



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

**ORS 195.300 to ORS 195.336 (MEASURE 49) SUPPLEMENTAL REVIEW
OF MEASURE 37 CLAIM
Final Order of Denial**

STATE ELECTION NUMBER: E130492

CLAIMANTS: Sandra Lee and James Richard Swayze
24872 SW Middleton Road
Sherwood, OR 97140

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 3S, Range 2W, Section 1A
Tax lot 2100
Washington County

The claimants, Sandra and James Swayze, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on October 30, 2006, for property located at 24872 SW Middleton Road, near Sherwood, in Washington 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 have 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 of Denial 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 two home site approvals in the election material. The Measure 37 waiver issued for this claim describes two home sites. Therefore, the claimants may qualify for a maximum of two 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 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, Sandra and James Swayze, filed a Measure 37 claim, M130492, with the state on October 30, 2006. The claimants filed a Measure 37 claim, 37CL0450, with Washington County on May 4, 2006. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Washington 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, Sandra and James Swayze are the owners of fee title to the property as shown in the Washington County deed records and, therefore, are owners of the property under Measure 49.

Washington 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 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 Washington County, outside the urban growth boundary and outside the city limits of the nearest city, Sherwood.

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 Agriculture and Forest – 5 (AF-5) by Washington County, in accordance with Goal 14, which prohibits the urban use of rural land and requires local comprehensive plans to identify and separate urbanizable from rural land in order to provide for the orderly and efficient transition from rural to urban use. State laws, namely Goal 14 and OAR 660-004-0040, prohibit the establishment of a lot or parcel less than the size established in the County rural residential zone in existence on October 4, 2000, if the zone in existence on that date had a minimum lot size of two or more acres. Washington County’s AF-5 requires a minimum lot size of five acres.

The claimants’ property consists of 4.46 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the two 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, it does not appear that the establishment of the two home sites for which the claimants may qualify on the property is prohibited by land use regulations described in ORS 195.305(3).

7. On the Claimant's Acquisition Date, the Claimant Lawfully Was Permitted to Establish at Least the Number of Lots, Parcels or Dwellings on the Property That Are Authorized Under Section 6 of Measure 49

A claimant's acquisition date is "the date the claimant became the owner of the property as shown in the deed records of the county in which the property is located. If there is more than one claimant for the same property under the same claim and the claimants have different acquisition dates, the acquisition date is the earliest of those dates."

Findings of Fact and Conclusions

Washington County deed records indicate that claimant Sandra Swayze acquired the property on April 20, 1990, and claimant James Swayze acquired the property on July 16, 2003. Therefore, for purposes of Measure 49, the claimants' acquisition date is April 20, 1990.

On April 20, 1990, the Measure 37 claim property was subject to Washington County's acknowledged Agriculture and Forest – 5 (AF-5) zone. Washington County's AF-5 zone required five acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consists of 4.46 acres, and is developed with a dwelling. Therefore, the claimants lawfully could not have established the requested home sites on their date of acquisition.

The claimants submitted comments to the preliminary evaluation, disputing this conclusion. The claimants assert that in 1990, they were entitled to partition their property into two developable parcels through the county's Rural Planned Development (RPD) process. However, there is no evidence in this record that the claimants were lawfully permitted to divide their less-than 5-acre parcel through the RPD process.

In general, the RPD process, in effect in 1990 when the claimants acquired the property, allowed for clustering of individual lots in the AF-5 zone, and some minor reduction in the minimum lot size, based on a calculation determined by the number of acres of the site divided by an established divisor. Under the provisions of Washington Code Section 404-5.4 (1989 edition), the claimants would not have been entitled to further divide the subject approximately 4.46-acre property. At most, the RPD could have been utilized to cluster lots in the AF-5 zone to as small as 3 or 4 acres, if certain conditions were satisfied. The RPD process provided for an additional, fact-based evaluation under Section 404-5.8 that potentially could have been used to justify a deviation from the AF-5 density requirements.¹ It is not clear on its face that this provision would have allowed additional reductions in the base density and, in any event, no such

¹ Washington County Section 404-5.8 (1989 edition) provided:

"If the RPD results in an increase in density of the basic district, the applicant shall demonstrate how the PRD complies with the purpose of the underlying District by varying the lot sizes to preserve the farm or forest uses on the site. If the RPD is contiguous to an EFU, EFC or AF-20 or commercial farm or forest use, demonstrate that the configuration of those lots does not seriously interfere with those uses."

It is not clear from the language of this section whether the intent of Section 404-5.8 was to allow further reductions in the density in addition to the reduction in the density of the base district that would be allowed under Section 404-5.4 or whether the intent of 404-5.8 was to require reductions in density allowed under 404-5.4 to an acreage less than the base zone to satisfy the requirements of 404-5.8 in addition to the requirements of 404-5.4.

application was in fact submitted or approved. Even assuming these provisions could have allowed reductions below the base density beyond those permitted under Section 404-5.4, the claimants would not have been allowed to divide the AF-5 zoned property to parcels less than 2.5 acres in size absent a rigorous and fact-dependent, discretionary review process.

Measure 49 allows a claimant to establish the number of lots, parcels and dwellings that lawfully would have been permitted at the time the claimant acquired the property. The claimants would not lawfully have been permitted a use that could have potentially been approved, and only following a fact-specific, discretionary evaluation that, in fact, did not occur.

II. COMMENTS ON THE PRELIMINARY EVALUATION

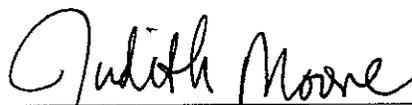
The department issued its Preliminary Evaluation for this claim on June 22, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. As discussed above, the claimant submitted comments which have been considered and taken into account by the department in the issuance of this Final Order of Denial.

III. CONCLUSION

Based on the analysis above, the claimants do not qualify for Measure 49 home site approvals because the claimants were not lawfully permitted to establish the lots, parcels or dwellings on the claimants' date of acquisition.

IT IS HEREBY ORDERED that this Final Order of Denial is entered by the Director of the Department of Land Conservation and Development as a final order of the department and the Land Conservation and Development Commission under ORS 197.300 to ORS 195.336 and OAR 660-041-0000 to 660-041-0160.

FOR THE DEPARTMENT AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:



Judith Moore, Measure 49 Division Manager
Dept. of Land Conservation and Development
Dated this 30TH day of September 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.