



**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**

November 14, 2008

STATE ELECTION NUMBER: E118733

CLAIMANTS: Robert and Betty Naglee
31178 SW Riverwood Dr
West Linn, Oregon 97068

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 3S, Range 1E, Section 22CB
Tax lots 100, 200, 3701, 3702 & 3703¹
Clackamas County

The claimants, Robert and Betty Naglee, filed a claim under ORS 197.352 (2005) (Measure 37) on July 8, 2005, for property located at 31178 SW Riverwood Drive, near West Linn, in Clackamas 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 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 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 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 three home site approvals in the election material. The Measure 37 waiver issued for this claim describes four home sites. Therefore, the claimants may qualify for a maximum of three home site approvals under Section 6 of Measure 49.

¹ While the Measure 37 claim was for five tax lots, information obtained from Clackamas County indicates that tax lots 100, 200, 3701, 3702 and 3703 are actually one legal lot of record.

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, Robert and Betty Naglee, filed a Measure 37 claim, M118733, with the state on July 8, 2005. The claimants filed a Measure 37 claim with Clackamas County on July 8, 2005. The state claim was filed prior to December 4, 2006. The claimants timely filed a Measure 37 claim with both the state and Clackamas 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 submitted by the claimants, Robert and Betty Naglee are the owners of fee title to the property as shown in the Clackamas County deed records and, therefore, are owners of the property under Measure 49. Clackamas County has confirmed that the claimants are the current owners of the property.

3. All Owners 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 Clackamas County, outside the urban growth boundary and outside the city limits of the nearest city, West Linn.

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 RA-2 by Clackamas County, in accordance with Goal 14, which prohibits the urban use of rural land and requires local comprehensive plans to identify and separate urbanizable land 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 dwelling on a lot or parcel less than two acres in a rural residential zone established before October 4, 2000, in which the County specified a minimum lot or parcel size of less than two acres.

The claimants' property consists of 2.57 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the three 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, the establishment of the three home sites for which the claimant may qualify on the property is not 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

The Clackamas County deed records indicate that the claimants acquired tax lot 100 (.26 acres) on March 31, 1973, tax lot 200 (.35 acres) on August 27, 1975 and tax lots 3701, 3702 and 3703 (1.96 acres) on July 1, 1977.

On March 13, 1973, when the claimants acquired tax lot 100, the property was subject to Clackamas County's GU zone. That zone remained in effect at the time the claimants acquired tax lots 200, 3701, 3702 and 3703 in August, 1975 and July, 1977. Clackamas County's GU zone required at least 20,000 square feet for the establishment of a dwelling on a lot or parcel, provided that public water service was available. If public water service was not available, the GU zone required a minimum parcel size of one-acre. Tax lot 100, which consists of 11,325 square feet, in itself, was of inadequate size to independently satisfy the minimum lot size requirements of the GU zone. However, in July, 1977, when the claimants had acquired the entire subject property, the property was of sufficient acreage to allow some level of development under the GU zoning standards then in effect.

However, in 1977, the subject property was subject not only to the county's GU zone, but also to the statewide planning goals and implementing regulations then in effect. Because the Commission had not acknowledged the county's comprehensive plan and land use regulations as being in compliance with the statewide planning goals, the statewide planning goals and Goal 14 in particular, applied directly to the claimants' property. For properties acquired after the goals were adopted, but before comprehensive plans were acknowledged for compliance with those goals, the department has determined that the zones adopted in the county's first acknowledged comprehensive plans are the best indicator of what would have been allowed under a direct application of the goals, unless a claimant can establish that direct application of the goals would have permitted more intensive development.

On December 31, 1981, the Commission acknowledged the application of Clackamas County's RA-2 zone to the entire 2.57 acre Measure 37 claim property. The Commission's acknowledgement of Clackamas County's RA-2 zone confirmed that zone's compliance with

Goal 14. Clackamas County's acknowledged RA-2 zone acknowledged that property as non-resource exceptions land under Goal 14, and required a minimum of two acres for the creation of a new lot or parcel. Therefore, in 1977, under the acknowledged RA-2 zone, the claimants lawfully could have established no more than one dwelling on the 2.57-acre property. The claimants therefore would not be qualified for relief under Section 6 of Measure 49, unless the claimants can show that a direct application of the land use planning goals would have allowed the claimants to establish additional dwellings.

The claimants have submitted evidence establishing that direct application of Goal 14 would have allowed development consistent with the county's GU zone in effect in 1977. On December 4, 2007 the claimants received approval from Clackamas County to partition the subject property based on their Measure 37 state and local waivers (File No. Z0623-07-M). The findings in the report include direct application of Goal 14 in effect at the time the claimants acquired the property. The report concludes that the proposed three home sites are consistent with the size and nature of the surrounding rural use development and could meet the intent and purpose of Goal 14 in effect in 1975 and 1977. The department agrees that although the property was ultimately acknowledged to require a minimum of two acres for the creation of a new lot or parcel, the county's GU zone would also have authorized development consistent with the surrounding area, in furtherance of the Goal 14 goal to ensure orderly and efficient transition from rural to urban land. Therefore, development consistent with the requirements of that zone (20,000 square feet with the availability of public water, and one acre where no public water was available) would have satisfied that goal.

The record is not clear whether public water was available to the subject property in 1977. Provided that public water service was available at the time the claimants acquired the entirety of the subject property in 1977, division of the 2.57 acre property into three no less than 20,000 square foot parcels would have lawfully been permitted when the claimants acquired the property. If public water service was not available, the zoning in effect in 1977 would have permitted division of the property into no more than two home sites.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on September 17, 2008. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. No written comments were received in response to the 28-day notice.

III. CONCLUSION

Based on the analysis above, the claimants qualify for up to three home sites. 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.

Based on the documentation provided by the claimants, the Measure 37 claim property includes one lot or parcel and one dwelling. There is no contiguous property under the same ownership. Therefore, provided public water service was available to the property in 1977 the three home

site approvals the claimants qualify for under Section 6 of Measure 49 will authorize the claimants to establish up to two additional lots or parcels and two additional dwellings on the Measure 37 claim property. Each dwelling must be on a separate lot or parcel, and must be contained within the Measure 37 claim property. The claimants may alter the configuration of the lots or parcels currently in existence on the Measure 37 claim property and contiguous property so that each additional dwelling established on the Measure 37 claim property, pursuant to the home site approvals, is sited on a separate lot or parcel. 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 claimants have developed the limit of twenty home sites under Measure 49, the claimants are no longer eligible for the home site approvals that are the subject of this order.

IV. HOME SITE AUTHORIZATION

Based on the analysis set forth above, this claim is approved, and the claimants qualify for three home site approvals. As a result, the claimants are authorized for two additional lots or parcels and two additional dwellings on the property on which the claimants are 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 claimants are eligible for Measure 49 relief. The establishment of a land division or dwelling based on this home site authorization must comply with all applicable standards governing the siting or development of the land division or dwelling. However, those standards must not be applied in a manner that prohibits the establishment of the land division or 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 land division or 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. The number of lots, parcels or dwellings a claimant may establish under this home site authorization is reduced by the number of lots, parcels and 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 lots, parcels or dwellings currently exist on the Measure 37 claim property or on contiguous property under the same ownership and the lots, parcels or dwellings have not been disclosed to the department, then the number of additional lots, parcels or dwellings a claimant may establish pursuant to this home site authorization must be reduced according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49.
4. Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimants may choose to convert any 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 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.

5. A home site approval only authorizes the establishment of a new lot, parcel or dwelling on the 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 the claimants are not eligible for Measure 49 relief. A lot or parcel established pursuant to a home site approval must either be the site of a dwelling that is currently in existence or be the site of a dwelling that may be established pursuant to the home site approval.
6. The claimants may use a home site approval to convert a lot, parcel or dwelling currently located on the property on which the claimants are eligible for Measure 49 relief to an authorized home site. If the number of lots parcels or dwellings existing on the property on which the claimants are eligible for Measure 49 relief exceeds the number of home site approvals the claimants qualify for under a home site authorization, the claimants may select which existing lots, parcels or dwellings to convert to authorized home sites; or may reconfigure existing lots, parcels or dwellings so that the number is equivalent to the number of home site approvals.
7. 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. The claimants may be required to alter the configuration of the lots or parcels currently in existence on the Measure 37 claim property and contiguous property so that each additional dwelling established on the property on which the claimants are eligible for Measure 49 relief, pursuant to this home site authorization, is sited on a separate lot or parcel.
8. If the claimants transferred their 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 lots, parcels and dwellings within 10 years of the conveyance. A lot or parcel lawfully created based on this home site 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 a home site approval is a permitted use.
9. 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/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/forest zone, but is less suitable for farm or forest use than the other Measure 37 claim properties.

10. 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 claimants first obtain 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:

Cora R. Parker, Deputy Director
Dept. of Land Conservation and Development
Dated this 14th day of November, 2008.

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.