



**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: D135045

CLAIMANT: Phyllis Rehling
23500 NW Dairy Creek Road
North Plains, OR 97133

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 2N, Range 3W, Section 4
Tax lot 700
Washington County

AGENT CONTACT INFORMATION: Bruce Vincent
Bedsaul/Vincent Consulting LLC
416 Laurel Avenue #3
Tillamook, OR 97141

The claimant, Phyllis Rehling, filed a claim with Washington County under ORS 197.352 (2005) (Measure 37) on December 4, 2006, for property located at 23500 NW Dairy Creek Road, near North Plains, in Washington 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 her Washington 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.

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To qualify for approval of a dwelling under Measure 49, as amended by SB 1049, a claimant must have filed, and not withdrawn, a valid Measure 37 claim with the county in which the claim property is located before Measure 49 became effective on December 6, 2007; and the county must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, Phyllis Rehling, filed a Measure 37 claim, 37CL0808, with Washington County on December 4, 2006. Washington County provided a certified copy of that claim to the department on June 7, 2010.

The claimant filed a timely Measure 37 claim with Washington 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 deeds submitted to the county by the claimant, Phyllis Rehling is the owner of fee title to the property as shown in the Washington County deed records and, therefore, is an owner of the property under Measure 49.

Washington 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 deeds by which the claimant acquired the property indicate that there is one non-claimant owner. The claimant has submitted a consent form signed by the non-claimant owner.

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 Washington County, outside any urban growth boundary and outside the city boundary of the nearest city, North Plains.

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 Forest and Conservation (EFC) by Washington County, in accordance with ORS chapter 215 and OAR 660, division 6, because the property is "forest land" under Goal 4. Applicable provisions of ORS chapter 215 and OAR 660 division 6, enacted or adopted pursuant to Goal 4, generally prohibit the establishment of a lot or parcel less than 80 acres in size in a forest zone and regulate the establishment of dwellings on new or existing lots or parcels.

The claimant's property consists of 38.39 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 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

Washington County deed records indicate that the claimant acquired the property on January 1, 1980.

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 Washington County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On January 1, 1980, the Measure 37 claim property was zoned Forest Resource and Conservation (FRC-38) by Washington County. Washington County's FRC-38 zone required a minimum of 38 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 January 1, 1980. Accordingly, the statewide planning goals, and in particular Goal 4 and ORS chapter 215 applied directly to the Measure 37 claim property when the claimant acquired it.

On July 31, 1984, the Commission acknowledged the application of Washington County's Exclusive Forest and Conservation (EFC) zone to the Measure 37 claim property. The Commission's acknowledgement of Washington County's EFC zone confirmed that zone's compliance with Goal 4 and ORS chapter 215. Washington County's acknowledged EFC zone required 76 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimant's property consists of 38.98 acres and is established with one dwelling. Therefore, on the claimant's acquisition date, she could not have established any additional home

sites 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 eligibility for home site approval is subject to consistency with local land use regulations in effect when the claimant acquired the subject property.

The Measure 37 claim property was subject to Washington County's FRC-38 zone on the claimant's date of acquisition. That zone required 38 acres for the creation of a new lot or parcel on which a dwelling could be established and allowed the establishment of a dwelling on an existing parcel.

The Measure 37 claim property consists of 38.39 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 a separate parcel on the Measure 37 claim property on her date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on December 2, 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 consultant submitted comments, asserting that the FRC-38 zone actually had a minimum lot size requirement of 10 acres, and that, accordingly, the claimant was lawfully entitled to a 10-acre "lot of exception" on which a new dwelling could be established. Included with the comment is a 2007 memo prepared by a county planner for the claimant's county Measure 37 claim. That memo states "FRC-38 had 38 ac min. & a process to create lots-of-exception 10 ac min. Must comply with ether Goal 3 or Goal 4 (property contains 27 ac of forest land but is 100% high value farmland)." Also included with the comments is a copy of Section 146-1.2 of the 1975 Washington County Code, which was in effect when the claimant acquired the claim property in 1980. Neither of those documents establishes that the claimant could have qualified for a 10-acre lot of exception when she acquired her property.

Contrary to the comments submitted, the county's memo does not "substantiate that an additional [10-acre] lot for an additional dwelling would have been allowed" when the claimant acquired the property. Rather, the memo simply states that a process was available at that time that would have allowed the claimant to apply for a lot of exception; and that the applicant would have been required to comply with Goal 3 or Goal 4 in order to obtain an approval through that process.

Although the provisions of Section 146-1.2c (1975) provided that “No lot created pursuant to Section 146-1.2 shall be less than ten (10) acres,” the county’s code did not entitle any applicant to a developable ten acre parcel in the FRC district. Rather, the provision in Section 124-1.2c described the smallest lot size that could potentially be approved in that zone through the county’s discretionary variance procedure. Absent a variance or conditional use approval, Section 146-1.1 stated that the “minimum lot area shall be thirty-eight (38) acres.”

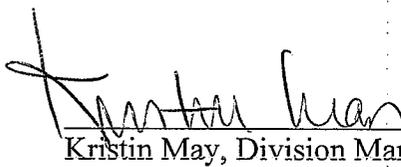
A claimant is not lawfully permitted to a use when that use required a variance that was only conditionally allowed following a discretionary approval process. In this case, even if the availability of a discretionary variance process could be construed to allow a use to become lawfully permitted for purposes of Measure 49, no evidence has been included in this record to establish that the claimant could have satisfied each of the variance criteria in order to lawfully create a 10-acre lot of exception from the 38.39-acre developed parcel. Under SB 1049 (2010), the claimant has not established that she was lawfully permitted to establish an additional home site on the Measure 37 claim property on her date of acquisition.

III. CONCLUSION

Based on the analysis above, the claimant does not qualify for relief under Measure 49, as amended by SB 1049, because the claimant was not lawfully permitted to establish a dwelling 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:



Kristin May, Division Manager
Dept. of Land Conservation and Development
Dated this 10th 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.