



OREGON DEPARTMENT OF LAND CONSERVATION AND  
DEVELOPMENT

ORS 195.300 to ORS 195.336 (MEASURE 49) SUPPLEMENTAL REVIEW  
OF MEASURE 37 CLAIM  
Final Order and Authorization

STATE ELECTION NUMBER:

D135007

CLAIMANTS:

Thomas and Phyllis Fencl  
48278 Kingwood Avenue, SW  
Mill City, OR 97360

MEASURE 37 PROPERTY  
IDENTIFICATION:

Township 9S, Range 3E, Section 31  
Tax lot 1003  
Linn County

The claimants, Thomas and Phyllis Fencl, filed a claim with Linn County under ORS 197.352 (2005) (Measure 37) on October 19, 2006, for property located at 48278 Kingwood Avenue, SW, near Mill City, 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 Linn 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 and Authorization 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 Section 6 of 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To qualify for approval of a dwelling under Measure 49, as amended by SB 1049, a claimant must have filed, and not withdrawn, a valid Measure 37 claim with the county in which the claim property is located before Measure 49 became effective on December 6, 2007; and the county must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, Thomas and Phyllis Fencel, filed a Measure 37 claim, M37-087-06, with Linn County on October 19, 2006. 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 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 warranty deed submitted to the county by the claimants, Thomas and Phyllis Fencel 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, and the majority of the property is located outside any urban growth boundary and outside the city boundary of the nearest city, Mill City.

Based on information provided by Linn County, the northeast corner (approximately 0.40 acres) and northwest corner (approximately 1.40 acres located north of Kingwood Avenue) portions of the property are located inside the Mill City urban growth boundary. Section 14 of HB 3225 prohibits establishment of lots parcels or dwellings pursuant to a Measure 49 authorization on property within an urban growth boundary. The remaining criteria will, therefore, not be evaluated for these portions of the claim property within the urban growth boundary.

**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 (F/F) by Linn 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.

The claimants' property outside the urban growth boundary consists of approximately 94.2 acres in one parcel and is developed with one dwelling. Therefore, state land use regulations prohibit the claimants from establishing one additional dwelling and a parcel on which to site that dwelling, on the Measure 37 claim property.

**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 an additional dwelling and a lot or parcel on which to site the dwelling for which the claimants may qualify 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 February 23, 1981.

The Measure 37 claim property located outside the urban growth boundary consists of approximately 94.2 acres, and is currently developed with one dwelling.

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 February 23, 1981, the Measure 37 claim property was zoned Farm/Forest by Linn County. Linn County's Farm/Forest zone required a minimum of 40 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 claimants acquired the property. Accordingly, the statewide planning goals, and in particular Goals 3 and 4 and ORS chapter 215 applied directly to the Measure 37 claim property when the claimants acquired it.

On July 18, 1985, the Commission acknowledged the application of Linn County's Farm/Forest zone to the Measure 37 claim property. The Commission's acknowledgement of Linn County's Farm/Forest zone confirmed that zone's compliance with Goals 3 and 4, and ORS 215. Linn County's acknowledged Farm/Forest zone required 40 acres for the establishment of a dwelling

on a new or existing parcel.<sup>1</sup> The portion of claimant's property located outside the urban growth boundary consists of approximately 94.2 acres. Therefore, on the claimants' acquisition date, they could have partitioned the property into two parcels and established one additional dwelling in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations.

## 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 question the requirement set forth in Condition 10 below, which restricts the size of new parcels, and the configuration of new dwellings authorized on the claim property. As explained in Condition 10, and as described in Measure 49, Section 11 and OAR 660-041-0180 (County Implementation), because the property is located in a mixed farm and forest zone, the new lot or parcel created for an authorized dwelling cannot exceed five acres, unless the property is located on high-value farm or forest land, in which case the new lot or parcel cannot exceed two acres. Specific details regarding the parcel size and dwelling configuration must be addressed by the county at the time the claimants seek approval to implement this authorization.

## III. CONCLUSION

Based on the analysis above, the claimants, Thomas and Phyllis Fencil, do not qualify for Measure 49 relief on the portion of the property located at the northeast corner (approximately 0.40-acre) and the northwest corner (approximately 1.40-acres located north of Kingwood Avenue) because those portions of the claim property are located inside an urban growth boundary.

Based on the analysis above, the claimants qualify for one dwelling on the portion of the claim property located outside the urban growth boundary. Because the Measure 37 claim property includes only one parcel that is already developed with one dwelling, the claimants also qualify to divide the claim property to create one additional lot or parcel on which to establish the dwelling. Therefore, the one dwelling approval the claimants qualify for under Section 6 of Measure 49, as amended by SB 1049, will authorize the claimants to establish one additional dwelling and one additional lot or parcel on which to site the dwelling on the Measure 37 claim property.

## IV. AUTHORIZATION

Based on the analysis set forth above, this claim is approved, and the claimants qualify for one dwelling approval on the portion of the claim property located outside the urban growth boundary. As explained in section III above, the claimants are authorized for one additional

---

<sup>1</sup> While the F/F zone did not generally have a specific minimum lot size, the zone did specify a minimum acreage requirement of 40 acres for the development of a farm dwelling on a lot or parcel.

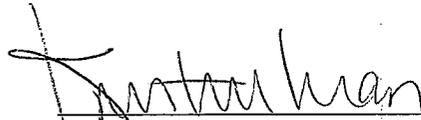
dwelling and one additional lot or parcel on which to site the dwelling on the property on which the claimants are eligible for Measure 49 relief, subject to the following terms:

1. The establishment of a dwelling and a lot or parcel for that dwelling based on a Measure 49 authorization must comply with all applicable standards governing siting or development. However, those standards must not be applied in a manner that prohibits the establishment of the dwelling, and the lot or parcel for that dwelling, unless the standards are reasonably necessary to avoid or abate a nuisance, to protect public health or safety, or to carry out federal law.
2. An authorization under Measure 49 does not allow the establishment of a dwelling, and lot or parcel for that dwelling, in violation of a land use regulation described in ORS 195.305(3) or in violation of any other law that is not a land use regulation as defined by ORS 195.300(14).
3. A claimant is not eligible for more than 20 home site approvals under Sections 5 to 11 of Measure 49 regardless of how many properties a claimant owns or how many claims a claimant filed.
4. Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimants may choose to convert a temporary dwelling currently located on the property on which the claimants are eligible for Measure 49 relief to an authorized home site pursuant to a Measure 49 dwelling approval. Otherwise, any temporary dwelling is subject to the terms of the local permit requirements under which it was approved, and is subject to removal at the end of the term for which it is allowed.
5. An authorization under Measure 49 only allows the establishment of a new dwelling, and lot or parcel for that dwelling, on property on which the claimants are eligible for Measure 49 relief. No additional development is authorized on contiguous property for which no Measure 37 claim was filed, or on Measure 37 claim property on which a claimant is not eligible for Measure 49 relief. A lot or parcel established pursuant to this authorization must site the dwelling that may be established pursuant to this authorization.
6. The claimants may use an authorization to convert an unauthorized or nonconforming dwelling currently located on the claim property into an allowed use.
7. The claimants may not implement the relief described in a Measure 49 authorization if a claimant has been determined to have a common law vested right to a use described in a Measure 37 waiver for the property. Therefore, if a claimant has been determined in a final judgment or final order that is not subject to further appeal to have a common law vested right as described in Section 5(3) of Measure 49 to any use on the Measure 37 claim property, then any Measure 49 authorization for the property will be void. However, so long as no claimant has been determined in such a final judgment or final order to have a common law vested right to a use described in a Measure 37 waiver for the property, a use that has been completed on the property pursuant to a Measure 37 waiver may be authorized using this approval.

8. An authorization under Measure 49 does not allow the establishment of a new dwelling on a lot or parcel that already contains one or more dwellings. The claimants may be required to partition a lot or parcel currently in existence on the Measure 37 claim property so that the authorized dwelling established on the property is sited on a separate lot or parcel.
9. If the property described in a claim is divided by an urban growth boundary, any new dwelling, and the lot or parcel for that dwelling that is established on the property pursuant to this authorization must be located on the portion of the property outside the urban growth boundary.
10. Because the property is located in a mixed farm and forest zone, the new lot or parcel created for an authorized dwelling cannot exceed five acres. However, existing or remnant lots or parcels may exceed five acres. Before beginning construction in one of these zones, the owner must comply with the requirements of ORS 215.293. Further, an authorization will not allow a new lot or parcel that exceeds two acres if the new lot or parcel is located on high-value farmland, on high-value forestland or on land within a ground water restricted area. However, existing or remnant lots or parcels may exceed two acres.
11. Because the property is in a mixed farm and forest zone, Measure 49 requires new the lot or parcel to be located so as to maximize suitability of the remnant lot or parcel for farm or forest use. If an owner of the property is authorized by other home site approvals to subdivide, partition, or establish dwellings on other Measure 37 claim properties, Measure 49 authorizes the owner to cluster some or all of the authorized lots, parcels or dwellings that would otherwise be located on land in an exclusive farm use zone, a forest zone or a mixed farm and forest zone on a single Measure 37 claim property that is zoned residential use or is located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone but is less suitable for farm or forest use than the other Measure 37 claim properties.
12. Once the department issues a final authorization, a dwelling and the lot or parcel for that dwelling established pursuant to that authorization will run with the property and will transfer with the property. An authorization will not expire, except that if a claimant who received an authorization later conveys the property to a party other than the claimant's spouse or the trustee of a revocable trust in which the claimant is the settlor, the subsequent owner of the property must establish the authorized dwelling and lot or parcel, within 10 years of the conveyance. A lot or parcel lawfully created based on this authorization will remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law. A dwelling lawfully created based on this authorization is a permitted use.

IT IS HEREBY ORDERED that this Final Order and Authorization 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 25<sup>th</sup> 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.