



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:

E133837

CLAIMANT:

Roger F. Hediger
6238 SW Burlingame Avenue
Portland, OR 97239

MEASURE 37 PROPERTY
IDENTIFICATION:

Township 2S, Range 9W, Section 4
Tax lots 401, 402 and 403
Tillamook County

The claimant, Roger Hediger, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 4, 2006, for property located on Long Prairie Road, near Tillamook, in Tillamook 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 six 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, Roger Hediger, filed a Measure 37 claim, M133837, with the state on December 4, 2006. The claimant filed a Measure 37 claim, M-06-77, with Tillamook 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 Tillamook 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 deeds submitted by the claimant, Roger Hediger is the owner of fee title to the property as shown in the Tillamook County deed records and, therefore, is an owner of the property under Measure 49.

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

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) by Tillamook 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. Tillamook County's RR zone requires a minimum lot size of 2 acres.

The claimant's property consists of 3.02 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property two of 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

Tillamook County deed records indicate that the claimant acquired tax lot 401 (2.28 acres) on October 10, 1975, tax lot 402 (0.37 acres) on June 15, 1981, and tax lot 403 (0.37 acres) on October 31, 1984.¹

The claimant acquired tax lots 401 and 402 of the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Tillamook County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251.

On October 10, 1975, and June 15, 1981, tax lots 401 and 402 of the Measure 37 claim property were zoned Medium Density Residential (R-1) by Tillamook County, which had a fixed minimum acreage standard of 7,500 square feet. On April 25, 1984, the Commission acknowledged the application of Tillamook County's Rural Residential (RR) zone to tax lots 401 and 402 of the Measure 37 claim property. Because the Commission had not acknowledged Tillamook County's comprehensive plan and land use regulations for compliance with the goals, when the claimants acquired tax lots 401 and 402 of the property on October 10, 1975 and June 15, 1981, the statewide planning goals, and in particular Goal 14, applied directly that portion of the Measure 37 claim property.

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

¹ The deed records indicate that the claimant reacquired tax lot 402 on June 15, 1981, and tax lot 403 on October 31, 1984, after conveying the tax lots to another person. Regarding reacquisition of claim property, Measure 49 section 21(3) provides: "If a claimant conveyed the property to another person and reacquired the property, whether by foreclosure or otherwise, the claimant's acquisition date is the date the claimant reacquired ownership of the property."

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, either not zoned by the county or subject to a county zone that included a fixed minimum acreage standard of two or fewer acres, are eligible for up to three home site approvals with a minimum acreage standard of two acres per home site.

Tax lots 401 and 402 of the Measure 37 claim property consists of 2.65 acres. Therefore, based on the analysis under SB1049 (2010), the claimant was lawfully permitted to establish one home site on the Measure 37 claim property on his date of acquisition.

On October 31, 1984, the Measure 37 claim property consisted of tax lots 401, 402 and 403 and was subject to Tillamook County's acknowledged Rural Residential (RR) zone. Tillamook County's RR zone required 2 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimant's property consists of 3.02 acres. Therefore, the claimant lawfully could have established no more than one home site on his date of acquisition.

However, because no laws currently prohibit the claimant from establishing the one home site on the Measure 37 claim property for which the claimant appears to qualify, an authorization under Measure 49 would not appear to provide the claimant with any benefit. Therefore, the claimant is not entitled to any relief under Measure 49.

II. COMMENTS ON THE PRELIMINARY EVALUATION

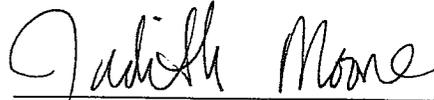
The department issued its Preliminary Evaluation for this claim on March 17, 2010. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. Comments received have been taken into account by the department in the issuance of this Final Order of Denial. Specifically, the claimant's attorney argues that the department erroneously interpreted SB 1049 (2010) and that the claimants were lawfully permitted to establish three home sites based on Section 2(3)(b) of SB 1049. The department disagrees with this assertion. Section 2(3)(b) of SB 1049 provides that the number of home sites lawfully permitted on rural residential lands must not be greater than the number that would have been allowed under the zoning at acquisition. In other words, a claimant is not entitled to more home sites under SB 1049 than the claimant would have been lawfully permitted to establish under the zoning in effect when the claimant acquired the property. Here, the RA-1 zoning in effect on the claimant's date of acquisition included a fixed minimum acreage standard of 7,500 square feet. Accordingly, Section 2(3)(a) applies because the RA-1 zone would have allowed more than one dwelling on two acres. Therefore, the claimant was lawfully permitted to establish up to three home sites with a minimum acreage standard of two acres per home site. The claimant's property consists of 3.02 acres. Thus, the claimant was lawfully permitted to establish one home site on his date of acquisition. However, as indicated above, because no laws currently prohibit the claimant from establishing one home site on the Measure 37 claim property, an authorization under Measure 49 would not appear to provide the claimant with any benefit. Therefore, the claimant is not entitled to any relief under Measure 49.

III. CONCLUSION

Based on the analysis above, the claimant is not eligible for any relief under Measure 49 because no land use regulation prohibits the claimant from establishing the one dwelling the claimant otherwise qualifies for under Measure 49, and because the claimant was not lawfully permitted to establish any additional 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, Division Manager
Dept. of Land Conservation and Development
Dated this 12TH 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.