



**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:**

E133673

**CLAIMANT:**

John C. Derbyshire  
36178 SW Bald Peak Road  
Hillsboro, OR 97123

**MEASURE 37 PROPERTY  
IDENTIFICATION:**

Township 2S, Range 3W, Section 10CB  
Tax lot 500  
Washington County

**AGENT CONTACT INFORMATION:**

John A. Rankin, LLC  
Attorney at Law  
26715 SW Baker Road  
Sherwood, OR 97140

The claimant, John Derbyshire, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 4, 2006, for property located at 36178 SW Bald Peak Road, near Hillsboro, 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. No waiver was issued for this claim. The Measure 37 claim filed with the state describes more than three 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, John Derbyshire, filed a Measure 37 claim, M133673, with the state on December 4, 2006. The claimant filed a Measure 37 claim, 37CL0864, with Washington County on December 4, 2006. The state claim was filed on 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 deed submitted by the claimant, John Derbyshire is the owner of fee title to the property as shown in the Washington County deed records and, therefore, is an owner of the property under Measure 49.

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

**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 Agriculture and Forest (AF-10) by Washington 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. Washington County's AF-10 zone requires a minimum lot size of ten acres.

The claimant's property consists of 9.96 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the three 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 three 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**

Washington County deed records indicate that the claimant acquired the property on November 6, 1978.

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 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 November 6, 1978, the Measure 37 claim property was zoned Agriculture and Forest (AF-10) by Washington County. Washington County's AF-10 zone included a fixed minimum acreage standard of ten acres. However, the Commission had not acknowledged that zone for compliance with the goals when the claimant acquired the property on November 6, 1978. Accordingly, the statewide planning goals, and in particular Goal 14 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 Agriculture and Forest (AF-10) zone to the Measure 37 claim property. The Commission's acknowledgement of Washington County's AF-10 zone confirmed that zones' compliance with Goal 14 and ORS chapter 215. Washington County's acknowledged AF-10 zone required ten acres for the creation of a new lot or parcel on which a dwelling could be established. The claimant's property consists of 9.96 acres and is developed with a dwelling. Therefore, on the claimant's acquisition date, he could not have established any additional 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, including existing development. 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.

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

The Measure 37 claim property consists of 9.96 acres and is developed with one lot or parcel and 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.

## **II. COMMENTS ON THE PRELIMINARY EVALUATION**

The department issued its Preliminary Evaluation for this claim on December 22, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. Although written comments were received after the 28-day deadline described in the Preliminary Evaluation, those comments were considered in this Final Order of Denial.

The claimant's agent submitted comments asserting that because processes under which the claimant could have attempted to obtain authorization for additional lots or parcels and dwellings existed on his acquisition date, the department should authorize lots, parcel or 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 highly discretionary review process and the record for the claim does not include any evidence that the claimant could have met the standards under such a review process.

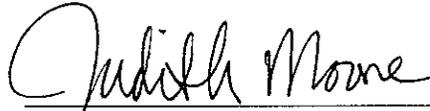
Alternatively, the claimant's agent asserts that the claimant is entitled to relief under Section 6(3) of Measure 49. A claimant may qualify for one home site under Section 6(3) only if a claimant does not qualify for relief under Section 6(2), but otherwise qualifies for relief under Section 6 of Measure 49. In this case the claimant does not otherwise qualify for relief under Section 6 because the claimant was not lawfully permitted to establish additional home sites on his acquisition date. Therefore, the claimant is not entitled to relief under Section 6(3).

## **III. CONCLUSION**

Based on the analysis above, the claimant does not qualify for Measure 49 home site approvals because the claimant would not have been lawfully permitted to establish any additional home sites when he acquired the 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 9<sup>th</sup> 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.