



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: E133228

CLAIMANTS: Jan J. and Frances N. Fourier
PO Box 907
Lafayette, OR 97127

MEASURE 37 PROPERTY IDENTIFICATION: Township 4S, Range 4W, Section 11
Tax lot 100
Yamhill County

AGENT CONTACT INFORMATION: Catherine A. Wright
Drabkin, Tankersley & Wright, LLC
PO Box 625
McMinnville, OR 97128

The claimants, Jan and Frances Fourier, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located at 9175 NE Highway 99 West, near McMinnville, 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.

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.

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, Jan and Frances Fourier, filed a Measure 37 claim, M133228, with the state on December 1, 2006. The claimants filed a Measure 37 claim, M37-205-06, with Yamhill County on November 30, 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 contract submitted by the claimants, Jan and Frances Fourier 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, McMinnville.

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. 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. Under ORS 215.780(2)(a), counties may adopt minimum lot sizes smaller than 80 acres, subject to approval by the Land Conservation and Development Commission (the Commission). The Commission has approved Yamhill County's EF-40 zone, which requires a minimum lot size of 40 acres.

The claimants' property consists of 66.80 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

Yamhill County deed records indicate that the claimants acquired the property on May 27, 1976.

The claimants acquired 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. On May 27, 1976, approximately 33 acres of the Measure 37 claim property was zoned Exclusive Farm Use (EF-40) and approximately 33 acres was zoned Agriculture and Forestry (AF-20) by Yamhill County. Yamhill County's Exclusive Farm Use (EF-40) zone included a fixed minimum acreage standard of 40 acres. Yamhill County's Agriculture and Forestry (AF-20) zone included a fixed minimum acreage standard of 20 acres. However, the Commission had not acknowledged those zones for compliance with the goals when the claimants acquired the property on May 27, 1976. Accordingly, the statewide planning goals, and in particular Goals 3, 4 and ORS chapter 215 applied directly to the Measure 37 claim property.

On June 12, 1980, the Commission acknowledged the application of Yamhill County's Exclusive Farm Use (EF-40) zone to approximately 33 acres of the Measure 37 claim property. The Commission's acknowledgement of Yamhill County's EF-40 zone confirmed that zone's compliance with Goal 3 and ORS chapter 215. Yamhill County's acknowledged EF-40 zone required 40 acres for the creation of a new lot or parcel on which a dwelling could be established. This portion of the claimants' property consists of approximately 33 acres. Therefore, on the claimants' acquisition date, they could not have established any home sites in

the EF-40 zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations.

On June 12, 1980, the Commission also acknowledged the application of Yamhill County's Agriculture and Forestry (AF-20) zone to approximately 33 acres of 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 creation of a new lot or parcel on which a dwelling could be established. This portion of the claimants' property consists of approximately 33 acres, and is developed with one dwelling. Therefore, on the claimants' acquisition date, they could not have established any additional home sites in the AF-20 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 claimant acquired the subject property, including existing development.

Approximately 33 acres of the Measure 37 claim property was subject to Yamhill County's Exclusive Farm Use (EF-40) zone on the claimants' date of acquisition. That zone included a fixed minimum acreage standard of 40 acres. Therefore, based on the analysis under SB 1049 (2010), it appears that the claimants do not qualify for any additional home sites on that portion of the Measure 37 claim property under Measure 49.

Approximately 33 acres of the Measure 37 claim property was subject to Yamhill County's Agriculture and Forestry (AF-20) zone on the claimants' date of acquisition. That zone included a fixed minimum acreage standard of 20 acres. This portion of the Measure 37 claim property is developed with one dwelling. Therefore, based on the analysis under SB 1049 (2010), the claimants were not lawfully permitted to establish any additional home sites on that portion of the Measure 37 claim property under Measure 49.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on March 12, 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. Both Yamhill County and the claimants' attorney assert that the claimants lawfully could have established additional home sites on their property when they acquired it. Specifically, the claimants' attorney argues that because "the parcel could have been divided to satisfy both zones, with a resultant 40+ acres parcel being zoned EF-40/AF-20 and a

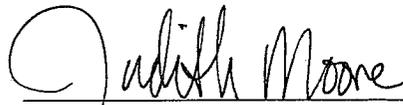
20+ acre parcel being zoned AF-20” the claimant should be entitled to an additional home site. The department disagrees with this assertion. Even if the claimants could have legally adjusted the zoning boundaries, approval of a dwelling would not have been permitted without compliance with a discretionary review process and the approval of a conditional use permit. 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 it would have required a conditional use approval.

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’ 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, Division Manager

Dept. of Land Conservation and Development

Dated this 3rd 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.