



**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: E132902

CLAIMANT: Rick R. Rolie
PO Box 924
Silverton, OR 97381

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 6S, Range 1E,
Sections 29B and 29C,
Tax lot 2600¹
Marion County

AGENT CONTACT INFORMATION: David H. Leonard
Churchill Leonard Lawyers
PO Box 804
Salem, OR 97308

The claimant, Rick Rolie, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located south of Abiqua Road and east of Davis Creek Road NE, near Silverton, in Marion 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 has 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

¹ The Measure 37 claim property is comprised of the westerly portion of tax lot 2600 consisting of 29.03 acres. The claimant appears to include the entirety of tax lot 2600 (consisting of 103.53 acres) in his election; however, a claim cannot be amended to include additional claim property.

was issued, the number of home sites described in the Measure 37 claim filed with the state. The claimant has 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 claimant 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 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, Rick Rolie, filed a Measure 37 claim, M132902, with the state on December 1, 2006. The claimant filed a Measure 37 claim, M06-305, with Marion County on January 12, 2006. The state claim was filed prior to December 4, 2006.

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

Marion 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 Marion County, outside the urban growth boundary and outside the city limits of the nearest city, Silverton.

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 Marion 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.

The claimant's property comprised of the westerly portion of tax lot 2600 consists of 29.03 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the three home sites the claimant 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 claimant, 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

Marion County deed records indicate that the claimant acquired the property on July 1, 1991.

On July 1, 1991, the Measure 37 claim property was subject to Marion County's acknowledged Exclusive Farm Use EFU zone. Marion County's EFU zone required 60 acres for the creation of a new lot or parcel on class II or III soils, on which a dwelling could be established. The claimant's property, comprised of the westerly portion of tax lot 2600, consists of 29.03 acres. Therefore, the claimant lawfully could not have established any home sites on his date of acquisition.

The county submitted comments to clarify that, in fact, in 1991 the county did not have a minimum parcel size requirement for the establishment of a dwelling on an existing lot or parcel. Rather, approval for development of a dwelling on an established parcel would have been based on a fact-specific evaluation, based on discretionary standards and criteria. In addition, while the creation of a new parcel in the EFU zone for class II or III soils required 60 acres, parcel sizes less than 60 acres could have been approved if an applicant could demonstrate that the parcel was "appropriate for commercial agricultural enterprises more intensive than the typical commercial farms in the vicinity." This demonstration also required a fact-specific evaluation, based on discretionary standards and criteria.

However, the claimant has not requested development of a single dwelling on an existing lot or parcel. Rather, the claimant has requested division of the property into three parcels, each with a dwelling. Moreover, even if the claimant had requested development of only one dwelling, the claimant has not established that the dwelling would have been lawfully permitted at the time he acquired the property. While the claimant could have potentially availed himself of a discretionary process that potentially could have allowed him to develop one dwelling, the

claimant has not established that, in 1991, he satisfied the requirements for that discretionary, fact-dependent review process. Likewise, with regard to the claimant's request to divide the 29.03-acre property into three parcels with dwellings, the claimant has not established that, in 1991, he would have satisfied the discretionary, fact-specific requirements for such a partition. The claimant would not have been allowed to divide the EFU-zoned property, which would otherwise require 60 acres for the creation of a new parcel, absent an approval following a fact-dependent, discretionary review process.

Measure 49 allows a claimant to establish the number of lots, parcels and dwellings that would have been lawfully permitted at the time the claimant acquired the property. The claimant would not lawfully have been permitted a use that could have potentially been approved, and only following a fact-specific, discretionary evaluation that, in fact, did not occur.

II. COMMENTS ON THE PRELIMINARY EVALUATION

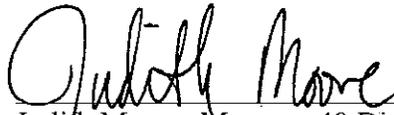
The department issued its Preliminary Evaluation for this claim on June 17, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. As discussed above, comments received have been taken into account by the department in the issuance of this 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 lots, parcels or dwellings 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, Measure 49 Division Manager
Dept. of Land Conservation and Development
Dated this 30th day of September 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.