



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:

E134146

CLAIMANTS:

Eugene D. Stanley
2022 Riley Road
Eagle Point, OR 97524

Jennifer Kennedy
PO Box 632
Eagle Point, OR 97524

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 36S, Range 1W, Section 11
Tax lot 100
Jackson County

AGENT CONTACT INFORMATION:

Mark S. Bartholemew
Hornecker Cowling, Hassen & Heysell, LLP
717 Murphy Road
Medford, OR 97504

The claimants, Eugene Stanley and Jennifer Kennedy, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 4, 2006, for property located along Riley Road, near Eagle Point, in Jackson 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.

This Final Order of Denial is the conclusion of the supplemental review of this claim.¹

¹ If the claimants can provide evidence that they satisfied the standards in Jackson County LDO 218.090 for establishment of a lot of record dwelling when they acquired the property in 1996, then this decision is subject to reconsideration.

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 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 claimants have requested one home site approval 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 claimants may qualify for a maximum of one 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 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, Eugene Stanley and Jennifer Kennedy, filed a Measure 37 claim, M134146, with the state on December 4, 2006. The claimants filed a Measure 37 claim, M37 2006-00316, with Jackson County on December 1, 2006. The state claim was filed on December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Jackson 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 claimants, Eugene Stanley and Jennifer Kennedy are the owners of fee title to the property as shown in the Jackson County deed records and, therefore, are owners of the property under Measure 49.

Jackson County has confirmed that the claimants are the current owners 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 Jackson County, outside the urban growth boundary and outside the city limits of the nearest city, Eagle Point.

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 Exclusive Farm Use (EFU) by Jackson 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.

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

Jackson County deed records indicate that the claimants acquired the property on December 30, 1996.

On December 30, 1996, the Measure 37 claim property was subject to Jackson County's acknowledged Exclusive Farm Use (EFU) zone. Jackson County's EFU zone required 80 acres for the establishment of a dwelling on a vacant lot or parcel, unless the owner could qualify for a Lot of Record dwelling under ORS 215.705 and Jackson County LDO 218.090(6). The Measure 37 claim property consists of 75.50 acres. Therefore, the claimants lawfully could not have established a home site on the Measure 37 claim property on their date of acquisition, unless they could have qualified for a lot of record dwelling under ORS 215.705 and Jackson County LDO 218.090(6) when they acquired the property, and are now prohibited from qualifying for such a dwelling as a result of the 1998 revisions of OAR 660-033-0139(3)(C). The record does not establish whether the claimants qualified for a lot of record based on the standards in effect when they acquired the property.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its preliminary evaluation for this claim on December 31, 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 Decision of Denial. Specifically, comments submitted by the claimants' attorney summarily conclude that the claimants were lawfully permitted to establish a dwelling on their date of acquisition pursuant to the lot of record dwelling provision of ORS 215.705 (1993). The comments allege that amendments to the administrative rules implementing that provision effective June 1, 1998, subsequently restricted that development by prohibiting a dwelling on a lot or parcel if that lot or parcel was part of a larger tract on November 4, 1993 that already contained a dwelling. OAR 660-033-0130(3)(C) (1998). The claimants' attorney is correct in that the claimants could qualify for a home site authorization under Measure 49 *if* the claimants qualified for a lot of record dwelling pursuant to ORS 215.705 and the claimants could not qualify for such a dwelling following the adoption of OAR 660-033-0130(3)(a) in 1998. However, neither the claimants nor their attorney have submitted evidence that the claimants could have satisfied the standards for obtaining approval for a lot of record dwelling in effect when they acquired the Measure 37 claim property. Therefore, the claimants have not yet established that they qualify for a home site approval, unless the claimants can show that under ORS 215.705 (1993) and the lot of record standards described in Jackson County's land development ordinance (LDO 218.090(6)), the claimants would have been lawfully permitted to establish a dwelling on the Measure 37 claim property when the claimants acquired the property.

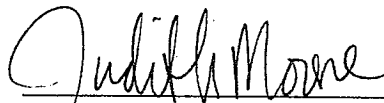
Jackson County also submitted comments in response to the department's preliminary evaluation. The comments correctly indicate that an individual could have lawfully established a non-farm dwelling on a lawfully created lot or parcel of less than 80 acres. However, that remains true today. The non-farm dwelling standards are subject to criteria that have not substantively changed since the claimants acquired the Measure 37 claim property. The question of whether the claimants could have qualified for or could currently qualify for a non-farm dwelling is independent of the issue relevant to the Measure 49 inquiry, which is statutorily limited to whether a claimant was lawfully permitted to establish one or more home sites on the claimant's acquisition date and, due to regulations established subsequent to that acquisition, is currently prohibited from establishing that use.

III. CONCLUSION

Based on the analysis above, the claimants do not qualify for Measure 49 home site approvals because they have not established that they were lawfully permitted to establish the dwelling on their 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 27th 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.