



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:**

E132079B<sup>1</sup>

**CLAIMANTS:**

Timothy D. Sweeney  
Intel Corporation, JF2-15  
2111 NE 25<sup>th</sup> Avenue  
Hillsboro, OR 97124

Fred Tsang  
9240 SE Shoreland Drive  
Bellevue, WA 98004

**MEASURE 37 PROPERTY  
IDENTIFICATION:**

Township 2S, Range 3W, Section 22  
Tax lot 4402  
Yamhill County

**AGENT CONTACT INFORMATION:**

John C. Pinkstaff  
Lane Powell Attorneys & Counselors  
601 SW 2<sup>nd</sup> Avenue Suite 2100  
Portland, OR 97204

The claimants, Timothy Sweeney and Fred Tsang, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 30, 2006, for property located near Newberg, in Yamhill 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.

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<sup>1</sup> Claim E132079 has been split into two claims, E132079A and E132079B, because the Measure 37 claim sought relief for two non-contiguous parcels. Claim E132079A addresses the claimants' eligibility for Measure 49 relief on tax lot 4401 and E132079B addresses the claimants' relief on tax lot 4402.

## 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 one home site approval in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes four home sites. Therefore, the claimants may qualify for a maximum of one home site approval 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, Timothy Sweeney and Fred Tsang, filed a Measure 37 claim, M132079, with the state on November 30, 2006. The claimants filed a Measure 37 claim, M37-218-06, with Yamhill 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 Yamhill 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, Timothy Sweeney and Fred Tsang are the owners of fee title to the property as shown in the Yamhill County deed records and, therefore, are owners of the property under Measure 49.

Yamhill 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 Yamhill County, outside the urban growth boundary and outside the city limits of the nearest city, Newberg.

**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 (EF-40) by Yamhill 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 (EFU). Applicable provisions of ORS chapter 215 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, provide standards for the establishment of a dwelling in an EFU zone. In general and subject to some exceptions, those standards require that the property be a minimum of 80 acres in size in an EFU zone and generate a minimum annual income from the sale of farm products.

The combined effect of the standards for the establishment of a dwelling in an EFU 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 one 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**

Yamhill County deed records indicate that claimant Timothy Sweeney acquired the western approximately 1.83-acre portion of the Measure 37 claim property on October 13, 1977, and claimant Fred Tsang acquired the western approximately 1.83-acre portion of the property on August 10, 1998. Therefore, for purposes of Measure 49, the claimants' acquisition date for the western approximately 1.83-acre portion of the Measure 37 claim property is October 13, 1977.

Yamhill County deed records indicate that claimants acquired the southern portion of the property on October 13, 1977, and the northeast approximately 3-acre portion of the property on August 10, 1998.

The claimants acquired the western and southern portions of the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Yamhill 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 Agriculture Forest (AF-20) by Yamhill County. Yamhill County's AF-20 zone included a fixed minimum acreage standard of 20 acres.

However, the Commission had not acknowledged that zone for compliance with the goals when the claimants acquired those portions of the property on October 13, 1977. Accordingly, the statewide planning goals, and in particular Goals 3 and 4, and ORS chapter 215 applied directly to those portions of the Measure 37 claim property when the claimants acquired them.

On June 12, 1980, the Commission acknowledged the application of Yamhill County's Agriculture Forest (AF-20) zone to the western and southern portions of Measure 37 claim property. The Commission's acknowledgement of Yamhill County's AF-20 zone confirmed that zone's compliance with Goals 3 and 4, and ORS chapter 215. Yamhill County's acknowledged AF-20 zone required 20 acres for the establishment of a dwelling on a vacant lot or parcel. The western and northern portions of the Measure 37 claim property consists of approximately 16.50 acres. Therefore, on the claimants' acquisition date, they could not have established any 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. Senate Bill (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 eligibility for home site approval is subject to consistency with local land use regulations in effect when the claimants acquired the subject property.

The western and southern portions of the Measure 37 claim property were subject to Yamhill County's AF-20 zone on the claimants' date of acquisition. That zone included a fixed minimum acreage standard of 20 acres.

The western and southern portions of the Measure 37 claim property consist of approximately 16.50 acres. Therefore, based on the analysis under SB 1049 (2010), the claimants were not lawfully permitted to establish any home sites on the western and southern portions of the Measure 37 claim property on their date of acquisition.

On August 10, 1998, the Measure 37 claim property was subject to Yamhill County's acknowledged Exclusive Farm Use (EF-40) zone. Yamhill County's EF-40 zone required 40 acres for the establishment of a dwelling on a vacant lot or parcel. The Measure 37 claim property consists of approximately 19.69 acres. Therefore, the claimants lawfully could not have established a home site on the Measure 37 claim property on their date of acquisition of the northeast approximately 3-acre portion of the property.

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

The department issued its Preliminary Evaluation for this claim on March 19, 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 arguing that the claimants should be entitled to establish a dwelling on tax lot 4402 based on the zoning in effect when they acquired the property.<sup>2</sup> The claimants' attorney also asserts the claimants should be entitled to an acquisition date of October 13, 1977 for the entire property because the subsequent lot line adjustments had no effect on the claimants' date of acquisition. The department disagrees with this assertion. Measure 49 Section 21(3) (2007) 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.' The deed records reflect the claimant reacquired this portion of the Measure 37 claim property on August 10, 1998.

Regardless, the claimants have not demonstrated that they were lawfully permitted to establish a home site on tax lot 4402 on the earlier date of acquisition. Although amendments to Yamhill County's Zoning Ordinance, effective December 1, 1982, permitted a lot of record dwelling on less than 20 acres, the amendments required applicants to demonstrate compliance with various standards. The Yamhill County decision approving the claimant's farm management plan for tax lot 4401 does not demonstrate whether tax lot 4402, the subject property of this claim, would have also complied with the standards.

### III. CONCLUSION

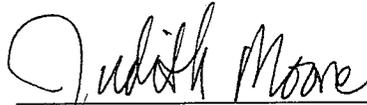
Based on the analysis above, the claimants do not qualify for Measure 49 home site approvals because the claimants were not lawfully permitted to establish the dwellings on the claimants' date of acquisition.

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<sup>2</sup> The comments also address tax lot 4401, the subject property of Claim A. However, because these comments were submitted after close of the comment period for Claim A, as set forth in OAR 660-041-0090, the department did not consider those comments in reaching its decision in the final order already issued for Claim A.

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 17<sup>th</sup> 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.