



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: H132890B^{1,2}

CLAIMANTS: Wayne Simmons
Allen Simmons
3287 Orchard Heights Road NW
Salem, OR 97304

MEASURE 37 PROPERTY IDENTIFICATION: Township 7S, Range 4W, Section 14
Tax lot 601³
Polk County

AGENT CONTACT INFORMATION: Alan Sorem
Saalfeld Griggs PC
PO Box 470
Salem, OR 97308

The claimants, Wayne Simmons and Allen Simmons, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located at 1895 Best Road, near Salem, in Polk County. ORS 195.300 to ORS 195.336 (Measure 49) entitles claimants who filed Measure 37 claims to elect supplemental review of their claim. However, as initially enacted in 2007, a claimant was not eligible for relief under Measure 49 if the claimant checked only "vested" on the Measure 49 election form. Wayne Simmons and Allen Simmons were not entitled to Measure 49 relief on that basis.

¹ Claimants also filed claim M119385 for the same property. Measure 49 Section 6(5) provides:

"If multiple claims were filed for the same property, the number of lots, parcels or dwellings that may be established for purposes of subsection (2)(a) of this section is the number of lots, parcels or dwellings in the most recent waiver issued by the state before the effective date of this 2007 Act or, if a waiver was not issued, the most recent claim filed with the state, but not more than three in any case."

This Final Order addresses M132890 because that claim is the most recent claim filed with the state.

² Claim H132890 has been divided into three claims because the claim includes multiple tax lots or parcels that are not in the same ownership. H132890A refers to tax lot 600 and claimants Nina Simmons, Wayne Simmons and Allen Simmons. H132890B refers to tax lot 601 and claimants Wayne Simmons and Allen Simmons. H132890C refers to tax lot 100 and claimants Nina Simmons, Wayne Simmons and Allen Simmons.

³ The Measure 37 claim property consisted of tax lot 601. Tax lot 601 has since been partitioned into tax lots 601, 604 and 605.

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, Wayne Simmons and Allen Simmons, 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 supplemental review under Section 6 of Measure 49. No waiver was issued for this claim. The Measure 37 claim filed with the state describes more than 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, Wayne Simmons and Allen Simmons, filed a Measure 37 claim, M132890, with the state on December 1, 2006. The claimants filed a Measure 37 claim, M05-14, with Polk County before December 4, 2006. 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 deed and trust documents submitted by the claimants, Wayne Simmons and Allen Simmons are the trustees of an irrevocable trust into which the Measure 37 property has been conveyed and, therefore, are owners of the property under Measure 49.

Polk 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 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 Polk County and the property is located outside any urban growth boundary and outside the city boundary of the nearest city, Salem.

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 Polk 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 claimants' property consists of 80 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the three 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 three 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

Polk County deed records indicate that the claimants acquired the property on August 8, 1989.

On August 8, 1989, the Measure 37 claim property was subject to Polk County's acknowledged Exclusive Farm Use (EFU) zone. As it does today, Polk County's EFU zone required 80 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consists of 80 acres. Therefore, the claimants lawfully could not have established the requested home sites on their date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on July 23, 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. Specifically, Friends of Polk County commented that the claimants are not eligible to even seek relief because they received a vesting determination from Polk County, which determined that the claimants' partition of their property, which was done pursuant to their Measure 37 waiver, but not their use of the property, was "vested" prior to the date Measure 49 came into effect. The Friends rely on a final order in a Marion County claim, Schmidt (E118475) to argue that the vested use determination precludes the claimants from obtaining relief under Measure 49.

The Friends' reliance on the order in Schmidt is misplaced. The final order quoted in the comment was superseded and replaced by an order on reconsideration, which determined that, in fact, in partitioning their property, the claimants to that claim did not in fact rely on and implement a vested right to continue and complete a use allowed under the Measure 37 waiver. The Friends are correct that, if a claimant has a vested right at common law to complete and continue a use described in a Measure 37 waiver, the claimant is not entitled to relief under Measure 49. Accordingly, had the claimants in this claim been determined to have a vested right to complete and continue the use allowed under their Measure 37 waiver, they would not be entitled to relief. The Polk County vested right determination, however, determined only that the claimants had a vested right in the partition of their property. The county determined that they did not have a vested right to continue and complete the use of their property.⁴ Accordingly, while in this claim, the department has determined that the claimants were not lawfully permitted to establish the requested home sites when they acquired the property, under Measure 49, as amended by HB 3225, the claimants are entitled to seek supplemental review of their Measure 37 claim.

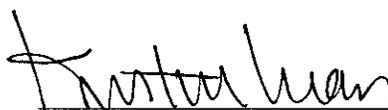
III. CONCLUSION

Based on the analysis above, the claimants do not qualify for Measure 49 home site approvals because the zoning and lawfully permitted uses of the claimants' property have not changed since they acquired it. The claimants would not have been lawfully permitted to establish the requested home sites when they acquired the property.

⁴ The claimants have appealed the county's denial of their application of vested rights determination. In the event that appeal is successful and the county determines the claimants have a vested right to complete and continue the use allowed under the Measure 37 waiver, this authorization will be void. (See Condition 8.)

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 10th day of October, 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.