



**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:

E132423B^{1,2}

CLAIMANTS:

Charles B. and Marilyn M. Roe
2400 Wedgewood Drive SE
Olympia, WA 98501

Harding T. and M. Cristina Roe
13201 Point Richmond Beach Road
Gig Harbor, WA 98322

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 2S, Range 3W, Section 20
Tax lot 500
Yamhill County

AGENT CONTACT INFORMATION:

Walter R. Gowell
Haugeberg, Rueter, et al, PC
PO Box 480
McMinnville, Oregon 97128

The claimants, Charles Roe, Jr., Marilyn Roe, Harding Roe, and Cristina Roe, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 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.

¹ Claim E132423 has been divided into two claims because the claim includes multiple tax lots or parcels that are not in the same ownership. E132423B refers to tax lot 500 and claimants Charles Roe, Jr. and Harding Roe. E132423A refers to tax lots 401 and 402 and claimants Charles Roe, Jr., Marilyn Roe, Harding Roe, and Cristina Roe.

² Claimants Charles Roe, Jr. and Harding Roe also have a claim, E132424, for property that is not contiguous to tax lot 500.

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 one home site. 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, Charles Roe, Jr., Marilyn Roe, Harding Roe, and Cristina Roe, filed a Measure 37 claim, M132423, with the state on December 1, 2006. The claimants filed a Measure 37 claim, M37-135-06, with Yamhill County on November 28, 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, Charles Roe, Jr. and Harding Roe 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.

According to the information submitted by the claimants, Marilyn Roe and Cristina Roe have not established their ownership of the property for the purposes of Measure 49 because they are not owners of the property as shown in the Yamhill County deed records.

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 Agriculture/Forestry (AF-80) by Yamhill County, in accordance with Goals 3 and 4, as implemented by OAR 660-006-0050. State land use regulations, including applicable provisions of ORS chapter 215 and OAR 660, divisions 6 and 33, provide standards for the establishment of a dwelling in a mixed farm/forest zone. In general and subject to some exceptions, those standards require that the property be a minimum of 80 acres and generate a minimum annual income from the sale of farm or forest products.

The combined effect of the standards for the establishment of a dwelling in a mixed farm/forest 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 claimants Charles Roe, Jr. and Harding Roe, acquired tax lot 500 (10.00 acres) on June 19, 1976.

Claimants Charles B. Roe, Jr. and Harding Roe acquired the Measure 37 claim property after adoption of the statewide planning goals, but before 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/Forestry (AF-20) by Yamhill County. However, the Commission had not acknowledged that zone for compliance with the goals when the claimants acquired the property on June 19, 1976. Accordingly, the statewide planning goals, and in particular Goals 3, 4, and ORS chapter 215 applied directly to the Measure 37 claim property when the claimants acquired it.

On June 12, 1980, the Commission acknowledged the application of Yamhill County's Agriculture/Forestry (AF-20) zone to the Measure 37 claim property. The Commission's acknowledgement of Yamhill County's AF-20 zone confirmed that zone's compliance with

Goals 3, 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 Measure 37 claim property consists of 10 acres. Therefore, on the claimant's acquisition date, they could not have established a home site on the Measure 37 claim property in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations. The claimants do not qualify for a home site on the Measure 37 claim property unless the claimants can show that a direct application of the goals and ORS chapter 215 would have allowed the claimants to establish a home site on the Measure 37 claim property.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on November 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. The claimants' agent submitted comments asserting that because processes under which the claimants could have attempted to obtain authorization for additional lots or parcels and dwellings existed on their acquisition date, the department should authorize lots, parcels or dwellings under Measure 49. Measure 49 allows a claimant to establish the number of lots, parcels and dwellings that would have been lawfully permitted at the time a claimant acquired the property. A use is not lawfully permitted when approval of the use on a claimant's acquisition date would have required a highly discretionary review process and the record for the claim does not include any evidence that the claimant could have met the standards under such a review process.

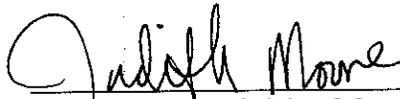
III. CONCLUSION

Based on the analysis above, the claimants, Charles Roe, Jr. and Harding Roe, do not qualify for Measure 49 home site approvals because they were not lawfully permitted to establish a dwelling on their date of acquisition.

Based on the analysis above, the claimants, Marilyn Roe and Cristina Roe, do not qualify for Measure 49 home site approvals because they have not established their ownership of the 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 12th day of January 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 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.