



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:

H130291

CLAIMANTS:

Ellen Clibbon
7140 Via Montemar Court
Gladstone, OR 97027

Carolyn Haley
15715 SE Hawthorne Court
Portland, OR 97233

Michael S. O'Brien
14203 SW Peninsula Drive
Terrebonne, OR 97760

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 7N, Range 4W, Section 2
Tax lot 400
Columbia County

The claimants, Ellen Clibbon, Carolyn Haley and Michael O'Brien, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on October 13, 2006, for property located near Clatskanie, in Columbia 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 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. However, as initially enacted in 2007, a claimant was not eligible for relief under Measure 49 if the claimant did not file a county Measure 37 claim. Ellen Clibbon, Carolyn Haley and Michael O'Brien were not entitled to Measure 49 relief on that basis.

However, the Oregon State Legislative Assembly subsequently amended this Measure 49 requirement through the passage of House Bill 3225 (Chapter 855 (2009 Laws)) (HB 3225). As a result, this requirement no longer prevents the claimants, Ellen Clibbon, Carolyn Haley and Michael O'Brien, from obtaining Measure 49 relief. The claimants elected to seek relief under Measure 49, as amended by HB 3225, and submitted the \$175 fee required by Section 18 of HB 3225 in order to have the claim reviewed.

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 three home site approvals in the election material. The Measure 37 waiver issued for this claim describes three home sites. Therefore, the claimants 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, as amended by HB 3225, 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 the state before Measure 49 became effective on December 6, 2007. If the claimant filed their state Measure 37 claim after December 4, 2006, the claimant must also have either (a) filed the claim in compliance with the provisions of OAR 660-041-0020 then in effect; (b) submitted a land use application as described in OAR 660-041-0020 then in effect prior to June 28, 2007; or (c) filed a Measure 37 claim with the county on or before December 4, 2006.

Findings of Fact and Conclusions

The claimants, Ellen Clibbon, Carolyn Haley and Michael O'Brien, filed a Measure 37 claim, M130291, with the state on October 13, 2006. The claimants did not file a county Measure 37 claim. The state claim was filed prior to December 4, 2006.

The claimants filed a timely Measure 37 claim with the state along with any additional claims or applications that the claimants had to have filed in order to be eligible for review under Measure 49, as amended by HB 3225.

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 trust documents submitted by the claimants, Ellen Clibbon is the trustee of an irrevocable trust into which the Measure 37 property has been conveyed and, therefore, is an owner of the property under Measure 49.

Columbia County has confirmed that claimant Ellen Clibbon is the current owner of the property.

According to the information submitted by the claimants, Carolyn Haley and Michael O'Brien are not owners of the property for the purposes of Measure 49. Because Carolyn Haley and Michael O'Brien have not met this requirement, the remainder of the approval criteria will not be evaluated with respect to Carolyn Haley and Michael O'Brien.

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 Majority of the Measure 37 Claim Property Is Located Outside Any Urban Growth Boundary and Outside the Boundaries of Any City or the Measure 37 Claim Property is Located within the Boundaries of A City and Entirely Outside Any Urban Growth Boundary

Either the majority of the Measure 37 claim property must be located outside any urban growth boundary and outside the boundaries of any city or the Measure 37 Claim Property must be located within the boundaries of a city and entirely outside any urban growth boundary.

Findings of Fact and Conclusions:

The Measure 37 claim property is located in Columbia County, and the property is located outside any urban growth boundary and outside the city boundary of the nearest city, Clatskanie.

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 Primary Forest (PF-76) by Columbia County, in accordance with ORS chapter 215 and OAR 660, division 6, because the property is "forest land" under Goal 4. Applicable provisions of ORS chapter 215 and OAR 660 division 6, enacted or adopted pursuant

to Goal 4, generally prohibit the establishment of a lot or parcel less than 80 acres in size in a forest zone and regulate the establishment of dwellings on new or existing lots or parcels.

The Measure 37 claim property consists of 65 acres. Therefore, state land use regulations prohibit claimant Ellen Clibbon 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 claimants, it does not appear that the establishment of the three home sites for which claimant Ellen Clibbon 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

Columbia County deed records indicate that claimant Ellen Clibbon acquired the property on August 14, 1995.

The zoning of the Measure 37 claim property has not changed since the claimant acquired the property. As it is currently, on August 14, 1995, the Measure 37 claim property was zoned Primary Forest (PF-76) in accordance with the applicable provisions of ORS chapter 215 and OAR 660, division 6. Therefore, claimant Ellen Clibbon is not qualified for Measure 49 relief on the Measure 37 claim property because the zoning and lawfully permitted uses of the property have not changed since the claimant acquired the property.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on June 15, 2010. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. The comment received has been taken into account by the department in the issuance of this Final Order of Denial. Specifically, claimant Michael O'Brien submitted a comment stating that members of his family acquired the property at an earlier date, and that the department should rely on that earlier date as the claimants' date of acquisition. Section 6(6)(f) of Measure 49 requires that "on the claimant's acquisition date, the claimant lawfully was permitted to establish at least the number of lots, parcels or dwellings authorized..." That a non-claimant family member may have owned the Measure 37 property at an earlier date does not affect a claimants' eligibility for relief under Measure 49. The claimant also asserts that he and claimant Carolyn Haley are also owners of the property. However, the only evidence of current ownership in the Clackamas County deed records that was submitted to the department is a Successor Trustee's Notice recorded on November 28, 1995 which cites claimant Ellen Clibbon as the current owner of the property. However, even if claimants Carolyn Haley and Michael O'Brien could submit proof of ownership, based on information in the file it appears that they would not have acquired an ownership interest for purposes of Measure 49 until the date that claimant Ellen Clibbon acquired an interest in the property, at which time the claimants were not lawfully permitted to establish any home sites on the property.

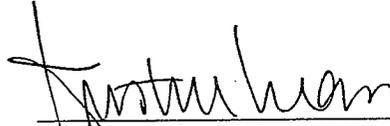
III. CONCLUSION

Based on the analysis above, claimant Ellen Clibbon 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.

Based on the analysis above, claimants Carolyn Haley and Michael O'Brien do not qualify for Measure 49 home site approvals because they are not owners of the Measure 37 claim 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:



Kristin May, Division Manager
Dept. of Land Conservation and Development
Dated this 2nd day of August 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.