



**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:

E131531

CLAIMANT:

Robert D. Burns
PO Box 239
Seaside, Oregon 97138

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 2S, Range 2E, Section 27A
Tax lot 1800
Clackamas County

The claimant, Robert Burns, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 29, 2006, for property located at 16007 S Holcomb Boulevard, near Oregon City, 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 claimant has elected supplemental review of his Measure 37 claim under Section 7 of Measure 49, which allows the Department of Land Conservation and Development (the department) to authorize up to ten 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 Claimant May Qualify

Under Section 7 of Measure 49, the number of home site approvals authorized by the department cannot exceed the lesser of the following: ten; the number stated by the claimant in the election materials; 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; or the number of home site approvals with a total value that represents just compensation for the reduction in fair market value caused by the enactment of one or more land use regulations that were the basis for the claim. The claimant has requested ten home site approvals in the election material. The appraisal submitted by the claimant attempts to support the assertion that the value of ten home site approvals is equal to or less than the loss of value caused by the enactment of land use regulations. No waiver was issued for this claim. The Measure 37 claim filed with the state describes seventeen (17) home sites. Therefore, the claimant may qualify for a maximum of ten home site approvals under Section 7.

B. Qualification Requirements

To qualify for a home site approval under Section 7 of Measure 49, the claimant must meet each of the following requirements:

1. Property not high-value farm, forest or groundwater restricted

The Measure 37 claim property must not be high-value farmland or high-value forestland, nor in a ground water restricted area, as defined in Section 2 of Measure 49.

Findings of Fact and Conclusions

The Measure 37 claim property is not high-value farmland or high-value forestland, nor in a ground water restricted area.

2. 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, Robert Burns, filed a Measure 37 claim, M131531, with the state on November 29, 2006. The claimant filed a Measure 37 claim, ZC381-06, with Clackamas County on November 28, 2006. The state claim was filed prior to December 4, 2006.

The claimant timely filed a Measure 37 claim with both the state and Clackamas County.

3. 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 land sale contract submitted by the claimant, Robert Burns is the purchaser under a recorded land sale contract in force for the property and, therefore, is an owner of the property under Measure 49.

Clackamas County has confirmed that the claimant is the current owner of the property.

4. 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.

5. 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, Oregon City.

6. 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 Rural Residential Farm/Forest (RRFF-5) 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 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 20 acres for property within a mile of the UGB for the Portland metropolitan area. Because the claimant's property is within a mile of the Portland metropolitan area UGB, all new lots or parcels must be at least 20 acres in size.

Based on Clackamas County Assessor's data, the claimant's property consists of 17.59 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the ten home sites the claimant is requesting under Section 7 of Measure 49.

7. 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 ten home sites for which the claimant may qualify on the property is prohibited by land use regulations described in ORS 195.305(3).

8. 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 7 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

Clackamas County deed records indicate that the claimant acquired the property on November 20, 1979.

The claimant acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Commission acknowledged Clackamas 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, the Measure 37 claim property was zoned Rural Agriculture/Residential (RA-1) by Clackamas County. However, while the property was ultimately acknowledged as non-resource land pursuant to Goal 14 (Urbanization), the Commission had not acknowledged Clackamas County's RA-1 zone for compliance with the goals. Therefore, when the claimant acquired the property on November 20, 1979, the statewide planning goals, and in particular Goal 14, applied directly to the Measure 37 claim property.

The property was rezoned RRFF-5 on June 19, 1980. On December 21, 1982, the Commission acknowledged the application of Clackamas County's Rural Residential Farm/Forest (RRFF-5) zone to the Measure 37 claim property. Clackamas County's acknowledged RRFF-5 zone required five acres for the creation of a new lot or parcel on which a dwelling could be established. The Commission's acknowledgement of Clackamas County's RRFF-5 zone confirmed that zone's compliance with Goal 14. Therefore, on the claimant's acquisition date, he could have established three home sites in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations.

However, because of uncertainty during the time period between adoption of the statewide planning goals in 1975 and each county's acknowledgment of its plan and land use regulations regarding the factual and legal requirements for establishing compliance with the statewide planning goals, the 2010 Legislative Assembly amended Measure 49. SB 1049 (2010) specifies the number of home sites considered lawfully permitted, for purposes of Measure 49, for property acquired during this period unless the record for the claim otherwise demonstrates the number of home sites that a claimant would have been lawfully permitted to establish. Those amendments provide, in relevant part, that claimants whose property was ultimately acknowledged as non-resource land pursuant to Goal 14 and whose property was, at acquisition, either not zoned by the county or subject to a county zone that included a fixed minimum acreage standard of two or fewer acres, are eligible for up to three home site approvals with a minimum acreage standard of two acres per home site.

The Measure 37 claim property consists of 17.59 acres. Therefore, based on the analysis under SB 1049 (2010), the claimant was lawfully permitted to establish up to eight home sites on the Measure 37 claim property on his date of acquisition.

9. The enactment of one or more land use regulations that are the basis for this claim, caused a reduction in the fair market value of the Measure 37 claim property that is equal to or greater than the fair market value of the home site approvals requested

Sections 7 and 8 of Measure 49 require that the reduction in the fair market value of the property be demonstrated through an appraisal that meets the following requirements:

a) The appraisal must be submitted within 180 days after the Measure 49 election is filed with the department.

The claimant submitted his election on April 4, 2008, and his appraisal on July 11, 2008. Therefore, the appraisal was submitted within 180 days of the election filing.

b) The appraisal must be prepared by a person certified under ORS chapter 674 or a person registered under ORS chapter 308.

The appraiser signing the submitted appraisal, Jonathan J. Deskin, is a state-certified general appraiser; therefore this requirement has been met.

c) The appraisal must comply with the Uniform Standards of Professional Appraisal Practice, as authorized by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

An appraisal review commissioned by DLCD has determined that the claimant's appraisal filed for the Measure 37 claim property does meet the threshold requirements for Uniform Standards of Professional Appraisal Practice compliance, relative to the information and conclusions developed in the report. Therefore this requirement has been met.

d) The appraisal must expressly determine the highest and best use of the property at the time the land use regulation was enacted and the highest and best use must be determined to be residential use.

The appraisal submitted determines that the highest and best use of the Measure 37 claim property at the time the land use regulations were enacted was a single-family dwelling in 1981 and multiple single-family dwellings in 2000. Therefore, this requirement has been met.

e) The appraisal must show the fair market value of the property one year before and one year after the enactment of the regulation(s) the claimants assert have resulted in a reduction of the fair market value of the Measure 37 claim property.

The claimant asserts that the enactment of Clackamas County's RRFF-5 zone and OAR 660-004-0040 reduced the fair market value of the Measure 37 claim property. The appraisal submitted by the claimant values the property on June 19, 1979, one year before Clackamas County changed the property's zoning to RRFF-5 and on June 19, 1981, one year after the zone change. The appraisal also values the property on October 4, 1999, one year before OAR 660-004-0040 was enacted, and on October 4, 2001, one year after the state regulation was enacted. Therefore, this requirement has been met.

f) The reduction in fair market value of the Measure 37 property determined by the appraisal shall be adjusted by any ad valorem property taxes not paid, any severance taxes paid and any recapture of additional tax liability that the claimant has paid or will pay for the property if the property is disqualified from special assessment under ORS 308A.703 as required by Section 7 (6) and (7). Also, the appraisal must show the present fair market value of each lot, parcel or dwelling that the claimant is seeking under section 7(2) of Measure 49.

In response to the preliminary evaluation, the claimant's appraiser submitted an addendum that included the required interest adjustments to the loss in fair market value and adjusted the determination of present fair market value of requested home sites from ten home sites to three home sites. The appraisal estimated the value of the 17.59-acre property with the potential to develop into three lots in 1999, at \$416,000. The appraisal estimated the value of the 17.59-acre property following the land use regulation in 2001, at \$393,600. The loss in fair market value is the difference, or \$22,400. Trending this value to 2008 and adding the price of the appraisal gives a total loss in fair market value of \$32,481.¹ The appraisal addendum asserted that the present fair market value of each lot if the property were partitioned into three lots is \$158,900. Therefore, this requirement has been met.

The appraisal states that the loss in fair market value caused by the enactment of land use regulations is \$32,481. The appraisal states that the current value of each of three home sites is \$158,900. The asserted reduction in fair market value caused by the enactment of one or more land use regulations that were the basis for this claim is not equal to or greater than the fair market value of the home sites requested. Therefore, this requirement has not been met.

¹ The loss in fair market value listed in the appraisal addendum, \$6,986, was incorrectly reduced by subtracting taxes paid by the claimant. Therefore, the value listed in this analysis, \$32,481, is the corrected loss in fair market value.

II. COMMENTS ON THE PRELIMINARY EVALUATION

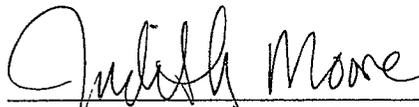
The department issued its Preliminary Evaluation for this claim on December 9, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. Comments received have been taken into account by the department in the issuance of this Final Order of Denial.

III. CONCLUSION

Based on the analysis above, the claimant is not eligible for any relief under Measure 49 because the asserted reduction in the fair market value of the property caused by the enactment of one or more land use regulations that were the basis for the claim is not equal to or greater than the fair market value of the home sites requested.

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 19th day of May 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.