



**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: D135005

CLAIMANTS: Calvin and Lois Cook
39068 Loma Drive
Scio, OR 97374

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 10S, Range 1W, Section 20
Tax lot 404
Linn County

The claimants, Calvin and Lois Cook, filed a claim with Linn County under ORS 197.352 (2005) (Measure 37) on April 11, 2005, for property located at 39068 Loma Drive and 38554 Highway 226, near Scio, in Linn County. The claimants 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 claimants have elected supplemental review of their County Measure 37 claim under SB 1049, and have 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 Claimants 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 Measure 49, as amended by SB 1049, the claimants 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To qualify for approval of a dwelling under Measure 49, as amended by SB 1049, a claimant must have filed, and not withdrawn, a valid Measure 37 claim with the county in which the claim property is located before Measure 49 became effective on December 6, 2007; and the county must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 claimants, Calvin and Lois Cook, filed a Measure 37 claim with Linn County on April 11, 2005. Linn County provided a certified copy of that claim to the department on June 7, 2010.

The claimants filed a timely Measure 37 claim with Linn 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 deed submitted to the county by the claimants, Calvin and Lois Cook are the owners of fee title to the property as shown in the Linn County deed records and, therefore, are owners of the property under Measure 49.

Linn 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 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 Linn County, outside any urban growth boundary and outside the city boundary of the nearest city, Scio.

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 Rural Residential (RR-5) by Linn 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 the size established in the County rural residential zone in existence on October 4, 2000, if the zone in existence on that date had a minimum lot size of two or more acres. Linn County's RR-5 zone requires a minimum lot size of five acres.

The claimants' property consists of 5.2 acres in one parcel and appears to be developed with two dwellings.¹ Therefore, state land use regulations prohibit the claimants 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;

¹ The documentation for this claim indicates that there may be one temporary medical hardship dwelling currently located on the subject property. Temporary dwellings are not considered in determining the number of dwellings currently existing on the property. However, the county assessor records indicate there are two dwellings, and the comment received from the claimant in response to the Preliminary Evaluation indicates that the property is developed with two permanent dwellings.

- (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 dwelling 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

Linn County deed records indicate that the claimants acquired the property on October 28, 1975.

The claimants acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Linn County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251.

On October 28, 1975, the Measure 37 claim property was zoned Agriculture, Residential and Timber (ART-5) by Linn County, which had a fixed minimum acreage standard of five acres, but allowed the county to approve two dwellings on existing lots greater than 4 acres. Because the Commission had not acknowledged Linn County's comprehensive plan and land use regulations for compliance with the goals, when the claimants acquired the property on October 28, 1975, the statewide planning goals, and in particular Goal 14, applied directly to the Measure 37 claim property.

Following court appeal and amendments to Linn County's rural residential exception areas, the Commission acknowledged the application of Linn County's Rural Residential (RR-5) zone to the Measure 37 claim property. The Commission's acknowledgement of Linn County's RR-5 zone confirmed that zone's compliance with Goal 14. Linn County's acknowledged RR-5 zone required five acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consists of 5.2 acres. Therefore, on the claimants' acquisition date, they could not have created a separate parcel on which to establish an 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 claimants whose property was ultimately acknowledged as non-resource land pursuant to Goal 14 and whose property was, at acquisition, subject to a county zone that included a fixed minimum acreage standard of more than two acres, are eligible for the number of home site approvals that would have been lawfully permitted under the minimum acreage standard in that zone, including existing development.

The Measure 37 claim property consists of 5.2 acres and is developed with more than one dwelling. The Measure 37 claim property was subject to Linn County's ART-5 zone on the claimants' date of acquisition. That zone required a minimum of five acres for the establishment of a new parcel for residential development. Therefore, the claimants were not lawfully permitted to establish any additional parcels for residential development when they acquired the property, and accordingly, based on the analysis under SB 1049 (2010), are not eligible to establish any additional parcels under Measure 49, as amended by SB 1049.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on November 16, 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 and Home Site Authorization. Specifically the claimants submitted a comment asserting that because the county approved an additional dwelling on the property in 1975, they were lawfully permitted to also establish an additional parcel. However, when the claimant acquired the property in 1975, while the ART-5 zone allowed two single-family dwellings on a lot greater than 4 acres (which the claimants requested in their County Measure 37 claim, and the county approved), the unacknowledged ART-5 zone required 5 acres for the creation of a new parcel for residential development. When the county's comprehensive plan was acknowledged, the property was zoned RR-5, which continued the restriction in place when the claimants acquired the property, and required 5 acres for the creation of a new parcel for residential development. The zoning restriction that was in place when the claimants acquired the property continues today. Under SB 1049, Section 3(b), the claimants' eligibility for relief is limited to be "consistent with the density of residential development allowed in the zone on the date the claimant acquired the property." When the claimants acquired the property, the zoning in effect would not have lawfully permitted the division of the claimants' property.

III. CONCLUSION

Based on the analysis above, the claimants do not qualify for relief under Measure 49, as amended by SB 1049, because the claimants were not lawfully permitted to establish an additional dwelling on a separate parcel on the claimants' 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:



Richard Whitman, Director
Dept. of Land Conservation and Development
Dated this 31st 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.