



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: E132083

CLAIMANTS: Reginald O. and Charlotte M. Tollefson
19723 S Bakers Ferry Road
Oregon City, OR 97045

MEASURE 37 PROPERTY IDENTIFICATION: Township 2S, Range 3E, Section 20
Tax lots 100, 180 and 190¹
Clackamas County

AGENT CONTACT INFORMATION: Thomas H. Cutler
Harris Berne Christensen LLP
5000 SW Meadows Road, Suite 400
Lake Oswego, OR 97035

The claimants, Reginald and Charlotte Tollefson, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 30, 2006, for property located at 19723 S Bakers Ferry Road, near Damascus, in Clackamas 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 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 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

¹ In the Clackamas County Measure 37 report, the county states that the three tax lots comprising the Measure 37 claim property, tax lots 100, 180 and 190, are one legal parcel. In reliance on that report, this final order considers the Measure 37 claim property as one legal parcel.

claimants have requested three home site approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes 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, Reginald and Charlotte Tollefson, filed a Measure 37 claim, M132083, with the state on November 30, 2006. The claimants filed a Measure 37 claim, ZC-525-06, with Clackamas County on December 1, 2006. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Clackamas 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 deed submitted by the claimants, Reginald and Charlotte Tollefson are the settlors of a revocable trust into which they conveyed the Measure 37 claim property and, therefore, are owners of the property under Measure 49.

Clackamas 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 Clackamas County, outside the urban growth boundary and outside the city limits of the nearest city, Damascus.

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 Clackamas 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 75.79 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

Clackamas County deed records indicate that the claimants acquired the property on September 4, 1992.

On September 4, 1992, the Measure 37 claim property was subject to Clackamas County's acknowledged General Agricultural District (GAD) zone. Clackamas County's GAD zone generally required 40 acres for the creation of a new lot or parcel on which a dwelling could be established. The zone did allow for the establishment of principal dwellings in conjunction with an existing commercial farm use on an established parcel of at least five acres, "provided that the established lot is as large as the acreage supporting the typical (median) commercial farm unit in the area . . . or the land supports a commercial farm use of greater intensity . . . than commercial farms in the area" and subject to compliance with other specified criteria (Clackamas County Code, Section 402.04, 1992 edition).

The claimants' representative asserts that the record for this claim establishes that the claimants would have been lawfully permitted to establish three home sites on the claimants' 75.79-acre property, which is developed with a dwelling, because the "median" size of properties within one mile of the subject property is 22.55 acres. The representative has submitted into the record a list of 69 properties within a one-mile radius of the subject property; that list shows that the 35th largest property within that radius is 22.55 acres in size. Accordingly, if verified, this list establishes that the claimants would have satisfied one of the several criteria for the establishment of a dwelling on an existing parcel under the provisions of Section 402.04, in effect when the claimants acquired the property. However, that the median size of surrounding properties is 22.55 acres in size does not establish compliance with criteria for approval of a lot division under Section 402.09.

Lot divisions under Section 402.09 required evidence that the lots to be created are "at least as large as the acreage supporting the typical commercial farm unit" among other criteria including, but not limited to, the requirements that "[t]he lot size will be sufficient to adequately support the proposed principal use stated in the farm management plan, considering [several additional

factors]” and “[t]he lot division will not adversely affect or limit the existing or potential commercial farm uses in the area.” Even if evidence of the median size of the surrounding commercial farm operations qualified as evidence of the size of the “typical” commercial farm unit under section 402.09, the claimants have not established that when they acquired the subject property in 1992, they could have satisfied all of the other criteria necessary to obtain approval to divide and further develop the subject property. The list of the size of surrounding properties does not establish that the claimants lawfully could have established any additional home sites on their date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

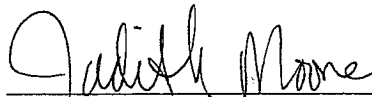
The department issued its Preliminary Evaluation for this claim on December 3, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. As discussed above, comments received have been taken into account by the department in the issuance of this Final Order of Denial. The comments and evidence submitted by the claimants’ representatives do not establish that the claimants were lawfully permitted to establish three home sites when they acquired their property in 1992.

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 19th day of May 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.