



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:

E131764

CLAIMANTS:

James F. and Alison Y. Elliott  
1650 Butler Creek Road  
Ashland, OR 97520

MEASURE 37 PROPERTY  
IDENTIFICATION:

Township 38S, Range 1E, Section 21  
Tax lots 109 and 110<sup>1</sup>  
Jackson County

The claimants, James and Alison Elliott, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 29, 2006, for property located at 1650 Butler Creek Road, near Ashland, in Jackson 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. No waiver was issued for this claim. The Measure 37 claim filed with the state describes two home sites. Therefore, the claimants may qualify for a maximum of two home site approvals under Section 6 of Measure 49.

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<sup>1</sup> The Measure 37 claim and the Measure 49 election form submitted by the claimants identify the claim property as tax lots 109 and 110. Based on Jackson County assessor records obtained by the department, tax lots 109 and 110 have been renumbered as tax lots 200 and 300.

## **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 Alison Elliott, filed a Measure 37 claim, M131764, with the state on November 29, 2006. The claimants filed a Measure 37 claim, M37 2006-00273, with Jackson County on December 1, 2006. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Jackson 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 deeds submitted by the claimants, James Elliott is the owner of fee title to tax lot 109 as shown in the Jackson County deed records and, therefore, is an owner of the property under Measure 49.

Jackson County has confirmed that claimant James Elliott is the current owner of tax lot 109 of the property.

According to the information submitted by the claimants, Alison Elliott has not established her ownership of tax lot 109 for the purposes of Measure 49.

According to the deeds submitted by the claimants, James and Alison Elliott are the owners of fee title to tax lot 110 as shown in the Jackson County deed records and, therefore, are owners of the property under Measure 49.

Jackson County has confirmed that claimants James and Alison Elliott are the current owners of tax lot 110 of the property as indicated above.

**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 Jackson County, outside the urban growth boundary and outside the city limits of the nearest city, Ashland.

**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:**

Tax lots 109 and 110 are currently zoned Exclusive Farm Use (EFU) by Jackson 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 80 acres in size in an EFU zone and regulate the establishment of dwellings on new or existing lots or parcels.

Tax lot 109 consists of 20 acres and tax lot 110 consists of 20 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**

Jackson County deed records indicate that claimant James Elliott acquired tax lot 109 on February 22, 2002.<sup>2</sup>

Jackson County deed records indicate that claimant James Elliott acquired tax lot 110 on June 3, 1988, and claimant Alison Elliott acquired tax lot 110 on January 2, 2004. Therefore, for purposes of Measure 49, the claimants' acquisition date is June 3, 1988.

On June 3, 1988, tax lot 110 was subject to Jackson County's acknowledged Exclusive Farm Use (EFU) zone. Jackson County's EFU zone required 80 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consists of 20 acres and is developed with a dwelling. Therefore, the claimants lawfully could not have established any home sites on tax lot 110 on their date of acquisition.

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<sup>2</sup> The deed records indicate claimant reacquired tax lot 109 on February 22, 2002, after conveying the tax lot to another entity in 2000. Regarding reacquisition of claim property, Measure 49 section 21(3) provides: "If a claimant conveyed the property to another person and reacquired the property, whether by foreclosure or otherwise, the claimant's acquisition date is the date the claimant reacquired ownership of the property." A general judgment dated May 21, 2008 purporting to alter claimant's acquisition date does not bind third parties, including the state, and does not alter the fact of a conveyance of tax lot 109 from the claimant to Butler Creek Ranch, LLC, on March 8, 2000, and rerecorded on April 8, 2000. Measure 49, Section 21, requires that the department rely on the most recent deed records, which reflect that the claimant acquired tax lot 109 from Butler Creek Ranch, LLC on February 22, 2002.

On February 22, 2002, tax lot 109 was subject to Jackson County's acknowledged Exclusive Farm Use (EFU) zone. Jackson County's EFU zone required 80 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimant's property consists of 20 acres. Therefore, claimant James Elliott lawfully could not have established any home sites on tax lot 109 on his date of acquisition.

## **II. COMMENTS ON THE PRELIMINARY EVALUATION**

The department issued its Preliminary Evaluation for this claim on January 11, 2010. 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. Specifically, the claimants' attorney submitted comments alleging that the department erroneously determined the claimants' acquisition date for tax lot 109 of the Measure 37 claim property. The comments assert that the general judgment referenced above, entered May 21, 2008, was a judgment of confession rather than a default judgment and therefore ORS 195.328(4) (2007) does not apply. However the confession of judgment is binding only between the parties to it, and not against third parties, including the state. Regardless, even without the 2000 conveyance and 2002 reacquisition, the claimant would not have been lawfully permitted to establish a dwelling on tax lot 109 when he first acquired tax lot 109 in 1988. On June 3, 1988, tax lot 109 was subject to Jackson County's acknowledged Exclusive Farm Use (EFU) zone which required 80 acres for the creation of a new lot or parcel on which a dwelling could be established. Although the EFU zone permitted a dwelling on an existing vacant lot or parcel, the zone only permitted the dwelling if in conjunction with a farm use and the lot or parcel was managed as part of a commercial farm operation. There is no evidence in the record that indicates the property was in commercial farm use at that time.

## **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' dates 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, Division Manager  
Dept. of Land Conservation and Development  
Dated this 3<sup>rd</sup> day of June 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.