



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: E134385

CLAIMANT: Darrell Mercier
2385 Cascade Highway SE
Salem, OR 97317

MEASURE 37 PROPERTY
IDENTIFICATION: Township 8S, Range 2W, Section 2A
Tax lot 1300
Marion County

The claimant, Darrell Mercier, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on May 25, 2007, for property located at 2413 82nd Ave, near Salem, in Marion 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 7 of Measure 49, which allows the Department of Land Conservation and Development (the department) to authorize up to ten 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 7 of Measure 49, the number of home site approvals authorized by the department cannot exceed the lesser of the following: ten; the number stated by the claimant in the election materials; 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; or the number of home site approvals with a total value that represents just compensation for the reduction in fair market value caused by the enactment of one or more land use regulations that were the basis for the claim. No waiver was issued for this claim. The Measure 37 claim filed with the state describes four home sites. The appraisal submitted by the claimant attempts to support the assertion that the value of four home site approvals is equal to or less than the loss of value caused by the enactment of land use regulations. Therefore, the claimant may qualify for a maximum of four home site approvals under Section 7.

B. Qualification Requirements

To qualify for a home site approval under Section 7 of Measure 49, the claimant must meet each of the following requirements:

1. Property not high-value farm, forest or groundwater restricted

The Measure 37 claim property must not be high-value farmland or high-value forestland, nor in a ground water restricted area, as defined in Section 2 of Measure 49.

Findings of Fact and Conclusions

The Measure 37 claim property is not high-value farmland or high-value forestland, nor in a ground water restricted area.

2. 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, Darrell Mercier, filed a Measure 37 claim, M134385, with the state on May 25, 2007. The claimant filed a Measure 37 claim, M07-01, with Marion County on or prior to July 11, 2007. The state claim was filed after December 4, 2006, in accordance with the applicable provisions of OAR 660-041-0020(2)(b).

The claimant timely filed a Measure 37 claim with both the state and Marion County.

3. 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, Darrell Mercier is the owner of fee title to the property as shown in the Marion County deed records and, therefore, is an owner of the property under Measure 49.

Marion County has confirmed that the claimant is the current owner of the property.

4. 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.

5. 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 Marion County, outside the urban growth boundary and outside the city limits of the nearest city, Salem.

6. 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 Acreage Residential (AR) by Marion 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 two acres in a rural residential zone established before October 4, 2000, in which the County specified a minimum lot or parcel size of less than two acres.

The claimant's property consists of 7.37 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the four home sites the claimant may qualify for under Section 7 of Measure 49.

7. 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 four home sites for which the claimants may qualify on the property is prohibited by land use regulations described in ORS 195.305(3).

8. 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 7 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

Marion County deed records indicate that the claimant acquired the property on December 9, 1997.

On December 9, 1997, the Measure 37 property was subject to Marion County's acknowledged Acreage Residential (AR) zone. Marion County's AR zone required 1.5 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimant's property consists of 7.37 acres. Therefore, the claimant lawfully could have established the requested four home sites on his date of acquisition.

9. The enactment of one or more land use regulations that are the basis for this claim, caused a reduction in the fair market value of the Measure 37 claim property that is equal to or greater than the fair market value of the home site approvals requested

Sections 7 and 8 of Measure 49 require that the reduction in the fair market value of the property be demonstrated through an appraisal that meets the following requirements:

- a) The appraisal must be submitted within 180 days after the Measure 49 election is filed with the department.**

The claimant submitted his election on April 7, 2008, and his appraisal on August 18, 2008. Therefore, the appraisal was submitted within 180 days of the election filing.

b) The appraisal must be prepared by a person certified under ORS chapter 674 or a person registered under ORS chapter 308.

The appraiser signing the submitted appraisal, Candence E. Robinson, is a state-certified general appraiser; therefore this requirement appears to have been met.

c) The appraisal must comply with the Uniform Standards of Professional Appraisal Practice, as authorized by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

An appraisal review commissioned by DLCDC has determined that the claimant's appraisal filed for the Measure 37 claim property meets the threshold requirements for Uniform Standards of Professional Appraisal Practice compliance. Therefore this requirement has been met.

d) The appraisal must expressly determine the highest and best use of the property at the time the land use regulation was enacted and the highest and best use must be determined to be residential use.

The appraisal submitted determines that the highest and best use of the Measure 37 claim property at the time the land use regulation was enacted was residential development. Therefore, this requirement has been met.

e) The appraisal must show the fair market value of the property one year before and one year after the enactment of the regulation(s) the claimants assert have resulted in a reduction of the fair market value of the Measure 37 claim property.

The claimant asserts that the enactment of OAR 660-004-0040 reduced the fair market value of the Measure 37 claim property. The appraisal submitted by the claimant values the property on October 4, 1999, one year before the enactment of OAR 660-004-0040, and on October 4, 2001, one year after the enactment of OAR 660-004-0040. Therefore, this requirement has been met.

f) The reduction in fair market value of the Measure 37 property determined by the appraisal shall be adjusted by any ad valorem property taxes not paid, any severance taxes paid and any recapture of additional tax liability that the claimant has paid or will pay for the property if the property is disqualified from special assessment under ORS 308A.703 as required by Section 7 (6) and (7). Also, the appraisal must show the present fair market value of each lot, parcel or dwelling that the claimant is seeking under section 7(2) of Measure 49.

In the appraisal submitted by the claimant the reduction in fair market value based on the difference between the value of the Measure 37 claim property on October 4, 1999, and October 4, 2001, was adjusted for interest and reduced by tax savings adjusted for interest. The claimant subtracted the amount of property taxes not paid due to the property receiving

farm-use special assessment (\$18,508); this figure was also adjusted for interest (\$9,195). The claimant also added in the recapture tax that would be payable upon the disqualification from the farm-use special assessment (\$12,255). Measure 49 requires these adjustments. However, in this case the claimant also adjusted the present value of the home site approval requested by these figures. The practical effect of adjusting both the reduction in the fair market value of the property and the present fair market value of the home site approval by these sums is to negate the inclusion of these adjustments. Adjustment of the fair market value of the home site approval by the ad valorem property taxes not paid, severance taxes paid, interest on any taxes not paid, and any recapture of additional tax liability that the claimant has paid or will pay for the property if the property is disqualified from special assessment is neither required nor permitted under Section 7. But for these adjustments to the present fair market value of the home site approval, the current value of the home site approval requested (\$50,000), as determined by the appraisal, is greater than the asserted loss (\$40,761).

Section 7(7) of Measure 49 allows inclusion of the cost of preparing the claim and appraisal to be added to the reduction of fair market value, not to exceed five thousand dollars. The claimant did not add any costs of their claim preparation to the asserted reduction of fair market value; but even if these costs amounted to the maximum of \$5000, the claimant's loss of fair market value would still be less than the value of the relief requested.

This requirement has not been met because the asserted reduction in the fair market value of the property caused by the enactment of one or more land use regulations that were the basis for the claim is not equal to or greater than the fair market value of the home sites requested.

II. COMMENTS ON THE PRELIMINARY EVALUATION

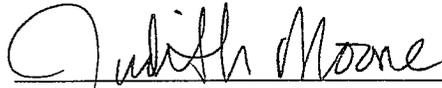
The department issued its Preliminary Evaluation for this claim on December 10, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. No written comments were received in response to the 28-day notice.

III. CONCLUSION

Based on the analysis above, the claimant the claimant is not eligible for any relief under Measure 49 because the asserted reduction in the fair market value of the property caused by the enactment of one or more land use regulations that were the basis for the claim is not equal to or greater than the fair market value of the home sites requested after adjustments.

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 19TH day of February 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.