and
 - The claimant was lawfully allowed to develop the property as currently requested.

¹⁷ Measure 49 §11(3)(a) reads as follows: “[A] *new* lot or parcel located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone may not exceed: . . . (A) Two acres if the lot or parcel is located on high-value farmland, on high-value forestland or on land within a ground water restricted area”(emphasis added). Given that a parcel is partitioned, all resulting lots from that division are considered “new” lots, the only way to ensure that property complies is if it is 6 acres or less. Any parcel to be partitioned, resulting in 2 or 3 lots, that is larger than 6 acres ensures that at least one of those new lots will be larger than the 2 allowable acres, and the application may fail.

For example: Owner John Doe owns an 8 acre parcel of high-value farmland zoned exclusive farm use, and is an existing Measure 37 claimant entirely outside the UGB without vested rights. He re-files under Measure 49 and is eligible for up to 3 new home sites. However, given that his parcel is a total of 8 acres, and each “new” parcel cannot be larger than 2 acres, at least one of his 3 new lots created from the partition of his 8 acre lot will be larger than 2 acres. Specifically, one lot will be 4 acres since the other 2 parcels are 2 acres each, and he will not be able to comply with Measure 49 given the wording in Measure 49 § 11(3).

¹⁸ Under Measure 49 §§ 12-15, it unclear as to whether or not the class of land will matter for future Measure 49 claimants (those affected by land use regulations passed after January 1, 2007), because unlike the preceding sections in Measure 49 which govern the procedures for existing Measure 37 claimants, Measure 49 provides no guidance as to the number of home sites allowed to future claimants or whether the class of their land will be determinative factor the number of home sites.

¹⁹ Under Measure 49 § 2(11), “High-value forestland” is land that is in a forest zone or a mixed farm and forest zone, that is located in western or eastern Oregon, and is composed of a specific type of soil that is described in §§ 2(11)(a) and (b) of Measure 49. There is no mention of “High-value forestland” in Measure 37; the class of land at issue is not relevant under Measure 37.

²⁰ *See* discussion *supra* note 16.

²¹ *See* discussion *supra* note 17.

²² Under Measure 49 §§ 12-15, it unclear as to whether or not the class of land will matter for future Measure 49 claimants (those affected by land use regulations passed after January 1, 2007), because unlike the preceding sections in Measure 49 which govern the procedures for existing Measure 37 claimants, Measure 49 provides no guidance as to the number of home sites allowed to future claimants or whether the class of their land will be determinative factor the number of home sites.

²³ Under Measure 49 § 2(9), “Ground water restricted area” means an area designated as a critical ground water area or as a ground water limited area by the Water Resources Department or Water Resources Commission before the effective date of Measure 49 (Measure 49 will be effective 30 days after the November 6, 2007 vote if it passes). There is no mention of “ground water restricted area” in Measure 37; the type of property at issue is not relevant under Measure 37.

²⁴ *See* discussion *supra* note 16.

²⁵ *See* discussion *supra* note 17.

²⁶ *See* discussion *supra* note 18.

²⁷ Measure 49 §§ 6 and 7.

²⁸ *Id.* at § 9.

²⁹ *Id.* at § 12(1).

³⁰ ORS § 197.352(5).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ To qualify for a home site approval as an existing Measure 37 claimant outside the UGB, without vested rights, the claimant must have filed a claim with both the state and the county in which the property is located, and must establish that: the claimant is an owner of the property; all owners of the property have consented in writing to the claim; the property is located entirely outside the UGB and entirely outside the boundaries of any city; one or more land use regulations prohibit establishing the lot, parcel or dwelling and that

the establishment of the lot, parcel or dwelling is not prohibited by a land use regulation described in ORS § 197.352; and that on the claimant's acquisition date, the claimant was lawfully allowed to develop the land as authorized. Measure 49 §§ 6(1), (6) and (7).

³⁵ Measure 49 § 10(5).

³⁶ ORS § 197.352(5).

³⁷ *Id.*

³⁸ Fair Market Value

³⁹ Measure 49 § 12(1). Under this provision, anyone who failed to file a Measure 37 claim before June 28, 2007 for regulations that were enacted prior to January 1, 2007, is prohibited from filing a claim.

⁴⁰ *Id.* at § 13(4).

⁴¹ *Id.* at § 2(16).

⁴² *Id.* at § 2(17).

⁴³ *Id.* at § 21(1).

⁴⁴ *Id.* at § 21(b).

⁴⁵ *Id.* at § 21(c).

⁴⁶ *Id.* at § 21(4).

⁴⁷ The governing body that is responsible for enacting the land use regulation impacting the claimant's property is the entity that must decide whether to compensate the owner or waive, modify or remove the restriction. *See generally* ORS § 197.352. As such, an applicant must make written demand to ALL governing bodies that are responsible for the restriction (Ex: a claimant must supply written demand to both the State, because it implements the State's Land Use Planning Goals, and the County in which the property is located, because it enacts the comprehensive plan and zoning regulations that restrict the use of property).

⁴⁸ *Id.* See discussion *supra* note 47.

⁴⁹ *Id.* See discussion *supra* note 47.

⁵⁰ Measure 49 § 8. The county where the property is located may comment on the application, but is only allowed to process a claim if it is the county's regulation that is restricting the use of the claimant's property. Measure 40, § 8(4).

⁵¹ *Id.* at § 10(2).

⁵² *Id.* at § 13(1).

⁵³ ORS § 197.352(2). Claimant is entitled to just compensation for regulations that reduce the FMV of their property, or any interest therein, and the amount of just compensation must be equal to the reduction in the FMV of the affected property interest resulting from the land use regulation on the date of the application. ORS § 197.352. *But see* ORS § 197.352(10) which allows the government, at its sole discretion, to "modify, remove, or not ... apply the land use regulation to allow the owner to use the property for a use permitted at the time the owner acquired the property" instead of paying just compensation, regardless of whether or not funds are available to pay the Measure 37 claim. To date, only one Measure 37 claimant has been awarded "just compensation" in lieu of a waiver. That claimant rejected the just compensation and requested waiver.

⁵⁴ *Id.* See discussion *supra* note 53.

⁵⁵ Measure 49 § 12(4).

⁵⁶ ORS § 197.352(8). See discussion *supra* note 53.

⁵⁷ *Id.* See discussion *supra* note 53.

⁵⁸ Measure 49 §§ 7(1)(2)(c) and 7(5)(g).

⁵⁹ *Id.* at §§ 9(2)(c); 9(5)(k); 12(2); 12(4)(b); and 12(5)(b) as applicable to their respective categories.

⁶⁰ ORS § 197.352(2).

⁶¹ *Id.*

⁶² Measure 49 § 12(2).

⁶³ However, while the one year T-Bill was discontinued in 2000, it may be only a superficial problem. Treasury securities with a 1 year maturity may be used to compute a one-year T-Bill rate. Rates can be researched at www.research.stlouisfed.org/fred.

⁶⁴ The text of Measure 37 states that a “land use regulation enacted prior to December 4, 2004, that restricts the use of private real property or any interest therein *and has the effect of reducing the FMV of the property*, or any interest therein” entitles the owner to just compensation. ORS § 197.352(1). (emphasis added). As such, the need for proof of the reduction in FMV is implied, but not specified.

⁶⁵ *Id.* See discussion *supra* note 64.

⁶⁶ *Id.* See discussion *supra* note 64.

⁶⁷ To show that there was a reduction in FMV under § 7(6) of Measure 49, and to therefore be eligible for the approval of 4 to 10 home sites, the claimant must determine the difference between FMV of the property 1 year before the regulation was enacted and the FMV of the land 1 year after the regulation was enacted. After the reduction in FMV is determined, the claimant must adjust that number by the property tax savings and recapture of deferred property tax payments for the previous 5 years.

- For Example: If property was acquired in 1970 and the offending regulation was enacted in 1975, the claimant must determine the FMV in 1974 minus the FMV in 1976. The difference would then be adjusted by the property tax savings from 1975 minus the recapture penalty resulting from the change of use. The net would be subject to an interest rate equal to the one-year T-Bill rate. Such rates are not currently available. See discussion *supra* note 63.

⁶⁸ To show that there was a reduction in FMV under § 9(6) of Measure 49, and to therefore be eligible for the approval of 1-10 single-family dwellings, the claimant must determine the difference between FMV of the property 1 year before the regulation was enacted and the FMV of the land 1 year after the regulation was enacted. After the reduction in FMV is determined, the claimant must adjust that number by the property tax savings and recapture of deferred property tax payments for the previous 5 years.

- For Example: If property was acquired in 1970 and the offending regulation was enacted in 1975, the claimant must determine the FMV in 1974 minus the FMV in 1976. The difference would then be adjusted by the property tax savings from 1975 minus the recapture penalty resulting from the change of use. The net would be subject to an interest rate equal to the one-year T-Bill rate. Such rates are not currently available. See discussion *supra* note 63.

⁶⁹ To show that there was a reduction in FMV under § 12(2) of Measure 49, the claimant must determine the difference between FMV of the property 1 year before the regulation was enacted and the FMV of the land 1 year after the regulation was enacted. After the reduction in FMV is determined, the claimant must adjust that number by the property tax savings and recapture of deferred payments tax payments for the previous 5 years.

- For Example: If property was acquired in 2008 and the offending regulation was enacted in 2009, the applicant must determine the FMV in 2010 minus the FMV in 2008. The difference would then be adjusted by the property tax savings from 2009 minus the recapture penalty resulting from the change of use. The net would be subject to an interest rate equal to the one-year T-Bill rate. Such rates are not currently available. See discussion *supra* note 63.

Also note that although Measure 49 explains in detail how the reduction in value is to be calculated and states, under Section 21(b) that the FMV “is the actual value of the property, with all of the property’s adaptations to general and special purposes”, it is unclear as to what “general and special purposes” actually includes, and makes future FMV calculations unclear. This will have an important, immediate effect on how proposed “homesites” will be valued when being compared to the calculated reduction in value.

⁷⁰ Under Measure 49 § 7(7), any claimant eligible for 4 - 10 home site approval must provide an appraisal that shows both the FMV of the property 1 year before and 1 year after the enactment of the land use regulation that is the basis for the claim. Additionally, the appraisal is also required to show the FMV of each home site approval “to which the claimant is entitled under **section 6(2)**” in addition to several other appraisal requirements listed in § 7(7) of Measure 49. **PLEASE NOTE:** it is our belief that, in § 7(7) of Measure 49, this qualification should actually read “to which the claimant is entitled under **section 7(2)**”, NOT “section 6(2)” as

Measure 49 currently reads, given that § 6(2) governs the “under 3 home sites” and not the 4 to 10 home sites found in § 7(2) for which the appraisal is required.

The cost for the appraisal may be included in the calculation of reduction in FMV, up to \$5,000 and is due 180 days after claimant chooses to proceed under § 7 of Measure 49 for the 4 to 10 home sites. Measure 49 § 8(5).

⁷¹ Under Measure 49 § 9(7), any claimant eligible 1-10 single-family dwellings must provide an appraisal that shows both the FMV of the property 1 year before and 1 year after the enactment of the land use regulation that is the basis for the claim. Additionally, the appraisal is also required to show the FMV of each single-family dwelling to which they are entitled, in addition to several other appraisal requirements listed in § 9(7) of Measure 49.

⁷² Under Measure 49 § 12(2), claimant must provide an appraisal that shows both the FMV of the property 1 year before and 1 year after the enactment of the land use regulation that is the basis for the claim. For the specific appraisal requirements, *see* Measure 49 § 12(2) and (3).

⁷³ Specifically, Measure 37 does not apply to land use regulations that (1) restrict or prohibit public nuisances (to be narrowly construed in favor of a finding of compensation); (2) restrict or prohibit activities for the protection of the public health and safety; (3) must comply with federal law; (4) restrict or prohibit the use of property for the purpose of selling pornography or performing nude dancing; or (5) were enacted prior to the acquisition of the property by the owner or a family member of the owner who now owns the property. ORS § 197.352(3).

⁷⁴ *Id.* See discussion *supra* note 73.

⁷⁵ Measure 49 does not apply to land use regulations that were enacted prior to the claimant’s acquisition date or to land regulations that: (1) restrict or prohibit public nuisances; (2) restrict or prohibit activities for the protection of the public health and safety; (3) must comply with federal law; or (4) restrict or prohibit the use of property for the purpose of selling pornography or performing nude dancing. Measure 49 § 4(3).

⁷⁶ Number of home sites may be limited under Measure 49 by the type of land being developed. See “ELIGIBILITY OF BY CLASS OF LAND” on the chart.

⁷⁷ Claimants who have filed a Measure 37 claim before June 28, 2007 may be eligible for up to 3 home sites under § 6 of Measure 49. A “home site approval” is defined as the “approval of the subdivision or partition of property or approval of the establishment of a dwelling on property.” Measure 49 § 2(12). Under Measure 49 § 6, the number of lots on property for these claimants, **may not exceed the lesser of:**

- The lots, parcels or dwellings described in a waiver issued by the State before June 28, 2007, OR
- The number of lots, parcels or dwellings described in the Measure 37 claim that was filed with the State if a waiver has yet to be granted by the State; OR
- Three, unless there are already existing dwellings on the property or the property contains more than one lot or parcel, then the total number of lots, parcels or dwellings may not exceed three.
- However, a claimant qualifying under § 6 of Measure 49 may establish at least one additional lot, parcel or dwelling on the property.
- Existing Measure 37 claimants, with or without receipt of a waiver, may amend their claim to reduce the number to no more than three. Measure 49 § 6(3).
- A Measure 37 claimant whose claim was for something other than a subdivision or partition of property, or other than approval for establishing a dwelling on the property, may amend their claim to make it comply with Measure 49 § 6(4).
- If multiple claims and waivers were have been received for the same property, the number of lots, parcels or dwellings that may be established under § 6 of Measure 39 is the number allowed in the most recent waiver issued by the State before the effective date of Measure 49. Measure 49 § 6(5)
- To qualify for a home site approval under § 6(6) the claimant must establish that they:
 - Filed their claim with both the state and the county in which the property is located;
 - Are the owner of the property (as defined in § 2 of Measure 49);
 - All owners of the property have consented in writing to the claim;
 - The property is entirely outside of the UGB and the boundaries of any city;
 - One or more land use regulations prohibit establishing the lot, parcel or dwelling;
 - The development is not prohibited under ORS § 197.352; and
 - The claimant was lawfully allowed to develop the property as currently requested.

⁷⁸ Claimants who have filed a Measure 37 claim before June 28, 2007 may be eligible for **4-10** home sites under § 7 of Measure 49. A “home site approval” is defined as the “approval of the subdivision or partition of property or approval of the establishment of a dwelling on property.” Measure 49 § 2(12). Under Measure 49 § 7, the number of lots on property for these claimants, **may not exceed the lesser of:**

- The lots, parcels or dwellings described in a waiver issued by the State before June 28, 2007, OR
- The number of lots, parcels or dwellings described in the Measure 37 claim that was filed with the State if a waiver has yet to be granted by the State; OR
- Ten, unless there are already existing dwellings on the property or the property contains more than one lot or parcel, then the total number of lots, parcels or dwellings may not exceed ten; OR
- The number of home sites that covers the amount of just compensation due for the diminution in FMV of the claimant’s property following the enactment of the limiting land regulation.
- Existing Measure 37 claimants, with or without receipt of a waiver, may amend their claim to reduce the number to no more than ten. Measure 49 § 7(3).
- If multiple claims and waivers have been received for the same property, the number of lots, parcels or dwellings that may be established under § 7 of Measure 39 is the number allowed in the most recent waiver issued by the State or the most recent claim if a waiver was not received, before the effective date of Measure 49, not to exceed 10. Measure 49 § 7(5).
- To qualify for a home site approval under § 6(6) the claimant must establish that:
 - They filed their claim with both the state and the county in which the property is located;
 - They are the owner of the property (as defined in § 2 of Measure 49);
 - All owners of the property have consented in writing to the claim;
 - The property is entirely outside of the UGB and the boundaries of any city;
 - One or more land use regulations prohibit establishing the lot, parcel or dwelling;
 - The development is not prohibited under ORS § 197.352;
 - The claimant was lawfully allowed to develop the property as currently requested; and
 - The enactment of one or more land use regulations caused a reduction in the FMV of the property that is equal to or greater than the FMV of the home sites the claimant is entitled to under Measure 49.
 - NOTE: To show that there was a reduction in FMV under § 7(6) of Measure 49, and to therefore be eligible for the approval of 4 to 10 home sites, the claimant must determine the difference between FMV of the property 1 year before the regulation was enacted and the FMV of the land 1 year after the regulation was enacted. After the reduction in FMV is determined, the claimant must adjust that number by the property deferred savings and recapture of deferred payments for the previous 5 years.
 - For Example: If a particular piece of property was acquired in 1970 and the regulation was imposed in 1975, the applicant must determine the FMV in 1974 minus the FMV in 1976. The difference would then be adjusted by the property tax savings from 1975 minus the recapture penalty resulting from the change of use.

⁷⁹ Measure 49 § 8(3).

⁸⁰ *Id.* at § 11(5).

⁸¹ *Id.* at § 9(1). Thus, if part of the claimant’s property is located outside the UGB, they are not eligible for any single-family dwellings under Measure 49 § 9(1). Additionally, under § 9(2), the number of single-family dwellings that may be established on the area within the UGB **may not exceed the lesser of:**

- The number of single-family dwellings allowed in a waiver that was received by Metro, a city or county before the effective date of Measure 49 (30 days after the election on November 6, 2007), or if a waiver was not issued, the number of dwellings described in the claim; or
- Ten, except that if there are existing dwellings already on the property, the number of single-family dwellings allowed will be adjusted to total no more than 10; or
- The number of single-family dwellings that represents the total dollar amount of just compensation due to the claimant for the reduction in the FMV cause by the land use regulation.
- Existing Measure 37 claimants, with or without receipt of a waiver, may amend their claim to reduce the number to no more than 10. Measure 49 § 9(4).
- If multiple claims have been filed, the most recent waiver issued (or claim submitted if no waiver was issued), applies, not to exceed 10 single-family dwellings. Measure 49 § 9(4).
- To qualify for relief, under Measure 49 § 9, a claimant must have filed a claims for the property with the city or county in which the property is located and, regardless of whether a waiver has already been issued, the claimant must still establish that:
 - The claimant is the owner of the property;

- All owners of the property have consented in writing to the claim;
- The property is located, in whole or in part, within an UGB;
- The claimant was lawfully permitted to develop the land on his/her acquisition date as described in their claim;
- **The property is zoned for residential use;**
- One or more land use regulations **prohibit** establishing the single-family dwellings;
- The development is not prohibited under ORS § 197.352(3);
- The land use regulation that is prohibited was enacted after the date of the property acquisition, or any portion of the property was brought into the UGB;
- If the property is within the boundaries of Metro, the regulation was enacted after the property was included within the boundaries of Metro;
- If the property is in the city, the regulation was enacted after the date the property was annexed to the city; and
- The enactment of the regulation caused a reduction of the FMV of the property, that is equal to or greater than the FMV of the single-family dwellings that may be established on the property.

⁸² *Id.* at § 9(8).

⁸³ *Id.* at § 9(10).

⁸⁴ *Id.* at § 11(5).

⁸⁵ *Id.* at § 13(1).

⁸⁶ *Id.* at § 11(5).

⁸⁷ *Id.* at § 12(3).

⁸⁸ ORS § 197.352(7).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Measure 49 § 8(5).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ If the land use regulation continues to apply to the claimant's property more than 180 days after the claimant has made written demand for compensation, the owner, or holder of any interest therein, has a cause of action for compensation in the circuit court in which the real property is located. ORS §§ 197.352(4) and (6).

⁹⁵ *Id.* at § 197.352(10).

⁹⁶ If the land use regulation continues to apply to the claimant's property more than 180 days after the claimant has made written demand for compensation, the owner, or holder of any interest therein, has a cause of action for compensation in the circuit court in which the real property is located. ORS §§ 197.352(4) and (6).

⁹⁷ *Id.* at § 197.352(10).

⁹⁸ *Id.* at § 8(4).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at § 8(6).

¹⁰² *Id.* at § 10(4).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at §§ 13(9) and (10).

¹⁰⁵ *Id.* at § 13(5). *See also id.* at § 14 for notice requirements.

¹⁰⁶ The present owner of the property at issue may recover reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect compensation after the enforcement of a land use regulation that restricts the use of their private real property. ORS § 197.352(6).

¹⁰⁷ *Id.* *See* discussion *supra* note 106.

¹⁰⁸ *Id.* *See* discussion *supra* note 106.

¹⁰⁹ The provision under Measure 37 allowing for recovery of attorneys fees (ORS § 197.352(6)) has been eliminated from Measure 49.

¹¹⁰ *Id.* *See* discussion *supra* note 109.

¹¹¹ *Id.* *See* discussion *supra* note 109.

¹¹² ORS § 197.352(1).

¹¹³ *Id.*.

¹¹⁴ Measure 49 §§ 6(6)(d); 7(5)(d); and 9(5)(f).

¹¹⁵ Measure 49 § 12(1)(c).

¹¹⁶ ORS § 197.352(7). Nor may the failure of an owner of property to file an application for a land use permit serve as grounds for dismissal, abatement, or delay of a compensation claim. *Id.*

¹¹⁷ *Id.* *See* discussion *supra* note 116.

¹¹⁸ Measure 49 §§ 8(1-3).

¹¹⁹ *Id.* at § (10)(1). If the public entity that issued the waiver lacks the information needed to determine whether the claimant is entitled to relief, the public entity must issue a written request to the claimant for the required information.

- The claimant is required to file the required information within 90 days after they receive the request, or else the public entity will review the information that is available, and shall complete a tentative review no later than 240 days after the effective date of Measure 49.
- The public entity shall provide written notices to the claimant, the DLCD and any other person entitled to notice of the tentative determination as to whether the claimant qualifies for relief under § 9 of Measure 49, and if so, the specific number of single-family dwellings that the public entity proposed to authorize.
- The notice must state that the recipient has 15 days to submit evidence or arguments in response to the tentative determination, after which the public entity shall make a final determination.
- A public entity shall make the final determination within 300 days after the effective date of Measure 49.

¹²⁰ Measure 49 is effective 30 days following the election on November 6, 2007.

¹²¹ *Id.* at §§10(2-5).

¹²² *Id.* at § 10(3).

¹²³ *Id.* at § 11(6). Note: Given that Measure 49 §11(6) now uses the word “authorization” as opposed to “waiver” in this section, it is unclear if the waiver actually runs with the land or not because the term “authorization” is not defined.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Measure 49 § 12(6).

¹²⁷ *Id.* at § 11(3). See discussion *supra* note 18.

¹²⁸ *Id.* at § 11(3)(B)(b).

¹²⁹ *Id.* at § 11(1).

¹³⁰ *Id.* at § 11(2).

¹³¹ *Id.* at § 11(1).

¹³² A decision by a governing body under Measure 37 shall not be considered a land use decision as defined in ORS § 197.015(10). ORS § 197.352(9). LUBA only has jurisdiction to hear appeals of final orders from land use decisions under ORS § 197.015(10).

¹³³ *Id.* See discussion *supra* note 132.

¹³⁴ Under Measure 49 § 16, if the determination being appealed was made by Metro, a city or a county, ORS §§ 34.010 - 34.100 applies; if the decision was made by the State, ORS § 183.484 governs. Regardless of who makes the decision, it is not considered a land use decision, and LUBA has no jurisdiction.

¹³⁵ If the land use regulation continues to apply to the claimant's property more than 180 days after the claimant has made written demand for compensation, the owner, or holder of any interest therein, has a cause of action for compensation in the circuit court in which the real property is located. ORS §§ 197.352(4) and (6).

¹³⁶ *Id.* See discussion *supra* note 135.

¹³⁷ *Id.* See discussion *supra* note 145.

¹³⁸ Under *Corey v. DLCD*, 210 Or. App. 542, 545, 152 P3d 933 (2007), when a M37 claimant seeks judicial review of the *extent* of the remedy provided by DLCD rather than a review of its determination of *whether* the claimant is entitled to a remedy, jurisdiction resides with the Oregon Court of Appeals. More specifically, the Oregon Court of Appeals has jurisdiction if the final order resulted from a proceeding "[i]n which the individual legal rights, duties or privileges of specific parties are required by statute or Constitution to be determined only after an agency hearing at which such specific parties are entitled to appear and be heard." ORS 183.310(2)(a)(A). Further, according to the Oregon Court of Appeals in *Emmel v. DLCD*, 213 Or. App. 681(2007), "under *Corey*, the principles guiding the determination of whether the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution required notice and a hearing derive from *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999), as construed by the Oregon Supreme Court in *Koskela v. Willamette Industries, Inc.*, 331 Or. 362, 15 P.3d 548 (2000)." *Emmel*, citing *Corey*, 210 Or. App. at 548-49. Those principles have been summarized by the Court of Appeals as follows:

A person has no constitutionally protected property interest in a government benefit when he or she is making a claim of entitlement because their protected property interest begins only when actual entitlement is established. *Id.* at 551. Therefore, a claimant is not entitled to a hearing regarding the determination of entitlement. *Id.* However, once a claimant's initial entitlement is established, that claimant acquires a constitutionally protected property interest in "all of the benefit for which he or she qualifies", and has a right to a full contested hearing as to the extent of the benefit under the Oregon Administrative Procedures Act. *Id.* (emphasis added).

¹³⁹ *Id.* See discussion *supra* note 138.

¹⁴⁰ Under Measure 49 § 16, if the determination being appealed was made by Metro, a city or a county, ORS 34.010 to 34.100 applies; if the decision was made by the State, ORS 183.484 governs. Regardless of who makes the decision, it is not considered a land use decision, and LUBA has no jurisdiction.