



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:

E134473¹

CLAIMANT:

James R. Sutton²
624 Railroad Ave
Ontario, OR 97914

MEASURE 37 PROPERTY
IDENTIFICATION:

Township 18S, Range 46E, Section 13D
Tax lots 200 and 300³
Malheur County

The claimant, James Sutton, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 16, 2007, for property located at 624 Railroad Avenue, near Ontario, in Malheur 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 (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

¹ A preliminary evaluation was issued on January 15, 2009 for this claim, which concluded preliminarily that the claimant would not qualify for relief under Measure 49. Based on additional information received from Malheur County during the comment period on that preliminary evaluation, the department has determined that the claimant may be eligible for relief under Measure 49.

² Geneva Sutton is listed as a claimant on the election form; however, she was not a claimant under Measure 37 and, therefore, is not eligible for relief under Measure 49.

³ In a supporting statement submitted with the claim, the county states that the two tax lots comprising the Measure 37 claim property, tax lots 200 and 300, are one legal parcel. In reliance on that representation, this final order considers the Measure 37 claim property as one legal parcel.

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 a use that could have resulted in 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, James Sutton, filed a Measure 37 claim, M134473, with the state on November 16, 2007. The claimant filed a Measure 37 claim, 2006-11-021, with Malheur County on December 4, 2006. The state claim was filed after December 4, 2006, in accordance with the applicable provisions of OAR 660-041-0020(2)(b).

The claimant timely filed a Measure 37 claim with both the state and Malheur County. However, the state claim was filed after December 4, 2006, and was thus subject to the requirements of OAR 660-041-0020 then in effect.

OAR 660-041-0020 required in relevant part that Measure 37 claims based on existing DLCD regulations and filed after December 4, 2006:

“(b) Include one of the following:

(A) A copy of the final written decision by a city, a county, or Metro on a Land Use Application that includes the Property and that requests authorization for the specific use that the Claim is based on, in which the city, county, or Metro determined that one or more Existing DLCD Regulations or city, county or Metro Land Use Regulations that implement Existing DLCD Regulations were approval criteria for the decision; or

(B) A copy of the final written action by an Agency on a complete application to the Agency, in which the Agency determined that one or more Existing DLCD Regulations were approval criteria for the application.”

The claimant has provided a final written decision indicating that an existing regulation of DLCD, another agency or a county was an approval criterion for a completed application that the

claimant had submitted to a city, county, Metro or an agency. Therefore the claim has been filed in compliance with the provisions of OAR 660-041-0020 then in effect.

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, James Sutton is the settlor of a revocable trust into which he conveyed the Measure 37 claim property and, therefore, is an owner of the property under Measure 49.

Malheur 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 Malheur County, outside the urban growth boundary and outside the city limits of the nearest city, Ontario.

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 Malheur 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 consists of 36 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

Malheur County deed records indicate that the claimant acquired the property on March 30, 1977.

The claimant acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Malheur County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On March 30, 1977, the

Measure 37 claim property was Exclusive Farm Use (F-1) by Malheur County. Malheur County's F-1 zone included a fixed minimum acreage standard of 40 acres. However, the Commission had not acknowledged that zone for compliance with the goals when the claimant acquired the property on March 30, 1977. Accordingly, the statewide planning goals, and in particular Goal 3, and ORS chapter 215 applied directly to the Measure 37 claim property.

On June 14, 1984, the Commission acknowledged the application of Malheur County's Exclusive Farm Use (EFU) zone to the Measure 37 claim property. The Commission's acknowledgement of Malheur County's EFU zone confirmed that zone's compliance with Goal 3 and ORS chapter 215. Although Malheur County's EFU zone was acknowledged to comply with the statewide planning goals, the zone did not establish a fixed minimum acreage standard for the creation of a lot or parcel on which a dwelling could be established. Rather, applications for division and development were evaluated on a case-by-case basis to ensure compliance with the Goals and the applicable requirements of ORS chapter 215. The claimant's property consists of 36 acres. Therefore, without evidence to establish that the requested home sites would have been allowed on the claimant's acquisition date, he could not have established any home sites in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations, without evidence to establish that the requested home sites would have complied with the applicable review criteria..

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.

The Measure 37 claim property was subject to Malheur County's F-1 zone on the claimant's date of acquisition. That zone included a fixed minimum acreage standard of 40 acres.

The Measure 37 claim property consists of 36 acres, and is developed with one dwelling. Therefore, based on the analysis under SB 1049 (2010), the claimant was not lawfully permitted to establish any additional home sites on the Measure 37 claim property on his date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

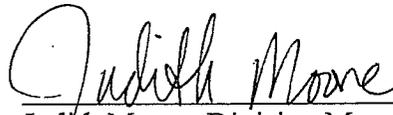
The department issued its Amended Preliminary Evaluation for this claim on March 25, 2010. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. No written comments were received in response to the 28-day notice.

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, Division Manager
Dept. of Land Conservation and Development
Dated this 17th 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.