



**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:

E129998

CLAIMANT:

James C. Miller
PO Box 3512
Ashland, OR 97520

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 38S, Range 2E
Section 25, Tax lots 900, 901 and 902
Sections 35 and 36, Tax lots 7300
Township 38S, Range 3E
Section 31, Tax lots 7000, 7001, 7002, 7003
and 7101
Township 39S, Range 2E
Section 1, Tax lots 200 and 300
Section 2, Tax lots 100 and 101
Jackson County

AGENT CONTACT INFORMATION:

Mark S. Bartholomew
Hornecker Cowling Hassen & Heysell, LLP
717 Murphy Road
Medford, OR 97504

The claimant, James Miller, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on September 8, 2006, for property located near Dead Indian Memorial Road and Cove Road, near Ashland, in Jackson 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. However, if the number of lots, parcels and dwellings currently in existence on the Measure 37 claim property and the contiguous property under the same ownership is equal to or greater than the maximum number of home sites a claimant could otherwise qualify for under Section 6 of Measure 49, a claimant may qualify for only one home site approval.

The claimant has requested one home site in the election material. The Measure 37 waiver issued for this claim describes more than three home sites. Because it appears that the Measure 37 claim property and contiguous property in the same ownership contain three or more lots or parcels that are developed with dwellings, the claimants may qualify for a maximum of one home site approval.

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, James Miller, filed a Measure 37 claim, M129998, with the state on September 8, 2006. The claimant filed a Measure 37 claim, M37 2005-00175, with Jackson County on September 14, 2005. The state claim was filed prior to December 4, 2006.

The claimant timely filed a Measure 37 claim with both the state and Jackson 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 claimant, James Miller is the settlor of a revocable trust into which he conveyed the Measure 37 claim property and, therefore, is an owner of the property under Measure 49.

Jackson County has confirmed that the claimant is the current owner 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 Jackson County, outside the urban growth boundary and outside the city limits of the nearest city, Ashland.

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:

Tax lots 900, 901, 902, 7300, 7000, 7002, 7003, 300, 100, 101 and a 119.50-acre portion of 200, 300 are currently zoned Exclusive Farm Use (EFU) by Jackson County, in accordance with ORS chapter 215 and OAR 660, division 33, because the property is “agricultural land” as defined by Goal 3. Goal 3 requires agricultural land to be zoned exclusive farm use. Applicable provisions of ORS chapter 215 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, generally prohibit the establishment of a lot or parcel less than 80 acres in size in an EFU zone. Those provisions also regulate the establishment of dwellings on new or existing lots or parcels and include restrictions on establishing more than one dwelling on a single tract.

Tax lots 7001, 7101 and a 39.23-acre portion of 200 are currently zoned Forest Resource (FR) by Jackson 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, generally prohibit the establishment of a lot or parcel less than 80 acres in size in a forest zone. Those provisions also regulate the establishment of dwellings on new or existing lots or parcels and include restrictions on establishing more than one dwelling on a single tract.

The claimant's property consists of 2,368.68 acres that make up a single tract. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the one home site the claimant 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 claimant, it does not appear that the establishment of the one home site 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

Jackson County deed records indicate that the claimant acquired tax lots 900 (35.97 acres), 901 (71.70 acres), 902 (160 acres), 7300 (1,187.23 acres), 7000 (232.72 acres), 7002 (140.90), 7003 (8.28 acres), an 80-acre portion of 200, 300 (163.67 acres), 100 (40 acres) and 101 (123.14 acres) on October 24, 1974, tax lot 7101 (14.94 acres) on April 14, 1980, tax lot 7001 (23.40 acres) on

January 8, 1988, a 39.5-acre portion of tax lot 200 on February 25, 1997, and a 39.23-acre portion of tax lot 200 on January 14, 1998.

On October 24, 1974, the Measure 37 claim property consisted of tax lots 900, 901, 902, 7300, 7000, 7002, 7003, 300, 100, 101 and an 80-acre portion of 200, and was subject to applicable provisions of ORS 197 and 215, and Jackson County's Exclusive Farm (EF) zone.

In 1974, Jackson County's EF zone did not require a specific number of acres for the creation of a new lot or parcel on which a dwelling could be established. At that time, the Measure 37 claim property, including Tax lots 900, 901, 902, 7300, 7000, 7002, 7003, 300, 100, 101 and an 80-acre portion of 200 acquired on October 24, 1974, consisted of 2243.61 acres. Therefore, under the local zoning then in effect, the claimant lawfully could have established the one home site for which the claimant may be eligible on either tax lot 900, 901, 902, 7300, 7000, 7002, 7003, 300, 100, 101 or the 80-acre portion of 200 acquired on October 24, 1974.

However, state law in effect when the claimant acquired the property, specifically ORS 197.175(1) and 197.280 (1973 edition), required that counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition.) Those interim land use planning goals included: "To preserve the quality of the air, water and land resources of the state"; "To conserve prime farm lands for the production of crops"; "To provide for the orderly and efficient transition from rural to urban land use"; "To protect life and property in areas subject to floods, landslides and other natural disasters"; and "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development" ORS 215.515 (1973 edition).

The interim planning goals would not have prohibited the claimant from lawfully establishing the one home site for which the claimant may be eligible on either tax lot 900, 901, 902, 7300, 7000, 7002, 7003, 200, 100, 101 or the 80-acre portion of 200 when he acquired those portions of the Measure 37 claim property on October 24, 1974. Rather, the applicable provisions of the interim goals are furthered by provisions of Section 6 of Measure 49, which limits the number of home sites authorized, and by Section 11(3), which regulates the size and location of lots or parcels on high value farm or forest land. Measure 49 Section 11(3) requires new parcels on high-value farm or forest land to be no larger than two acres and "clustered so as to maximize suitability of the remnant lot or parcel for farm or forest use."

It appears that the claimant's property is high-value farmland. Therefore, when the claimant acquired the property, the claimant lawfully could have established the requested one home site on the property, provided it was developed in a manner that conserved the high-value or prime farmland for the production of crops. In order to meet this requirement, the home site should be clustered so as to maximize the suitability of the remnant lot or parcel for farm use. If the claimant chooses to reconfigure these parcels, the parcels other than the remnant parcel may be no larger than two acres.

The claimant acquired tax lot 7101 of the Measure 37 claim property on April 14, 1980, after adoption of the statewide planning goals, but before the Commission acknowledged Jackson 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, tax lot 7101 of the Measure 37 claim property was zoned Forest Resource (FR) by Jackson County. However, the Commission had not acknowledged that zone for compliance with the goals when the claimant acquired tax lot 7101 on April 14, 1980. Accordingly, the statewide planning goals, and in particular Goal 4, and ORS chapter 215 applied directly to the Measure 37 claim property when the claimant acquired it.

On May 16, 1983, the Commission acknowledged the application of Jackson County's Forest Resource (FR) zone to tax lot 7101 of the Measure 37 claim property. The Commission's acknowledgement of Jackson County's FR zone confirmed that zone's compliance with Goal 4 and ORS chapter 215. Jackson County's acknowledged FR zone required 160 acres for the creation of a new lot or parcel on which a dwelling could be established. Tax lot 7101 of the Measure 37 claim property consists of 14.94 acres. The claimant was lawfully permitted to establish more than one dwelling on a tract on his date of acquisition. Therefore, on the date the claimant acquired tax lot 7101, he could not have established a home site, in addition to the existing lots or parcels with dwellings, in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations. The claimant does not qualify for a home site on tax lot 7101, unless the claimant can show that a direct application of the Goals and ORS chapter 215 would have allowed the claimant to establish the one home site for which the claimant is eligible.

The claimant acquired tax lot 7001 on January 8, 1988. At that time, tax lot 7001 was subject to Jackson County's acknowledged Forest Resource (FR) zone. Jackson County's FR zone required 160 acres for the establishment of a dwelling on a lot or parcel. The FR-zoned portion of the Measure 37 claim property (tax lots 7001 and 7101) consisted of 38.34 acres. Therefore, although the claimant was lawfully permitted to establish more than one dwelling on a tract on his date of acquisition, the claimant lawfully could not have established any additional home sites on tax lot 7001 on the date he acquired that tax lot.

The claimant acquired the 39.5-acre portion of tax lot 200 of the Measure 37 claim property on February 25, 1997. On that date, tax lot 200 was subject to Jackson County's acknowledged Exclusive Farm Use (EFU) zone. Jackson County's EFU zone required 80 acres for the creation of a new lot or parcel on which a dwelling could be established and did not allow the establishment of more than one dwelling on a tract on that date. Therefore, the claimant lawfully could not have established any additional home sites on the 39.50-acre portion of tax lot 200 on the date he acquired that portion of the Measure 37 claim property.

The claimant acquired a 39.23-acre portion of tax lot 200 on January 14, 1998. That 39.23-acre portion of the Measure 37 claim property was subject to Jackson County's acknowledged Forest Resource (FR) zone. Jackson County's acknowledged FR zone required 80 acres for the creation of a new lot or parcel on which a dwelling could be established and did not allow the establishment of more than one dwelling on a tract. Therefore, the claimant lawfully could not have established any additional home sites on the 39.23-acre portion of tax lot 200 on the date he acquired that portion of the Measure 37 claim property.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on January 12, 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. An agent for the claimant submitted comments suggesting that the property may include fewer legal lots or parcels than tax lots and requesting authorization of an additional lot or parcel to accommodate the dwelling authorized in case there are no existing vacant lots or parcels on the property. As the agent indicates, however, the claimant has "not done a lot legality review to determine the number of legal lots and parcels." If there are no vacant lots or parcels on the property, including the portion of the property on which the claimant is not eligible for any Measure 49 relief, the home site approval would include one additional lot or parcel. However, if there is a vacant lot or parcel anywhere on the Measure 37 claim property, the home site approval would not include an additional lot or parcel. Rather, the claimant may be required to reconfigure the existing lots or parcels so that the dwelling could be established on a separate lot or parcel on a portion of the property on which the claimant is eligible for Measure 49 relief.

III. CONCLUSION

Based on the analysis above, the claimant qualifies for the one home site approval on the portion of the property that consists of following tax lots: 900, 901, 902, 7300, 7000, 7002, 7003, 300, 100, 101, and the 80-acre portion of tax lot 200 acquired on October 24, 1974.

The number of lots, parcels or dwellings that a claimant is authorized to 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. If a claimant otherwise qualifies for relief under Section 6 of Measure 49, the claimant will be able to establish at least one additional lot, parcel or dwelling, regardless of the number of dwellings currently in existence.

Based on the preliminary analysis, the claimant does not qualify for any home site approvals on tax lots 7001, 7101, the 39.5-acre portion of 200 acquired on February 25, 1997, and the 39.23-acre portion of tax lot 200 acquired on January 14, 1998 because the claimant was not lawfully permitted to establish any dwellings on those portions of the Measure 37 claim property on the date he acquired each of those tax lots.

Based on the documentation provided by the claimant and information from Jackson County, the Measure 37 claim property includes thirteen lots or parcels and seven dwellings. There is no contiguous property under the same ownership. Therefore, the one home site approval the claimant qualifies for on the portion of the property consisting of tax lots 900, 901, 902, 7300, 7000, 7002, 7003, 300, 100, 101 and the 80-acre portion of 200 acquired on October 24, 1974 will authorize the claimant to establish one additional dwelling on the portion of the property consisting of tax lots 900, 901, 902, 7300, 7000, 7002, 7003, 300, 100, 101, and the 80-acre portion of tax lot 200 acquired on October 24, 1974.

IV. HOME SITE AUTHORIZATION

Based on the analysis set forth above, this claim is approved and the claimant qualifies for one home site approval. As explained in section III above, after taking into account the number of existing lots, parcels or dwellings, the claimant is authorized to establish one additional dwelling on the portion of the property consisting of tax lots 900, 901, 902, 7300, 7000, 7002, 7003, 300, 100, 101, and the 80-acre portion of 200 acquired on October 24, 1974 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 land division or dwelling based on a Measure 49 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. A 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. 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. 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 Measure 49 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 lot, parcel or dwelling on 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 or on Measure 37 claim property on which a claimant is 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 future site of a dwelling that may be established pursuant to the home site approval.

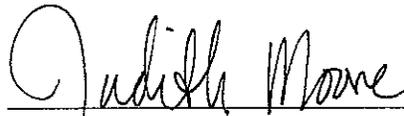
7. The claimant may use a home site approval to convert a lot, parcel or dwelling currently located on the property on which the claimant is eligible for Measure 49 relief to an authorized home site.
8. The claimant may not implement the relief described in this Measure 49 home site authorization if 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. 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 lot, parcel or dwelling 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.
11. Because the property is located in an exclusive farm use zone and a forest zone, the home site authorization will not authorize new lots or parcels that 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, the home site authorization will not authorize new lots or parcels that exceed two acres if the new lots or parcels are 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.
12. Because the property is located on high-value farmland and was acquired during the period when the interim land use planning goals set forth in ORS 215.515 (1973) applied to the property, Measure 49 requires new home sites to be no more than two acres and clustered on the portion of the property least suitable for farm use. Further, 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.

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, Division Manager
Dept. of Land Conservation and Development
Dated this 13th day of April 2010.

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.