



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: E130587B<sup>1</sup>

CLAIMANTS: Richard and Judy Kindwall  
14550 Orchard Knob Road  
Dallas, OR 97338

MEASURE 37 PROPERTY  
IDENTIFICATION: Township 7S, Range 5W, Section 17  
Tax lot 702  
Polk County

The claimants, Richard and Judy Kindwall, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 6, 2006, for property located at on James Howe Road, near Dallas, in Polk 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 one home site. Therefore, the claimants may qualify for a maximum of one home site approval under Section 6 of Measure 49.

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<sup>1</sup> Claim E130587 has been divided into two claims because the claim includes multiple tax lots or parcels that are not in the same ownership. E130587A refers to tax lot 603, and claimant Judy Kindwall. E130587B refers to tax lot 702, and claimants Richard and Judy Kindwall.

## **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, Richard and Judy Kindwall, filed a Measure 37 claim, M130587, with the state on November 6, 2006. The claimants filed a Measure 37 claim, M06-90, with Polk County on November 3, 2006. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Polk 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 and trust documents submitted by the claimants, Richard and Judy Kindwall are the settlors of revocable trusts into which they conveyed the Measure 37 claim property and, therefore, are owners of the property under Measure 49.

Polk 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 Polk County, outside the urban growth boundary and outside the city limits of the nearest city, Dallas.

**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 (FF) by Polk 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, provide standards for the establishment of a dwelling in a mixed farm/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 farm or forest products.

The combined effect of the standards for the establishment of a dwelling in a mixed farm/forest zone is to prohibit the claimants 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 claimants, it does not appear that the establishment of the home site 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**

Polk County deed records indicate that the claimants acquired the property on July 21, 1991.

On July 21, 1991, the Measure 37 claim property was subject to Polk County's acknowledged Farm Forest (FF) zone. Polk County's FF zone required 40 acres for the establishment of a dwelling on a vacant lot or parcel. The Measure 37 claim property consists of 6.30 acres. Therefore, the claimants lawfully could not have established a home site on the Measure 37 claim property on their date of acquisition.

**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.

The department considered the written comments of claimants' attorney dated October 7, 2009. Claimants' attorney asserts that claimants acquired the property from C.M. Shelton and Minnie Shelton on November 1, 1973, by deed recorded at Book 50, Page 825, records of Polk County. The department based claimants' acquisition date on a deed dated July 24, 1991, recorded at Book 244, Page 1117, wherein John and Diane Richoux were the grantors. The assertions of claimants' attorney are without merit for several reasons. First, the deed recorded at Book 50, Page 825 does not describe the subject property. Second, the deed relied on by the department clearly describes the subject property. Third, the file contains a deed recorded at Book 222, Page 399 describing the subject property wherein John and Diane Richoux acquired the subject property from Paul E. Dickerson on **May 2, 1989**, almost sixteen years after claimants assert to have acquired the property. Finally, the claimants' M37 claim asserted a date of acquisition for the property of July 24, 1991, and the M37 claim included a certification from First American Title Insurance Company certifying that claimants first acquired the property on July 24, 1991.

Additionally, the claimant's attorney asserts that a dwelling may have been allowed on a pre-existing lot or parcel less than 40 acres as a conditional use. Specifically, the claimants' attorney asserts that a non-farm dwelling may have been lawfully permitted on the subject property based on a decision of approval the claimants received for a non-farm dwelling on a 29.05-acre parcel in 1994. Measure 49 allows a claimant to establish the number of lots, parcels and dwellings that would have been lawfully permitted at the time a claimant acquired the property. A use is not lawfully permitted when approval of the use on a claimant's acquisition date would have required a highly discretionary review process and the record for the claim does not include

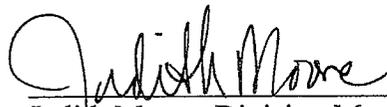
evidence that the claimant could have met the standards under such a review process. The submitted non-farm dwelling approval is for a 29.05-acre property, not the 6.30-acre property that is the subject of this claim. It is unclear what the result would be if the review criteria were applied to the property that is the subject of this claim. Additionally, if the claimants could have qualified for a non-farm dwelling on this property on their acquisition date, it is unclear that they would be prohibited from qualifying for a non-farm dwelling under current standards. ORS 215.284 and OAR 660-033-0130 provide the criteria for the establishment of a non-farm-related dwelling in an EFU zone. Non-farm dwellings are subject to criteria that have not substantively changed since the claimant acquired the Measure 37 claim property. The question of whether the claimant could have qualified for or could currently qualify for a non-farm dwelling is independent of the issue relevant to the Measure 49 inquiry, which is statutorily limited to whether a claimant was lawfully permitted to establish one or more home sites on the claimant's acquisition date and, due to regulations established subsequent to that acquisition, is currently prohibited from establishing that use.

### **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 a dwelling 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:



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Judith Moore, Division Manager  
Dept. of Land Conservation and Development  
Dated this 12<sup>th</sup> day of January 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 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.