



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: E131154A¹

CLAIMANTS: James and Carol Wampler
4990 Surf Pines Lane
Waldport, Oregon 97394

Kenneth D. and Janis A. Werth
2490 SW Williams Road
Powell Butte, Oregon 97753

MEASURE 37 PROPERTY IDENTIFICATION: Township 15S, Range 14E
Section 11, Tax lot 110
Section 14, Tax lot 101
Crook County

AGENT CONTACT INFORMATION: Edward P. Fitch
Bryant Everson and Fitch
PO Box 457
Redmond, Oregon 97756

The claimants, James and Carol Wampler and Kenneth and Janis Werth, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 24, 2006, for property located along SW Ayers Lane, near Powell Butte, in Crook 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.

¹ Claim E131154 has been split into three claims, E131154A, E131154B and E131154C, because the Measure 37 claim sought relief for three non-contiguous parcels and includes multiple tax lots or parcels that are not in the same ownership. Claim E131154A addresses the claimants' eligibility for Measure 49 relief on tax lot 101 (T15S, R14E, S14) and tax lot 110 (T15S, R14E, S11), E131154B addresses the claimants' eligibility for relief on tax lot 600 (T15S, R14E, S11) and E131154C addresses the claimants' eligibility for relief on tax lot 108 (T15S, R14E, S11).

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. No waiver was issued for this claim. The Measure 37 claim filed with the state describes more than three home sites. Therefore, the claimants 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 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, James and Carol Wampler and Kenneth and Janis Werth, filed a Measure 37 claim, M131154, with the state on November 24, 2006. The claimants filed a Measure 37 claim, *Wampler and Werth*, with Crook County on November 24, 2006. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Crook 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, Kenneth and Janis Werth are the settlors of a revocable trust into which they conveyed tax lots 101 and 110 of the Measure 37 claim property and, therefore, are owners of the property under Measure 49. Crook County has confirmed that the claimants are the current owners of the property.

According to the information submitted by the claimants, James and Carol Wampler have not established their ownership of the property for the purposes of Measure 49. James and Carol Wampler conveyed their interest in the property to Kenneth and Janis Werth as trustees of the Janis A. Werth Revocable Trust on February 21, 1996, and, therefore, are no longer owners under Measure 49.

Because this requirement has not been met for claimants James and Carol Wampler, they are not entitled to any relief under Measure 49 for tax lots 101 and 110, and, therefore, the remaining approval criteria will be evaluated only for claimants Kenneth and Janis Werth.

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 Crook County, outside the urban growth boundary and outside the city limits of the nearest city, Prineville.

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 Exclusive Farm Use (EFU-3) by Crook 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 160 acres in size in an EFU zone that is designated rangeland, and regulate the establishment of dwellings on new or existing lots or parcels.

The claimants' property consists of 93.84 acres. Therefore, state land use regulations prohibit claimants Kenneth and Janis Werth 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, it does not appear that the establishment of the three 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

Crook County deed records indicate that claimants Kenneth and Janis Werth acquired the property on May 4, 1994.

On May 4, 1994, the Measure 37 claim property was subject to Crook County's acknowledged Exclusive Farm Use (EFU-3) zone. Crook County's EFU-3 zone required 160 acres to establish a dwelling on an existing lot or parcel and 160 acres for the creation of a new lot or parcel on which a dwelling could be established. Crook County's acknowledged EFU-3 zone allowed for the establishment of a dwelling on a vacant lot or parcel of less than 160 acres but greater than

80 acres if certain discretionary criteria were met as determined by an administrative review process. However, the claimants have not submitted any evidence or documentation to establish that they would have satisfied the criteria then in effect, which would have permitted approval of a dwelling on less than 160 acres. The claimants' property consists of 93.84 acres. Therefore, the claimants lawfully could not have established any home sites on their date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on December 21, 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 Order of Denial. An agent for the claimants submitted comments asserting that the claimants became owners of the Measure 37 claim property in 1966 as reflected by a subsequent agreement that was recorded on January 8, 1979. However, the purchaser under the 1966 contract was Wampler & Werth Farms, a partnership. Wampler & Werth Farms is a separate and distinct legal entity from the claimants. Therefore, the acquisition date for the claimants is the date they acquired the property in their individual capacity, May 4, 1994.

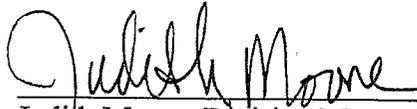
III. CONCLUSION

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

Based on the analysis above, claimants James and Carol Wampler do not qualify for Measure 49 home site approvals because they have not established their ownership of the Measure 37 claim property for the purposes of Measure 49.

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, Division Manager
Dept. of Land Conservation and Development
Dated this 5th 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.