



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:

E133689¹

CLAIMANTS:

Roland A. Hendricks
13384 Picard Place SE
Turner, OR 97392

C. Diane Kent
15108 SE 24th Street
Vancouver, WA 98683

Jerry R. and Judith K. Kinney
PO Box 38
Siletz, OR 97380

Kurt and Kimberlee Cochran
PO Box 290
Siletz, OR 97380

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 11S, Range 10W, Section 7A
Tax lot 1300
Lincoln County

AGENT CONTACT INFORMATION:

Dennis L. Bartoldus, Attorney at Law
PO Box 1510
Newport, OR 97365

The claimants, Ronald Hendricks, Diane Kent, Jerry and Judith Kinney, and Kurt and Kimberlee Cochran, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 4, 2006, for property located at the intersection of Highways 20 and 229, near Toledo, in Lincoln 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.

¹ Claimants Jerry and Judith Kinney also have submitted a claim for property not contiguous to and not in the same ownership as the subject property which is identified as E122832.

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 material; 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 claimants have requested supplemental review under Section 6. No waiver was issued for this claim. The Measure 37 claim filed with the state describes one home site. Therefore, the claimants may qualify for a maximum of one home site approval 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, Ronald Hendricks, Diane Kent, Jerry and Judith Kinney, and Kurt and Kimberlee Cochran, filed a Measure 37 claim, M133689, with the state on December 4, 2006. The claimants filed a Measure 37 claim, 144-LURCC-06-1372, with Lincoln County on December 4, 2006. The state claim was filed on December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Lincoln 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 land sale contract submitted by the claimants, Jerry and Judith Kinney are the purchasers under a recorded land sale contract in force for the property and, therefore, are owners of the property under Measure 49.

Lincoln County has confirmed that the claimants are the current owners of the property.

According to the information submitted by the claimants, Roland Hendricks and Diane Kent have not established their ownership of the property for the purposes of Measure 49. As evidenced by a recorded land sale contract submitted by the claimants, Roland Hendricks and Diane Kent sold the Measure 37 property to claimants Jerry and Judith Kinney on June 11, 1998.

According to the information submitted by the claimants, Kurt and Kimberlee Cochran have not established their ownership of the property for the purposes of Measure 49. The claimants have not submitted any documentation that supports Kurt and Kimberlee Cochrans' ownership of the Measure 37 property.

Because this requirement has not been met, claimants Roland Hendricks, Diane Kent, and Kurt and Kimberlee Cochran are not entitled to any relief under Measure 49, and, therefore, the remaining approval criteria will not be evaluated for those claimants.

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 Lincoln County, outside the urban growth boundary and outside the city limits of the nearest city, Toledo.

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 Agricultural Conservation (A-C) by Lincoln 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 (EFU). Applicable provisions of ORS chapter 215 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, provide standards for the establishment of a dwelling in an EFU zone. In general and subject to some exceptions, those standards require that the property be a minimum of 80 acres in size in an EFU zone and generate a minimum annual income from the sale of farm products.

The combined effect of the standards for the establishment of a dwelling in an EFU zone is to prohibit the claimants from establishing a dwelling on the Measure 37 claim property.

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 one home site 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

Lincoln County deed records indicate that claimants Jerry and Judith Kinney acquired the property on June 11, 1998.

On June 11, 1998, the Measure 37 claim property was subject to Lincoln County's acknowledged Agricultural Conservation (A-C) zone. Lincoln County's A-C zone required 80 acres for the establishment of a dwelling on a vacant lot or parcel. The Measure 37 claim property consists of 3.20 acres. Therefore, claimants Jerry and Judith Kinney lawfully could not have established a home site on the Measure 37 claim property on their date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on November 24, 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. An attorney for the claimants submitted comments asserting that Roland Hendricks and Diane Kent are owners of the Measure 37 claim property under Measure 49 and have been since July 1974. The attorney is correct that the Preliminary Evaluation misstated that Jerry and Judith Kinney are the owners of fee title to the property. However, Jerry and Judith Kinney are the purchasers under a land sale contract in force for the property and are, therefore, the owners of the property for purposes of Measure 49. A seller under a land sale contract in force for the property does not fall within the definition of "owner" under Measure 49.

III. CONCLUSION

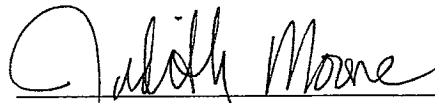
Based on the analysis above, claimants Jerry and Judith Kinney do not qualify for Measure 49 home site approvals because the claimants were not lawfully permitted to establish the dwellings on the claimants' date of acquisition.

Based on the analysis above, claimants Roland Hendricks and Diane Kent do not qualify for Measure 49 home site approvals because they are no longer owners of the Measure 37 property.

Based on the analysis above, claimants Kurt and Kimberlee Cochran do not qualify for Measure 49 home site approvals because they have not established their ownership of the Measure 37 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 25TH day of January 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.