



**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: E133781

CLAIMANTS: Shirley L. and Stephen F. Mannenbach
15380 Ellendale Road W
Dallas, OR 97338

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 7S, Range 5W, Section 30D
Tax lots 1800, 1900 and 2000
Polk County

The claimants, Shirley and Stephen Mannenbach, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 4, 2006, for property located at 15380 Ellendale Road W, near Dallas, in Polk 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.

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 two home site approvals 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 two 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, Shirley and Stephen Mannenbach, filed a Measure 37 claim, M133781, with the state on December 4, 2006. The claimants filed a Measure 37 claim, M06-224, with Polk County on December 4, 2006. The state claim was filed on December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Polk 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 claimants, Shirley and Stephen Mannenbach are the owners of fee title to the property as shown in the Polk County deed records and, therefore, are owners of the property under Measure 49.

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

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 Farm Forest (FF) by Polk County, in accordance with Goals 3 and 4, as implemented by OAR 660-006-0050. State land use regulations, including applicable provisions of ORS chapter 215 and OAR 660, divisions 6 and 33, generally prohibit the establishment of a lot or parcel less than 80 acres in size in a mixed farm/forest zone and regulate the establishment of dwellings on new or existing lots or parcels. Under ORS 215.780(2)(a), counties may adopt minimum lot sizes smaller than 80 acres, subject to approval by the Land Conservation and Development Commission (the Commission). The Commission has approved Polk County's FF zone, which requires a minimum lot size of 40 acres.

The claimants' property consists of 24.28 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the two home sites the claimants 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 claimants, it does not appear that the establishment of the two home sites 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

Polk County deed records indicate that claimant Shirley Mannenbach acquired tax lots 1900 (14.65 acres) and 2000 (5 acres) on March 18, 1988, and claimant Stephen Mannenbach acquired 14 acres of tax lots 1900 and 2000 on March 18, 1988 and acquired the remaining 5.65 acres of tax lots 1900 and 2000 on April 9, 1998. Therefore, for purposes of Measure 49, the claimants' acquisition date for tax lots 1900 and 2000 is March 18, 1988.

Polk County deed records indicate that the claimants acquired tax lot 1800 (4.63 acres) on October 24, 1990.

The claimants acquired tax lots 1900 and 2000 of the Measure 37 claim property after adoption of the statewide planning goals, but before the Commission acknowledged Polk County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. At that time, the Measure 37 claim property was zoned Farm Forest (FF) by Polk County. On March 18, 1988, the county's FF zone allowed divisions into parcels, and farm dwellings on parcels, of at least 40 acres. Divisions or dwellings on lots or parcels less than 40 acres (and more than 10 acres) were allowed subject to a discretionary process that required the applicant to establish that the parcel was capable of producing \$10,000 in annual agricultural productivity; that the parcel would not significantly impact identified fish and wildlife habitat; and that the agricultural enterprise was "appropriate considering soils, productivity, topography and other agricultural activities located within ¼ miles to determine if there are conflicts." In addition, to establish a dwelling, the parcel was required to be currently employed for farm use (Ordinance No. 87-26, adopted December 23, 1987). Because the claimants' property is less than 40 acres, division or development of the claimants' property would have required the claimants' to establish compliance with these discretionary criteria. The evidence in the record does not establish that these criteria could have been satisfied in March 1987. Even if the claimants' property was in productive farm use and could otherwise establish compliance with these criteria, at that time the claimants' property consisted of 19.65 acres and was developed with one dwelling. Division of the property would thus necessarily result in a new

parcel of less than 10 acres. Therefore, even if it could be divided, the FF zone would have prohibited the establishment of a dwelling.

However, because the Commission had not acknowledged that zone for compliance with the goals, when the claimants acquired the property on March 18, 1988, the statewide planning goals, and in particular Goals 3 and 4 and ORS ch. 215 applied directly to the Measure 37 claim property when the claimants acquired it.

To determine whether a use of property that was not subject to an acknowledged zone at the time the claimant acquired it would have complied with Goals 3 and 4, and ORS 215, OAR 660-041-0110 provides that DLCDC will apply the first acknowledged local land use regulations, unless the evidence in the record, including but not limited to, county Measure 37 waivers or local land use determinations issued at the time the property was acquired, establishes that a greater number of lots, parcels or dwellings would have been lawfully permitted.

In 1988, Goal 3 was “to preserve and maintain agricultural lands. It required the adoption of exclusive farm use zones pursuant to ORS chapter 215, and required that “[s]uch minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area.” Goal 4 was “to conserve forest lands for forest uses” and required that forest land be “retained for the production of wood fiber and other forest uses.” Depending on the nature of the individual property, OAR 660, division 6 required compliance with either Goal 3 or Goal 4.

On April 22, 1988, the Commission acknowledged the application of Polk County’s Farm Forest (FF) zone to the Measure 37 claim property. The Commission’s acknowledgement of Polk County’s FF zone confirmed that zone’s compliance with Goals 3 and 4, and ORS chapter 215. Polk County’s acknowledged FF zone required 40 acres for the creation of a new lot or parcel on which a dwelling could be established.

There is no evidence in the record that establishes that the creation of a new parcel of less than 10 acres for the development of a dwelling would have satisfied Goal 3 and ORS 215 or Goal 4 prior to acknowledgement. The county’s unacknowledged zone, which was modified and made more restrictive prior to acknowledgement, would not have allowed the establishment of a dwelling, even if the claimant could otherwise establish compliance with the criteria for division of the property. In addition, no evidence in the record establishes that a less than 10-acre parcel with a dwelling would serve to “preserve and maintain agricultural lands” or that such small lot sizes would “be appropriate for the continuation of the existing commercial agricultural enterprise within the area,” as required by Goal 3. Nor is there evidence that the parcels would “conserve forest lands for forest uses” or retain forest lands “for the production of wood fiber and other forest uses.” Absent evidence establishing that a division of the claimants’ property into less than 10-acre parcels for development of a dwelling would have satisfied the requirements of Goal 3 and ORS 215 or Goal 4 and ORS 215, the claimants do not qualify for the requested home sites.

On October 24, 1990, the Measure 37 claim property consisted of 24.28 acres and was subject to Polk County’s acknowledged Farm Forest (FF) zone. Polk County’s FF zone required, among

other criteria, 40 acres for the creation of a new lot or parcel on which a dwelling could be established. Therefore, the claimants lawfully could not have established any home sites when they acquired the remainder of the property in 1990.

II. COMMENTS ON THE PRELIMINARY EVALUATION

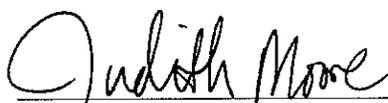
The department issued its Preliminary Evaluation for this claim on September 11, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. The claimants submitted comments, disputing the conclusion that the claimants were not lawfully permitted to establish an additional home site when they acquired tax lot 2000 in 1988. Specifically, the claimants assert that because tax lot 2000 was created by previous owners through a partition in 1977, a dwelling could have been established on that parcel in 1977. From that assertion, the claimants further assert that they could have established a dwelling on that tax lot when they later acquired it in 1988. However, the date of creation of the parcel is not dispositive of whether a claimant was lawfully permitted to establish a home site on the date the claimant acquired the property. Measure 49 allows the claimants to develop home sites only if that use would have been lawfully permitted on the date the claimants acquired the property. As explained above, when the claimants acquired tax lot 2000 in 1988, they would not have been lawfully permitted to establish a dwelling on the property, regardless of when that tax lot was created. The claimants' comments have been taken into account by the department in the issuance of this Final Order of Denial.

III. CONCLUSION

Based on the analysis above, the claimants do not qualify for Measure 49 home site approvals because the claimants were not lawfully permitted to establish the lots, parcels or dwellings on the claimants' dates 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, Measure 49 Division Manager
Dept. of Land Conservation and Development
Dated this 3rd day of December 2009.

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.