



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 NUMBERS: E129859 and E129829¹

CLAIMANTS: Richard L. and Sandra M Twigg
31500 SW Firdale Road
Cornelius, OR 97113

Leland R. and Shirley A. Twigg²
32000 SW Firdale Road
Cornelius, OR 97113

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 1S, Range 3W, Section 36
Tax lots 901, 1600, 1700 and 1701³
Washington County

The claimants, Richard and Sandra Twigg and Leland and Shirley Twigg, filed two claims with the state under ORS 197.352 (2005) (Measure 37) on August 9, 2006, for property located at 31500 SW Firdale Road, near Cornelius, in Washington 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.

¹Claims E129859 and E129829 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.

²The claimants, Leland and Shirley Twigg, filed a Measure 37 claim for tax lots 1700 and 1701, and they have elected review under Measure 49 for relief together with the claimants Richard and Sandra Twigg, for claim E129859. However, Leland and Shirley Twigg are not claimants for claim E129829, which includes tax lots 901 and 1600.

³The Measure 37 claim property consists of tax lots 901, 1600, 1903, 1700 and 1701. The claimants did not elect supplemental review for tax lot 1903. While a claim cannot be amended to remove claim property, analysis of a claimants' eligibility for relief on a portion of claim property may, in some cases, be immaterial. In this case whether the claimants are eligible for relief on tax lot 1903 is not relevant to the analysis of whether the claimants are eligible for relief on tax lots 901, 1600, 1700 and 1702. Therefore, although tax lot 1903 is part of the Measure 37 claim property, review of the claimants' eligibility for relief on tax lot 1903 is omitted and all references to Measure 37 claim property refer only to tax lot 901, 1600, 1700 and 1702.

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 was issued, the number of home sites described in the Measure 37 claim filed with the state. The claimants have requested four home site approvals in the E129859 election material and two home site approvals in the E129829 election material. The Measure 37 waiver issued for this claim describes an unspecified number of 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 filed Measure 37 claims, M129859 and M129829, with the state on August 9, 2006. The claimants filed Measure 37 claims, 37CL0488 and 37CL0489, for tax lots 901 and 1600 on July 10, 2006, and 37CL0513, for tax lots 1700 and 1701 on August 3, 2006, with Washington County. The state claim was filed prior to December 4, 2006.

The claimants timely filed Measure 37 claims with both the state and Washington 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 and land sale contract submitted by the claimants, Richard and Sandra Twigg are the owners of fee title to tax lots 1600, 1700 and 1701 as shown in the Washington County deed records and the purchasers under a recorded land sale contract in force for tax lot 901. Therefore, they are owners of the property under Measure 49.

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

According to the information submitted by the claimants, Leland and Shirley Twigg have not established their ownership of the property for the purposes of Measure 49.

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 Washington County, outside the urban growth boundary and outside the city limits of the nearest city, Cornelius.

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:

The property is currently zoned Exclusive Farm Use (EFU) by Washington 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 claimants' property consists of 113.58 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

Washington County deed records indicate that the claimants, Richard and Sandra Twigg, acquired tax lot 901 (9.85 acres) on June 11, 1978, tax lots 1700 (38.11 acres) and 1701 (41.17 acres) on December 31, 1984, and tax lot 1600 (24.45 acres) on November 1, 1985.

The claimants acquired tax lot 901 of the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Washington County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On June 11, 1978, the Measure 37 claim property was zoned General Farm Use (GFU-38) by Washington County. Washington County's GFU-38 zone included a fixed minimum acreage standard of 38 acres. However, the Commission had not acknowledged that zone for compliance with the goals when

the claimants acquired the property on June 11, 1978. Accordingly, the statewide planning goals, and in particular Goal 3 and ORS chapter 215 applied directly to the Measure 37 claim property.

On July 31, 1984, the Commission acknowledged the application of Washington County's Exclusive Farm Use (EFU) zone to the Measure 37 claim property. The Commission's acknowledgement of Washington County's EFU zone confirmed that zone's compliance with Goal 3 and ORS chapter 215. Washington County's acknowledged EFU zone required 76 acres for the creation of a new lot or parcel on which a dwelling could be established. Tax lot 901 of the claimants' property consists of 9.85 acres. Therefore, on the claimants' acquisition date, they could not have established any home sites 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. 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 Washington County's GFU-38 zone on the claimants' date of acquisition. That zone included a fixed minimum acreage standard of 38 acres. The Measure 37 claim property consists of 9.85 acres. Therefore, based on the analysis under SB 1049 (2010), the claimants were not lawfully permitted to establish any home sites on tax lot 901 of the Measure 37 claim property on their date of acquisition. Although Washington County's land development ordinance included provisions outlining a discretionary review process and discretionary standards under which a property owner could obtain approval for a dwelling on a vacant lot or parcel of less than 38 acres, the current record does not establish that the claimants would have been able to satisfy the requirements under such a review.

On December 31, 1984, and November 1, 1985, tax lots 901, 1600, 1700 and 1701 of the Measure 37 claim property were subject to Washington County's acknowledged Exclusive Farm Use (EFU) zone. Washington County's EFU zone required 76 acres for the creation of a new lot or parcel on which a dwelling could be established. Tax lots 901, 1600, 1700 and 1701 consist of 113.58 acres and are developed with three dwellings. Therefore, the claimants lawfully could not have established any additional home sites on their date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on December 16, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. Comments received have been taken into account by the department in the issuance of this Final Order of Denial.

Specifically, the claimants' attorney submitted comments stating that claimant Richard Twigg acquired tax lots 1700 and 1701 at any earlier date through a partnership agreement with his parents. However, Twigg Farms, the partnership between Richard Twigg and his parents, is a separate and distinct legal entity from Richard Twigg. Therefore, the acquisition date for the claimant Richard Twigg is December 31, 1984.

The claimants' attorney also submitted comments stating that Leland and Shirley Twigg continue to have an ownership interest in tax lot 1700 and 1701 because they are the vendors under a 1994 land sale contract. However, under Section 2(16)(b) of Measure 49, only the purchasers under a recorded land sale contract are "owners" for purposes of Measure 49. Therefore, Leland and Shirley Twigg are not current owners of tax lots 1700 and 1701 for purposes of Measure 49.

The claimants' attorney appears to assert that because processes under which the claimants could have attempted to obtain authorization for dwellings on pre-existing lots or parcels existed on their acquisition date, the department should authorize dwellings under Measure 49. Measure 49 allows a claimant to establish the number of lots, parcels and dwellings that would have been lawfully permitted at the time a claimant acquired the property. A use is not lawfully permitted when approval of the use on a claimant's acquisition date would have required a discretionary review process and the record for the claim do not include any evidence that the claimant could have met the standards under such a review process.

Finally, the claimants' attorney appears to take issue with the lawfully permitted analysis for the portion of the property that the claimants acquired prior to the acknowledgment of Washington County's comprehensive plan and land use regulations. The lawfully permitted analysis in this final order conforms with Senate Bill 1049 (2010), which clarifies the lawfully permitted analysis for properties acquired during this time period.

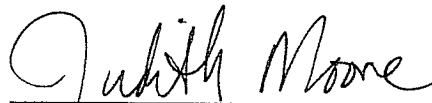
III. CONCLUSION

Based on the preliminary analysis, the claimants, Richard and Sandra Twigg, 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.

Based on the department's preliminary analysis, it appears that the claimants, Leland and Shirley Twigg, are not eligible for any relief under Measure 49 because the claimants have not established their ownership of the property for the purposes of Measure 49.

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 1st day of April 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 is 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.