



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

**ORS 195.300 to ORS 195.336 (MEASURE 49) SUPPLEMENTAL REVIEW
OF MEASURE 37 CLAIM
Final Order of Denial**

STATE ELECTION NUMBER: E121744, 131674 and 131681^{1,2}

CLAIMANTS: Malcolm R. and Rue G. Brown
PO Box 101
Gold Hill, OR 97525

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 35S, Range 2W, Section 5
Tax lots 201, 202 and 501
Jackson County

The claimants, Malcolm and Rue Brown, filed claims with the state under ORS 197.352 (2005) (Measure 37) on August 4, 2006, and November 29, 2006, for property located at 14790 and 14922 Ramsey Road, near Gold Hill, in Jackson County. ORS 195.300 to ORS 195.336 (Measure 49) entitles claimants who filed Measure 37 claims to elect supplemental review of their claims. The claimants have elected supplemental review of their Measure 37 claims under Section 6 of Measure 49, which allows the Department of Land Conservation and Development (the department) to authorize up to three home site approvals to qualified claimants.

This Final Order of Denial is the conclusion of the supplemental review of this claim.

I. ANALYSIS OF CLAIM

A. Maximum Number of Home Sites for Which the Claimants May Qualify

Under Section 6 of Measure 49, the number of home site approvals authorized by the department cannot exceed the lesser of the following: three; the number stated by the claimant in the election materials; or the number described in a Measure 37 waiver issued by the state, or if no waiver

¹ The claimants also filed claim M131515 for tax lot 201. Measure 49 Section 6(5) provides:
"If multiple claims were filed for the same property, the number of lots, parcels or dwellings that may be established for purposes of subsection (2)(a) of this section is the number of lots, parcels or dwellings in the most recent waiver issued by the state before the effective date of this 2007 Act or, if a waiver was not issued, the most recent claim filed with the state, but not more than three in any case."

This final order addresses M121744 because the most recent waiver was issued under that claim.

² Claims E121744, E131674 and E131681 have been combined into one claim because the properties are contiguous. Per OAR 660-041-0150 the Department of Land Conservation and Development will combine multiple claims into one claim if the Measure 37 claim property contains multiple contiguous lots or parcels that are in the same ownership.

was issued, the number of home sites described in the Measure 37 claim filed with the state. The claimants have requested more than three home site approvals in the election material. The Measure 37 waiver issued for claim M121744 describes one home site. No waiver was issued for claim M131674 or M131681. The Measure 37 claims filed with the state describe more than three home sites. Therefore, the claimants may qualify for a maximum of three home site approvals under Section 6 of Measure 49.

B. Qualification Requirements

To qualify for a home site approval under Section 6 of Measure 49, the claimants must meet each of the following requirements:

1. Timeliness of Claim

A claimant must have filed a Measure 37 claim for the property with either the state or the county in which the property is located on or before June 28, 2007, and must have filed a Measure 37 claim with both the state and the county before Measure 49 became effective on December 6, 2007. If the state Measure 37 claim was filed after December 4, 2006, the claim must also have been filed in compliance with the provisions of OAR 660-041-0020 then in effect.

Findings of Fact and Conclusions

The claimants, Malcolm and Rue Brown, filed Measure 37 claim M121744 with the state on August 4, 2006, and filed Measure 37 claims M131674 and M131681 with the state on November 29, 2006. The claimants filed Measure 37 claims, 2005-00141 and 2006-00354, with Jackson County on August 2, 2005, and December 1, 2006, respectively. The state claims were filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Jackson County.

2. 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."

Findings of Fact and Conclusions:

According to the deeds submitted by the claimants, Malcolm and Rue Brown are the owners of fee title to the property as shown in the Jackson County deed records and, therefore, are owners of the property under Measure 49.

Jackson County has confirmed that the claimants are the current owners of the property.

3. All Owners of the Property Have Consented in Writing to the Claim

All owners of the property must consent to the claim in writing.

Findings of Fact and Conclusions:

All owners of the property have consented to the claim in writing.

4. The Property Is Located Entirely Outside Any Urban Growth Boundary and Entirely Outside the Boundaries of Any City

The Measure 37 claim property must be located entirely outside any urban growth boundary and entirely outside the boundaries of any city.

Findings of Fact and Conclusions:

The Measure 37 claim property is located in Jackson County, outside the urban growth boundary and outside the city limits of the nearest city, Gold Hill.

5. One or More Land Use Regulations Prohibit Establishing the Lot, Parcel or Dwelling

One or more land use regulations must prohibit establishing the requested lot, parcel or dwelling.

Findings of Fact and Conclusions:

Tax lots 201 and 202 of the property are currently zoned Exclusive Farm Use (EFU) by Jackson 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.

Tax lots 201 and 202 of the claimants' property consist of 156.67 acres.

Tax lot 501 of the property is currently zoned Forest Resource (FR) by Jackson 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.

Tax lot 501 consists of 14.32 acres.

Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the three home sites the claimants may qualify for under Section 6 of Measure 49.

6. 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.

Findings of Fact and Conclusions

Based on the documentation submitted by the claimants, it does not appear that the establishment of the three home sites for which the claimants may qualify on the property is prohibited by land use regulations described in ORS 195.305(3).

7. On the Claimant's Acquisition Date, the Claimant Lawfully Was Permitted to Establish at Least the Number of Lots, Parcels or Dwellings on the Property That Are Authorized Under Section 6 of Measure 49

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."

Findings of Fact and Conclusions

Jackson County deed records indicate that the claimants acquired tax lots 201 (124.00 acres) and 202 (32.67 acres) on July 21, 1990, and tax lot 501 (14.32 acres) on October 2, 1995.

On July 21, 1990, the Measure 37 claim property consisted of tax lots 201 and 202 and was subject to Jackson County's acknowledged Exclusive Farm Use (EFU) zone. Jackson County's EFU zone required 80 acres for the creation of a new lot or parcel on which a dwelling could be established. Tax lots 201 and 202 consist of 156.67 acres and are developed with a dwelling. Therefore, the claimants lawfully could not have established any additional home sites on their date of acquisition.

On October 2, 1995, tax lot 501 was subject to Jackson County's acknowledged Forest Resource (FR) zone. Jackson County's FR zone required 80 acres for the establishment of a dwelling on a lot or parcel. Tax lot 501 of the claimants' property consists of 14.32 acres. Therefore, the claimants lawfully could not have established any home sites on tax lot 501 on their date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on November 3, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. In response to the Preliminary Evaluation, the claimants submitted comments, objecting that the department's analysis is incorrect and that, in fact, the claimants were lawfully permitted to establish additional dwellings when they acquired tax lots 201 and 202 as evidenced by the fact that they sought and were granted county approval for a non-farm dwelling in 1990, on the contiguous 3-acre tax lot, 200.

However, the analysis under Measure 49 is statutorily limited to whether a claimant was lawfully permitted to establish one or more home sites on the claimant's acquisition date which, due to regulations established subsequent to that date, the claimant is currently prohibited from establishing. ORS 215.284 and OAR 660-033-0130 provide the criteria for the establishment of a non-farm-related dwelling in an EFU zone. Those criteria have not substantively changed since the claimants acquired the Measure 37 claim property. Accordingly, the claimants' eligibility for approval of a non-farm dwelling has not substantively changed since the claimants acquired the property. Therefore, the question of whether the claimants could then have qualified for or could currently qualify for a non-farm dwelling is independent of the Measure 49 inquiry.

The regulations affecting the claimants' Measure 37 claim property that have become more restrictive since the claimants acquired the property are those amendments to ORS Chapter 215 enacted in 1993 through House Bill 3661. However, those amendments did not further restrict the claimants' ability to establish additional dwellings on the property relative to what was allowed under the county's EFU zone when they acquired the property. When the claimants acquired the property in 1990, Jackson County's EFU zone required a minimum of 80 acres for the establishment of parcel on which a farm dwelling could be established. That minimum acreage standard has not changed since then. Because the claimants currently have a dwelling on the Measure 37 claim property and they were not lawfully permitted to establish additional farm dwellings on the property under the standards in effect when they acquired it, they are not entitled to relief under Measure 49.

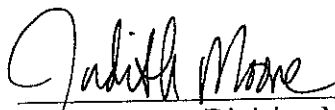
Comments received have been taken into account by the department in the issuance of this Final Order of Denial.

III. CONCLUSION

Based on the analysis above, the claimants do not qualify for Measure 49 home site approvals because the claimants were not lawfully permitted to establish the lots, parcels or dwellings on the claimants' date of acquisition.

IT IS HEREBY ORDERED that this Final Order of Denial is entered by the Director of the Department of Land Conservation and Development as a final order of the department and the Land Conservation and Development Commission under ORS 197.300 to ORS 195.336 and OAR 660-041-0000 to 660-041-0160.

FOR THE DEPARTMENT AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:



Judith Moore, Division Manager
Dept. of Land Conservation and Development
Dated this 25th day of January 2010.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to judicial remedies including the following:

1. Judicial review is available to anyone who is an owner of the property as defined in Measure 49 that it the subject of this final determination, or a person who timely submitted written evidence or comments to the department concerning this final determination.
2. Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 must be filed in the Circuit Court in the county in which the affected property is located. Upon motion of any party to the proceedings, the proceedings may be transferred to any other county with jurisdiction under ORS 183.484 in the manner provided by law for change of venue.
3. Judicial review of this final determination is limited to the evidence in the record of the department at the time of its final determination. Copies of the documents that comprise the record are available for review at the department's office at 635 Capitol St. NE, Suite 150, Salem, OR 97301-2540. Judicial review is only available for issues that were raised before the department with sufficient specificity to afford the department an opportunity to respond.