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:	E133125[1]
CLAIMANT:	Margey Bowers[2] PO Box 172 Creswell, OR 97426
MEASURE 37 PROPERTY IDENTIFICATION:	Township 19S, Range 3W, Section 13 Tax lot 2301 Lane County
AGENT CONTACT INFORMATION:	Michael Farthing, Attorney PO Box 10126 Eugene, OR 97440

The claimant, Margey Bowers, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located at 34162 Cloverdale Road, near Creswell, in Lane 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 her 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

[1] The claimant also has submitted a claim for property not contiguous to the subject property which is identified as E133123.

[2] Information obtained by the department indicates that claimant Wayne Bowers passed away on December 15, 2008. Under Measure 49, if a claimant dies on or after December 6, 2007, entitlement to prosecute the claim passes to the person who acquires the claim property by devise or by operation of law.

was issued, the number of home sites described in the Measure 37 claim filed with the state. The claimant has requested Section 6 review in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state 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, Margey Bowers, filed a Measure 37 claim, M133125, with the state on December 1, 2006. The claimant filed a Measure 37 claim, PA06-7311, with Lane 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 Lane 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 claimant, Margey Bowers is the owner of fee title to the property as shown in the Lane County deed records and, therefore, is an owner of the property under Measure 49.

Lane County has confirmed that the claimant is the current owner 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 Lane County, outside the urban growth boundary and outside the city limits of the nearest city, Creswell.

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 Rural Residential (RR-5) by Lane County, in accordance with Goal 14, which prohibits the urban use of rural land and requires local comprehensive plans to identify and separate urbanizable from rural land in order to provide for the orderly and efficient transition from rural to urban use. State laws, namely Goal 14 and OAR 660-004-0040, prohibit the establishment of a lot or parcel less than the size established in the County rural residential zone in existence on October 4, 2000, if the zone in existence on that date had a minimum lot size of two or more acres. Lane County's RR-5 zone requires a minimum lot size of five acres.

The claimant's property consists of 4.56 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

Lane County deed records indicate that the claimant acquired the property on June 2, 1977.

The claimant acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Lane 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 General Rural (GR-10) by Lane County, which had a fixed minimum acreage standard of 10 acres. Because the Commission had not acknowledged Lane County's comprehensive plan and land use regulations for compliance with the goals when the claimant acquired the property on June 2, 1977, the statewide planning goals, and in particular Goal 14, applied directly to the Measure 37 claim property.

On November 18, 1985, the Commission acknowledged the application of Lane County's Rural Residential (RR-5) zone to the Measure 37 claim property. The Commission's acknowledgement of Lane County's RR-5 zone confirmed that zone's compliance with Goal 14. Lane County's acknowledged RR-5 zone required 5 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimant's property consists of 4.56 acres. Therefore, on the claimant's acquisition date, she 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 claimants whose property was

ultimately acknowledged as non-resource land pursuant to Goal 14 and whose property was, at acquisition, subject to a county zone that included a fixed minimum acreage standard of more than two acres, are eligible for the number of home site approvals that would have been lawfully permitted under the minimum acreage standard in that zone, including existing development.

The Measure 37 claim property was subject to Lane County's GR-10 zone on the claimant's date of acquisition. That zone had a fixed minimum acreage standard of 10 acres.

The Measure 37 claim property consists of 4.56 acres and is developed with one dwelling. Therefore, based on the analysis under SB 1049 (2010), it appears that the claimant does not qualify for any additional home sites under Measure 49, as amended.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on December 30, 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.

III. CONCLUSION

Based on the analysis above, the claimant 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 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

Judith Moore, Division Manager
Dept. of Land Conservation and Development
Dated this 6TH 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 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.