



**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 Home Site Authorization**

STATE ELECTION NUMBER: E118495

CLAIMANT: Albert Dilnik¹
17666 NW Shorewood Drive
Beaverton, OR 97006

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 2N, Range 2W, Section 24D
Tax lots 2300 and 2400
Township 2N, Range 1W, Section 19C
Tax lots 1700 and 1701²
Multnomah County

The claimant, Albert Dilnik, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on May 23, 2005, for property located at 15725 NW Sheltered Nook Road, near Portland, in Multnomah 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 claimant has elected supplemental review of his 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 and Home Site Authorization is the conclusion of the supplemental review of this claim.

I. ANALYSIS OF CLAIM

A. Maximum Number of Home Sites for Which the Claimant 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

¹ Deane Dilnik was also a Measure 37 claimant; however, she passed away since the filing of the Measure 37 claim.

² The Measure 37 claim property consisted of tax lots 1700, 1701, 2300, and 2400. The claimant did not elect supplemental review for tax lot 1701; however, a claim cannot be amended to remove claim property. Tax lot 1700 (5 acres) and tax lot 2400 (5 acres) have since been reconfigured into tax lot 1700 (4.38 acres), tax lot 1702 (.5 acres), and tax lot 2400 (4.74 acres). Tax lot 1702 and tax lot 2400, which comprise one legal parcel, have been sold.

claimant has requested three home site approvals in the election material. The Measure 37 waiver issued for this claim describes three home sites. Therefore, the claimant may qualify for a maximum of three 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 claimant 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 claimant, Albert Dilnik, filed a Measure 37 claim, M118495, with the state on May 23, 2005. The claimant filed a Measure 37 claim, T1-05-042, with Multnomah County on July 12, 2005. The state claim was filed prior to December 4, 2006.

The claimant timely filed a Measure 37 claim with both the state and Multnomah 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 deed obtained by the Department, Albert Dilnik is the settlor of a revocable trust into which he conveyed tax lots 1700, 1701, and 2300 of the Measure 37 claim property and, therefore, is an owner of tax lot 1700, tax lot 1701, and tax lot 2300 of the property under Measure 49. Multnomah County has confirmed that the claimant is the current owner of tax lots 1700, 1701, and 2300.

According to the information submitted by the claimant, Albert Dilnik has not established his ownership of tax lot 1702 (0.5 acres) and tax lot 2400 (4.74 acres) for the purposes of Measure 49 because he is no longer an 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:

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 Multnomah County, outside the urban growth boundary and outside the city limits of the nearest city, Portland.

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 Commercial Forest Use (CFU-2) by Multnomah 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, provide standards for the establishment of a dwelling in a forest zone. In general and subject to some exceptions, those standards require that the property be a minimum of 80 acres and generate a minimum annual income from the sale of forest products.

The combined effect of the standards for the establishment of a dwelling in a forest zone is to prohibit the claimant from establishing a 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 claimant, it does not appear that the establishment of the three home sites 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

Multnomah County deed records indicate that the claimant acquired the Measures 37 claim property on April 5, 1966.

On April 5, 1966, the Measure 37 claim property was subject to Multnomah County's Suburban Residential District (SR) zone. Multnomah County's SR zone required up to 40,000 square feet for the establishment of a dwelling on a vacant lot or parcel if the property was served by an approved public or private water supply and approved individual sewage disposal system. If the property was not served by an approved public water supply and public sewer, the lot area was increased to conform to the requirements of the Multnomah County Health Department. The reconfigured tax lot 1700 now consists of 4.38 acres, tax lot 1701 consists of 4.59 acres and tax lot 2300 consists of 4.74 acres. Therefore, the claimant lawfully could have established three home sites on the Measure 37 claim property on his date of acquisition provided that property is served by an approved public or private water supply and approved individual sewage disposal system.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on September 10, 2009. 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 Decision and Home Site Authorization. The claimant and Multnomah County submitted comments indicating that the portion of the Measure 37 claim property that has been transferred to a different owner, tax lots 2400 and 1702, make up only one legal parcel. The conclusion and Home Site Authorization in this Final Order reflect this additional information.

III. CONCLUSION

Based on the analysis above, the claimant qualifies for up to three home sites on the reconfigured tax lot 1700, tax lots 1701 and 2300.

Based on the analysis above, the claimant does not qualify for Measure 49 home site approvals on tax lots 1702 and 2400, which comprise one legal parcel, because the claimant is not an owner of that portion of the Measure 37 claim property.

Because the Measure 37 claim property includes one lot or parcel that has been transferred to a different owner, the number of home site approvals that the claimant qualifies on the portion of the property that he currently owns is reduced to two.

However, the number of lots, parcels or dwellings that a claimant may establish pursuant to a home site authorization is reduced by the number of lots, parcels or dwellings currently in existence on the Measure 37 claim property and any contiguous property under the same ownership according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49.

Based on the documentation provided by the claimant and information from Multnomah County, the Measure 37 claim property in the ownership of the claimant includes three lots or parcels and no dwellings. There is no contiguous property under the same ownership. Therefore, the two home site approvals the claimant qualifies for under Section 6 of Measure 49 will authorize the claimant to establish two dwellings on tax lot 1701, 2300, or reconfigured tax lot 1700 of the Measure 37 claim property. Each dwelling must be on a separate lot or parcel, and must be contained within tax lots 1701, 2300, or reconfigured tax lot 1700 of the Measure 37 claim property.

IV. HOME SITE AUTHORIZATION

Based on the analysis set forth above, this claim is approved, and the claimant qualifies for two home site approvals. As explained in section III above, after taking into account the number of existing lots, parcels or dwellings the claimant is authorized to establish two dwellings on tax lots 1701, 2300, or reconfigured tax lot 1700 of the Measure 37 claim property. The claimant may choose on which of these three tax lots to locate two authorized dwellings on the property on which the claimant is eligible for Measure 49 relief, subject to the following terms:

1. Each dwelling must be on a separate lot or parcel, and must be contained within the property on which the claimant is eligible for Measure 49 relief. The establishment of a dwelling based on this home site authorization must comply with all applicable standards governing the siting or development of the dwelling. However, those standards must not be applied in a manner that prohibits the establishment of the 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. This home site authorization will not authorize the establishment of a 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).

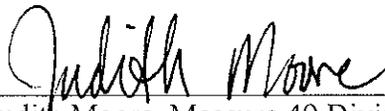
3. A claimant is not eligible for more than 20 home site approvals under Sections 5 to 11 of Measure 49 regardless of how many properties a claimant owns or how many claims a claimant filed. If the claimant has developed the limit of twenty home sites under Measure 49, the claimant is no longer eligible for the home site approval that is the subject of this order.
4. The number of dwellings a claimant may establish under this home site authorization is reduced by the number of dwellings currently in existence on the Measure 37 claim property and contiguous property in the same ownership, regardless of whether evidence of their existence has been provided to the department. If, based on the information available to the department, the department has calculated the number of currently existing dwellings to be either greater than or less than the number of dwellings actually in existence on the Measure 37 claim property or contiguous property under the same ownership, then the number of additional dwellings a claimant may establish pursuant to this home site authorization must be adjusted according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49. Statements in this final order regarding the number of lots, parcels or dwellings currently existing on the Measure 37 claim property and contiguous property are not a determination on the current legal status of those lots, parcels or dwellings.
5. Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimant may choose to convert any temporary dwelling currently located on the property on which the claimant is eligible for Measure 49 relief to an authorized home site pursuant to a home site 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.
6. A home site approval only authorizes the establishment of a new dwelling on the property on which the claimant is eligible for Measure 49 relief. No additional development is authorized on contiguous property for which no Measure 37 claim was filed.
7. The claimant may use a home site approval to convert a dwelling currently located on the property on which the claimant is eligible for Measure 49 relief to an authorized home site. If the number of dwellings existing on the property on which the claimant is eligible for Measure 49 relief exceeds the number of home site approvals the claimant qualifies for under a home site authorization, the claimant may select which existing dwellings to convert to authorized home sites.
8. The claimant may not implement the relief described in this Measure 49 Home Site 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 this Measure 49 Home Site Authorization is 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 converted to an authorized home site.

9. A home site approval does not authorize the establishment of a new dwelling on a lot or parcel that already contains one or more dwellings.
10. Because the property is located in a forest zone, the owner must comply with the requirements of ORS 215.293 before beginning construction.
11. If an owner of the property is authorized by other home site authorizations 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. If the claimant transferred ownership interest in the Measure 37 claim property prior to the date of this order, this order is rendered invalid and authorizes no home site approvals. Provided this order is valid when issued, a home site approval authorized under this order runs with the property and transfers with the property. A home site approval will not expire, except that if a claimant who received this home site 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 dwellings within 10 years of the conveyance. A dwelling lawfully created based on a home site approval is a permitted use.
13. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, this home site authorization will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the subject property imposed by private parties.

IT IS HEREBY ORDERED that this Final Order and Home Site 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:



Judith Moore, Measure 49 Division Manager
Dept. of Land Conservation and Development
Dated this 19th 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.