



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: D135032

CLAIMANT: Kirk Worrall¹
8625 Clear Creek Road
Parkdale, OR 97041

MEASURE 37 PROPERTY IDENTIFICATION: Township 1S, Range 10E, Section 18
Tax lot 2301
Hood River County

AGENT CONTACT INFORMATION: Martine Stillman
151 NE 56th Street
Seattle, WA 98105

The claimant, Kirk Worrall, filed a claim with Hood River County under ORS 197.352 (2005) (Measure 37) on November 3, 2005, for property located at 8625 Clear Creek Road, near Parkdale, in Hood River County. The claimant did not file a state Measure 37 claim. ORS 195.300 to ORS 195.336 (Measure 49), as amended by Senate Bill 1049 (SB 1049) entitles claimants who filed Measure 37 claims only with the county in which the claim property is located to elect supplemental state review of their claims; and allows the Department of Land Conservation and Development (the department) to authorize one dwelling approval to qualified claimants and, if the property does not include a vacant parcel for the dwelling, a parcel on which to site the dwelling.

The claimant has elected supplemental review of his Hood River County Measure 37 claim under SB 1049, and has submitted the \$2500 fee required by Section 7(2) of SB 1049 for that review.

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

¹ Karen Worrall is listed as a claimant on the election form, but she was not a claimant under the county Measure 37 claim and, therefore, is not eligible for relief under Measure 49.

I. ANALYSIS OF CLAIM

A. Maximum Relief for Which the Claimant May Qualify

Under Measure 49, as amended by SB 1049, the department may authorize one dwelling approval and, if the property does not include a vacant parcel for that dwelling, a parcel on which to site the dwelling.

B. Qualification Requirements

To qualify for a dwelling approval under Section 6 of Measure 49, as amended by SB 1049, the claimant must meet each of the following requirements:

1. Timeliness of Claim

To qualify for approval of a dwelling under Measure 49, as amended by SB 1049, a claimant must have filed, and not withdrawn, a valid Measure 37 claim with the county in which the claim property is located before Measure 49 became effective on December 6, 2007; and the county must have provided a certified copy of the claim to the department no later than June 30, 2010.

Findings of Fact and Conclusions

The claimant, Kirk Worrall, filed a Measure 37 claim, 05-M047, with Hood River County on November 3, 2005. Hood River County provided a certified copy of that claim to the department on June 22, 2010.

The claimant filed a timely Measure 37 claim with Hood River County in order to be eligible for supplemental review under SB 1049.

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 to the county by the claimant, Kirk Worrall is the purchaser under a recorded land sale contract in force for the property and, therefore, is an owner of the property under Measure 49.

Hood River 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:

The deed by which the claimant acquired the property indicates that there is a non-claimant owner. The non-claimant owner signed the election form.

4. The Majority of the Measure 37 Claim Property Is Located Outside Any Urban Growth Boundary and Outside the Boundaries of Any City or the Measure 37 Claim Property is Located within the Boundaries of A City and Entirely Outside Any Urban Growth Boundary

Either the majority of the Measure 37 claim property must be located outside any urban growth boundary and outside the boundaries of any city or the Measure 37 claim property must be located within the boundaries of a city and entirely outside any urban growth boundary.

Findings of Fact and Conclusions:

The Measure 37 claim property is located in Hood River County, outside any urban growth boundary and outside any city boundary, near the community of Parkdale.

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 (EFU) by Hood River 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. Applicable provisions of ORS chapter 215 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, generally prohibit the establishment of a lot or parcel less than 80 acres in size in an EFU zone and regulate the establishment of dwellings on new or existing lots or parcels.

The claimant's property consists of 10 acres in one parcel and is developed with one dwelling. Therefore, state land use regulations prohibit the claimant from establishing one additional dwelling on the Measure 37 claim property and a parcel on which to site that dwelling.

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 dwelling 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

Hood River County deed records indicate that the claimant acquired the property on June 16, 1979.

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 Hood River County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On June 16, 1979, the Measure 37 claim property was zoned Rural Residential (RR5) by Hood River County. Hood River County's RR5 zone required a minimum of five acres for the establishment of a new lot or parcel and allowed a dwelling on an existing lot or parcel. However, the Commission had not acknowledged that zone for compliance with the goals when the claimant acquired the property on June 16, 1979. Accordingly, the statewide planning goals, and in particular Goal 3 and ORS chapter 215 applied directly to the Measure 37 claim property when the claimant acquired it.

On January 11, 1985, the Commission acknowledged the application of Hood River County's Exclusive Farm Use (EFU) zone to the Measure 37 claim property. The Commission's acknowledgement of Hood River County's EFU zone confirmed that zone's compliance with Goal 3 and ORS chapter 215. Hood River County's acknowledged EFU zone required 20 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimant's property consists of 10 acres. Therefore, the claimant lawfully could not have established one

additional dwelling 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. 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. Those amendments provide, in relevant part, that subject to consistency with local land use regulations in effect when they acquired the Measure 37 claim property, claimants whose property consists of less than 20 acres were lawfully permitted to establish one home site, including existing development.

The Measure 37 claim property consists of 10 acres and is developed with one dwelling. Therefore, based on the analysis under SB 1049 (2010), the claimant was not lawfully permitted to establish an additional dwelling on separate parcel on the Measure 37 claim property on his date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on November 19, 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 comments that the department erred in its evaluation of his claim and that he should qualify for an additional parcel and dwelling on his 10-acre parcel. The claimant argues that an additional parcel and dwelling would have been permitted under the unacknowledged zone in effect when he acquired the property; that a goals analysis conducted in 1984 for a conditional use permit for the existing non-farm dwelling located on the property indicated that development of the 10-acre property complied with the statewide planning goals; that SB 1049 in fact allows the requested division and development based on the unacknowledged zone in effect in 1979; and that the property "is by nature and design" already divided for additional residential development.

Contrary to the claimant's arguments, and as explained in the preliminary evaluation, SB 1049, Section 2(1)(a) specifically limits the development on the 10-acre claim property to one dwelling. As explained above, because the property's zoning was not acknowledged for compliance with the statewide planning goals when the claimant acquired the property, at that time he was required to comply not only with the zoning then in effect but also with the statewide planning goals. In fact, the county did conduct an analysis for goal compliance when it evaluated a conditional use application for one dwelling on the 10-acre property in 1984. However, that goal compliance evaluation for a conditional use permit for one dwelling on the 10-acre property did not purport to and, in fact, does not establish that two dwellings, one on

each of two five acre parcels on the property, could satisfy the goals.² Rather, SB 1049, Section 2(1)(a) specifically addresses the situation of the claimant's property, explaining:

“(1) For property that was subsequently designated in the first acknowledged comprehensive plan as land subject to a goal related to agricultural lands or a goal related to forestlands and that was not zoned, was subject to a zone without a fixed minimum acre standard or was subject to a zone with a fixed minimum acreage standard that would have allowed at least the number of home sites that would result under the application of this subsection:

- (a) If the property contains less than 20 acres, the claimant is deemed to have been lawfully permitted to establish one home site on the property.”

Because the claimant's property was subsequently designated as land subject to Goal 3 and was subject to a zone with a fixed minimum acreage standard that would have allowed at least one home site, and because the property consists of less than 20 acres, under this statutory requirement, the claimant is limited to one dwelling on the claim property.

The claimant argues that the claim property should fall under Section 3(b), which provides, in part, that “if the property was zoned for residential development at a density of less than one dwelling per two acres, the claimant is deemed to have been lawfully permitted to establish three home sites.” However, Section 3 is, by its terms, limited to “property that was subsequently designated in the first acknowledged comprehensive plan as land for rural residential development.” Because the claim property at issue was not designated for rural residential development in the first acknowledged plan, Section 3 is not applicable to this claim.

Under the requirements of SB 1049 Section (2)(1)(a), the EFU-zoned, 10-acre claim property is limited to one dwelling. Because the property is currently developed with one dwelling, the claimant is not eligible for relief under Measure 49, as amended by SB 1049.

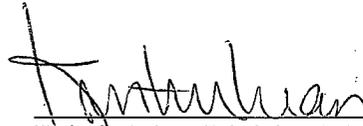
III. CONCLUSION

Based on the analysis above, the claimant does not qualify for relief under Section 6 of Measure 49, as amended by SB 1049, because the claimant was not lawfully permitted to establish an additional dwelling on a separate parcel on the claimant's date of acquisition.

² SB 1049, Section 4 provides that “[n]otwithstanding subsections (1) and (2) of this section, if the record of the claim includes a county evaluation and determination of the compliance or noncompliance of the requested residential use with the applicable statewide land use planning goals, the Department of Land Conservation and Development may defer to that analysis.” However, the goal compliance evaluation in the 1984 conditional use permit application is not an evaluation of compliance of *the requested residential use*. The excerpted findings from that conditional use permit decision analyzed one dwelling on the ten-acre parcel for goal compliance. It did not evaluate for goal compliance the requested residential use of two residential dwellings on five-acre parcels.

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:



Kristin May, Division Manager
Dept. of Land Conservation and Development
Dated this 3rd day of January, 2011.

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.