



**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:

E131731

CLAIMANTS:

Theodore J. and Cora L. Bennett
8745 Highland Road
Independence, OR 97351

Charles L. Bennett
20295 S Unger Road
Beavercreek, OR 97004¹

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 4S, Range 3E, Section 16
Tax lot 1200
Clackamas County

AGENT CONTACT INFORMATION:

Kristen S. David
Bowerman & David, PC
PO Box 100
Oregon City, OR 97045

The claimants, Theodore and Cora Bennett and Charles Bennett, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 29, 2006, for property located at 20295 S Unger Road, near Beavercreek, 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 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

¹ Iris J. Bennett was also a claimant under the Measure 37 claim. Iris J. Bennett did not elect under Measure 49.

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, Theodore and Cora Bennett and Charles Bennett, filed a Measure 37 claim, M131731, with the state on November 29, 2006. The claimants filed a Measure 37 claim, ZC687-06, with Clackamas County on November 30, 2006. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Clackamas 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 land sale contract submitted by the claimants, Charles L. Bennett is the purchaser under a recorded land sale contract in force for the property.

According to the information submitted by the claimants, Theodore and Cora Bennett have not established their ownership of the property for the purposes of Measure 49.

Clackamas County has confirmed that claimant Charles L. Bennett is the current owner of the property and that Theodore and Cora Bennett are not 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 Clackamas County, outside any urban growth boundary and outside of any city limits, near the community of Beaver Creek.

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/Forest (Ag/F) by Clackamas 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 and regulate the establishment of dwellings on new or existing lots or parcels.

The claimant's property consists of 14.45 acres. Therefore, state land use regulations prohibit the claimants 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 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

Clackamas County deed records indicate that claimant Charles L. Bennett acquired the property on May 19, 1992. Clackamas County deed records indicate that claimants Theodore and Cora Bennett are not the current owners of the property.

On May 19, 1992, the Measure 37 claim property was subject to Clackamas County's acknowledged Transitional Timber (TT-20) zone. Clackamas County's TT-20 zone required 20 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimant's property consists of 14.45 acres, and is developed with one dwelling. Therefore, the claimant lawfully could not have established any home sites on his date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on May 28, 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.

On June 24, 2009, the department received comments from the claimants' attorney, Kristen S. David, objecting to the department's conclusion with respect to the acquisition date of Theodore J. Bennett and Cora L. Bennett. The Preliminary Evaluation concluded that Theodore J. Bennett and Cora L. Bennett acquired, or re-acquired, the property for purposes of Measure 49 on November 28, 2006, the date of entry of a Stipulated Judgment of Rescission and Declaratory Relief in Clackamas County Circuit Court. The judgment purported to rescind and declare to be "null and void" a November 1, 2002, fulfillment deed wherein Theodore J. Bennett

and Cora L. Bennett conveyed all of their interest to Charles L. Bennett. The Judgment further declared that Theodore J. Bennett and Cora L. Bennett have had "a continuous ownership interest of the real property from August 6, 1975 to date."

The department concedes that the Preliminary Evaluation was in error with respect to the conclusions relative to acquisition and current ownership of Theodore J. Bennett and Cora L. Bennett and of Charles L. Bennett, but not for the reasons asserted in the comment from claimants' attorney. An explanation of the basis for the conclusions contained in this Final Order of Denial is set forth below.

Theodore J. Bennett and Cora L. Bennett originally acquired the property on August 6, 1975, as reflected by the Personal Representatives deed included with the claim. Theodore J. Bennett and Cora L. Bennett conveyed the property to Charles L. Bennett by land sale contract on May 19, 1992, as reflected by the recorded Memorandum of Agreement included with the claim. Theodore J. Bennett and Cora L. Bennett conveyed fee title to the property to Charles L. Bennett and Iris J. Bennett in fulfillment of the land sale contract on November 1, 2002, as reflected by the Warranty Deed included with the claim. As noted above, on November 28, 2006, claimants caused to be entered in Clackamas County Circuit Court a "Stipulated Judgment of Rescission and Declaratory Relief" that rescinded the November 1, 2002, fulfillment deed. The Judgment did not rescind, or purport to rescind, the May 19, 1992, land sale contract between Theodore J. Bennett and Cora L. Bennett as vendors, and Charles L. Bennett as purchaser.² Furthermore, a joint declaration executed by the claimants on November 28, 2006, and made under the penalty of perjury, confirms that the May 19, 1992, land sale contract between Theodore J. Bennett and Cora L. Bennett, as vendors, and Charles L. Bennett, as purchaser, remains in full force and effect notwithstanding the judgment referenced above.

Section 3 (16)(b) of Measure 49 defines "owner" as the "purchaser under a land sale contract, if there is a land sale contract in force for the property." Charles L. Bennett is the current owner of the property as purchaser under the May 19, 1992, land sale contract. Theodore J. Bennett and Cora L. Bennett are not current owners of the subject property.

III. CONCLUSION

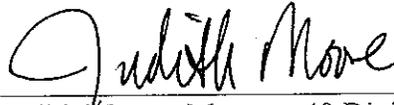
Based on the analysis above, claimant Charles L. Bennett does not qualify for Measure 49 home site approvals because the claimant was not lawfully permitted to establish the lots, parcels or dwellings on the claimant's date of acquisition.

Based on the analysis above, claimants Theodore and Cora Bennett do not qualify for Measure 49 home site approvals because they have not established their current ownership of the property for the purposes of Measure 49.

² ORS 197.328(4) provides: "A default judgment entered after December 2, 2004, does not alter a claimant's acquisition date unless the claimant's acquisition date is after December 2, 2004." Although the department finds that the November 28, 2006, judgment is a default judgment within the meaning of ORS 197.328(4), the judgment does not alter these claimants' acquisition dates because, as noted below, notwithstanding the judgment Charles L. Bennett is the current owner of the property and Theodore J. Bennett and Cora L. Bennett are not current owners of the property under the May 19, 1992, land sale contract in force for the property.

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 6th day of October 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.