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: E132633

CLAIMANT:
Dennis G. Nelson
18920 SW Mobile Lane
Aloha, Oregon 97006

MEASURE 37 PROPERTY IDENTIFICATION:
Township 2N, Range 3W, Section 25
Tax lot 2003
Washington County

The claimant, Dennis Nelson, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located at 31897 NW Pumpkin Ridge Drive, near North Plains, in Washington 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 elected supplemental review of his 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 Claimant 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 claimant has 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 one home site. Therefore, the claimant 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 claimant 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 claimant, Dennis Nelson, filed a Measure 37 claim, M132633, with the state on December 1, 2006. The claimant filed a Measure 37 claim, 37CL0533, with Washington County on September 19, 2006. The state claim was filed prior to December 4, 2006.

The claimant timely filed a Measure 37 claim with both the state and Washington 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 deed submitted by the claimant, Dennis Nelson, is the owner of fee title to the property as shown in the Washington County deed records and, therefore, is an owner of the property under Measure 49.

Washington County has confirmed that the claimant is the current owner 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 Washington County, outside the urban growth boundary and outside the city limits of the nearest city, North Plains.

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 (EFU) by Washington 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 claimant 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 claimant, it does not appear that the establishment of the one home site 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

Washington County deed records indicate that the claimant acquired the property on October 5, 1988.

On October 5, 1988, the Measure 37 claim property was subject to Washington County's acknowledged Agriculture and Forest (AF-20) zone. In general, Washington County's AF-20 zone required no less than 20 acres for the establishment of a dwelling on a vacant lot or parcel. The Measure 37 claim property consists of 5.03 acres. Therefore, the claimant lawfully could not have established a home site on the Measure 37 claim property on his date of acquisition, based on the 20-acre standard.

As the claimant correctly clarifies, the 20-acre standard was not the exclusive means through which a dwelling could be established on EFU- or AF-20 zoned land. In fact, although under the county's code the department generally has determined that a dwelling could be established on a lot or parcel of at least 20 acres, twenty acres would not necessarily have been sufficient to satisfy the county standard. To establish a farm related dwelling, the acknowledged county code required, in relevant part that the lot or parcel produce $10,000 in annual gross farm or woodlot income.

The claimant provided two expired Washington County decisions (89-242-AD and 90-713-AD) that he obtained. Both decisions conditioned approval of the establishment of a dwelling on the property upon the claimant implementing a farm plan that included planting the property with crops capable of producing $10,000 annually.

However, historic decisions including conditions that required the claimant to prospectively meet the farm dwelling standards which the claimant did not subsequently meet do not establish that the claimant was lawfully permitted to establish a dwelling under those standards at the time the claimant acquired the property.

Additionally, the possibility that the claimant could potentially satisfy that standard today does not establish that he satisfied or could have satisfied that standard at the time he acquired the property or during the period when the county's code would have permitted the claimant to establish that use.

Based on the evidence in the record, the claim does not establish that on the claimant's acquisition date the claimant lawfully was permitted to establish the dwelling he now seeks to develop.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on June 26, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. As discussed above, the department received comments from the claimant. These comments 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 does not qualify for Measure 49 home site approvals because the claimant was not lawfully permitted to establish the dwelling on the claimant's date 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

Judith Moore, Division Manager
Dept. of Land Conservation and Development
Dated this 12 day of March 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.