



**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:

E130537

CLAIMANTS:

Darrell Sheets
P.O. Box 888
North Plains, OR 97133

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 2N, Range 2B, Section 17
Tax lots 6400, 6402, and 6403¹
Washington County

AGENT CONTACT INFORMATION:

Bruce Vincent
Bedsaul/Vincent Consulting, LLC
825 NE 20th Avenue, Suite 300
Portland, OR 97232

The claimant, Darrell Sheets, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 2, 2006 for property located at 26525 NW Dorland Road, near North Plains, 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 claimant has elected supplemental review of his Measure 37 claim 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 Claimant 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 claimant has requested three home site approvals in the election material. The Measure 37

¹ Information from Washington County indicates that tax lots 6400, 6402, and 6403 make up one legal parcel.

waiver issued for this claim describes two home sites. Therefore, the claimant may qualify for a maximum of two 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 claimant 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 claimant, Darrell Sheets, filed a Measure 37 claim, M130537, with the state on November 2, 2006. The claimant filed a Measure 37 claim, 37CL0434, with Washington County on April 6, 2006. The state claim was filed prior to December 4, 2006.

The claimant timely filed a Measure 37 claim 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 submitted by the claimant, Darrell Sheets is the owner of fee title to tax lots 6402 and 6403 as shown in the Washington County deed records. According to the recorded real estate contract submitted by the claimant, Darrell Sheets is the purchaser under a recorded land sale contract in force for tax lot 6400, as shown in the Washington County deed records. Darrell Sheets is therefore an owner of the Measure 37 claim property under Measure 49.

Washington County has confirmed that the claimant is the current owner of the property.

3. All Owners 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, North Plains.

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 Forest and Conservation (EFC) by Washington 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.

The claimant's property consists of 120 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the two home sites the claimant 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 claimant, it does not appear that the establishment of the two home sites for which the claimant 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

The Washington County deed records indicate that the claimant acquired tax lots 6402 (40 acres) and 6403 (40 acres) on November 16, 1979, and tax lot 6400 (40 acres) on February 15, 2005.

The claimant acquired tax lots 6402 and 6403 of the Measure 37 claim property after adoption of the statewide planning goals, but before 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. At that time, the Measure 37 claim property was zoned FRC-38 by Washington County. However, the Commission had not acknowledged that zone for compliance with the goals when the claimant acquired the property on November 16, 1979. Accordingly, the statewide planning goals, and in particular Goal 4, and ORS chapter 215 applied directly to tax lots 6402 and 6403 when the claimant acquired them.

To determine whether a use of property, that was not subject to an acknowledged zone at the time the claimant acquired it, would have complied with Goal 4, OAR 660-041-0110 provides that DLCDD will apply the first acknowledged local land use regulations, unless the evidence in the record, including but not limited to, county Measure 37 waivers or local land use determinations issued at the time the property was acquired, establishes that a greater number of lots, parcels or dwellings would have been lawfully permitted.

In 1979, Goal 4 was "to conserve forest lands for forest uses." Goal 4 required that "forest lands shall be retained for the production of wood fiber and other forest uses. Lands suitable for forest uses shall be inventoried and designated as forest lands. Existing forest uses shall be protected unless proposed changes are in conformance with the comprehensive plan."

On July 31, 1984, the Commission acknowledged the application of Washington County's EFC zone to tax lots 6402 and 6403 of the Measure 37 claim property. The Commission's acknowledgement of Washington County's EFC zone confirmed that zone's compliance with Goal 4 and ORS chapter 215. Washington County's acknowledged EFC zone required 76 acres for the creation of a new lot or parcel on which a dwelling could be established. Tax lots 6402

and 6403 together consist of 80 acres. The record indicates that the standards in the FRC-38 zone did not comply with Goal 4 and the record does not include evidence to the contrary. As Washington County indicated in its waiver under Measure 37 (Claim 37CL0434), "from 1975 to 1993... case law, and the fact that Goal 4 did not list dwellings as permitted, enumerated use on lands zoned for forest uses, pre-empted the [Community Development Code] standards for dwellings in effect at that time." In that waiver the county concluded "If current regulations are "waived" and the standards for forest dwellings that were in effect in 1979 are applied (which will include the applicable case law and Goal 4 requirements), the Claimant may not be able to demonstrate that the site qualifies for even one dwelling."

The claimant's agent submitted argument in response to the Preliminary Evaluation that the unacknowledged FRC-38 zone was in effect when the claimant acquired the property, and that under the standards of that zone, the claimant would have been lawfully permitted to establish an additional lot or parcel and authorize an existing dwelling on his date of acquisition of tax lots 6403 and 6403. The claimant's agent submitted examples of Washington County partition approvals that included Goal 4 findings between 1980 and 1983. However, those examples did not concern property that was in the FRC-38 zone and the agent indicated that he "found no FRC-38 zoned partitions during the years 1980 to 1984." The evidence thus does not speak to or establish that the standards in the FRC-38 zone complied with Goal 4.

Washington County submitted comments indicating that had the claimant acquired tax lots 6402 and 6403 via recorded deed only slightly earlier, under the County Development Code those tax lots would have become separate legal parcels. However, those comments do not address whether such a result under the code would have been in compliance with state law and Goal 4 in effect at the time.

Therefore, on the claimant's acquisition date, the evidence in the record indicates that the claimant could not have established the two requested home sites in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations. The claimant does not qualify for any home sites on tax lots 6402 and 6403 because the claimant has not shown that a direct application of the Goals and ORS chapter 215 would have allowed the claimant to establish additional lots or dwellings.

On February 15, 2005, the Measure 37 claim property was subject to Washington County's acknowledged Exclusive Forest and Conservation (EFC) zone. Washington County's EFC zone required 80 acres for the creation of a new lot or parcel on which a dwelling could be established. On February 15, 2005, the claimant's property, including tax lots 6400, 6402 and 6403, together consisted of 120 acres. Therefore, the claimants lawfully could not have established the two requested home sites on his date of acquisition.²

² On both of the claimant's acquisition dates he may have been lawfully permitted to establish one home site on the Measure 37 claim property. However, because it appears that the Measure 37 claim property consists of one lot or parcel that is already developed with at least one dwelling, an authorization of one home site approval would not appear to provide the claimant with any benefit.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on March 20, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. As discussed above, both the claimant's agent and the County submitted comments and additional evidence in response to the Preliminary Evaluation.

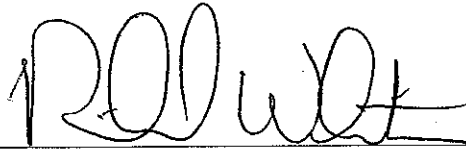
The additional evidence submitted does not establish that a direct application of the Goals and ORS chapter 215 would have allowed the claimant to establish the requested home sites. As discussed above, because the Commission had not acknowledged the FRC-38 zone for compliance with the goals when the claimant acquired the property on November 16, 1979, Goal 4 and ORS chapter 215 applied directly to tax lots 6402 and 6403.

III. CONCLUSION

Based on the analysis above, the claimant, Darrel Sheets does not qualify for Measure 49 home site approvals because the claimant was not lawfully permitted to establish the lots, parcels or dwellings on the claimant's dates 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:



Richard Whitman, Director
Dept. of Land Conservation and Development
Dated this ~~30th~~ day of ~~July~~, 2009.
June

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.