



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: E132691

CLAIMANT: James N. Smith
5195 Buyserie Road NE
St. Paul, OR 97137

MEASURE 37 PROPERTY IDENTIFICATION: Township 4S, Range 2W, Section 8
Tax lot 1200
Marion County

PRIMARY CONTACT INFORMATION: Madeline Wilson
5195 Buyserie Road NE
St. Paul, OR 97137

The claimant, James Smith, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located at 5195 Buyserie Road NE, near St. Paul, in Marion 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. No waiver was issued for this claim. The Measure 37 claim filed with the state describes eight home sites. Therefore,

the claimant 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 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, James Smith, filed a Measure 37 claim, M132691, with the state on December 1, 2006. The claimant filed a Measure 37 claim, M06-302, with Marion County on December 1, 2006. The state claim was filed prior to December 4, 2006.

The claimant timely filed a Measure 37 claim with both the state and Marion 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 information obtained from Marion County, James Smith conveyed his interest in tax lot 1200 to other individuals by warranty deed dated November 11, 2009. Therefore, claimant has not established his ownership of the Measure 37 claim property for the purposes of Measure 49.

Because this requirement has not been met, the remaining approval criteria will not be evaluated.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on February 17, 2010. 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, comments from Madeline Wilson, the claimant's daughter and current owner of the subject property, state that she was listed as the claimant's agent on the election form and the department should proceed with the claim. To the extent the comments argue that Madeline Wilson was a claimant under Measure 49, the department disagrees with this assertion. Madeline Wilson was neither listed as a claimant on the Measure 49 election form nor on the Measure 37 claim materials and therefore cannot be added as a claimant for purposes of Measure 49.

To the extent the comments argue that Madeline Wilson has the right to prosecute the claim because she acquired the property from the deceased claimant, the department disagrees with this assertion. Section 11 (9), Measure 49 (2007) provides:

If a claimant is an individual, the entitlement to prosecute the claim under section 6, 7 or 9 of this 2007 Act and an authorization to use the property provided by a waiver under section 6, 7 or 9 of this 2007 Act:

- (a) Is not affected by the death of the claimant if the death occurs on or after the effective date of this 2007 Act; and
- (b) Passes to the person that acquires the property by devise or by operation of law.

In this case, however, the claimant transferred ownership of the property by warranty deed prior to his death. The current owner did not acquire the property by devise or by operation of law upon the claimant's death and therefore may not prosecute the claim.

III. CONCLUSION

Based on the analysis above, the claimant does not qualify for Measure 49 home site approvals because he is not an owner of the Measure 37 claim property.

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 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.