



**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:

H133122

CLAIMANTS:

Michael P. and Michelle L. Miller
3330 Hayden Bridge Road
Springfield, OR 97477

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 17S, Range 2W, Section 19
Tax lots 1100 and 1200
Lane County

AGENT CONTACT INFORMATION:

Bill Kloos, PC
375 4th Street, Suite 204
Eugene, OR 97401

The claimants, Michael and Michelle Miller, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located at 2828 Hayden Bridge Road, near Springfield, in Lane County. ORS 195.300 to ORS 195.336 (Measure 49) entitles claimants who filed Measure 37 claims to elect supplemental review of their claims. As initially enacted in 2007, a claimant was not eligible for relief under Measure 49 if the claimant made a claim for property that lies partially within an urban growth boundary. Michael and Michelle Miller 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, Michael and Michelle Miller, 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. 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, 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, Michael and Michelle Miller, filed a Measure 37 claim, M133122, with the state on December 1, 2006. The claimants filed a Measure 37 claim, PA06-7202, with Lane County on December 1, 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 submitted by the claimants, Michael and Michelle Miller are the owners of fee title to the property as shown in the Lane County deed records and, therefore, are owners of the property under Measure 49.

Lane 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 Lane County and the majority of the property is located outside any urban growth boundary and outside the city boundary of the nearest city, Springfield.

The southern 0.5 acre of tax lot 1100 and the southern 2.6 acres of tax lot 1200 are located inside an urban growth boundary. Section 14 of HB 3225 prohibits establishment of lots parcels or dwellings pursuant to a Measure 49 authorization on property within an urban growth boundary. The remaining criteria will therefore not be evaluated for the southern 0.5 acre of tax lot 1100 and the southern 2.6 acres of tax lot 1200 of the Measure 37 claim property.

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 northern 14.67 acres of tax lot 1100 and the northern 2.25 acres of tax lot 1200 located outside of the urban growth boundary are currently zoned Exclusive Farm Use (E40) by Lane 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 and include restrictions on the establishment of more than one dwelling on a single tract. 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 Lane County’s E40 zone, which requires a minimum lot size of 40 acres.

The northern 14.67 acres of tax lot 1100 and the northern 2.25 acres of tax lot 1200 consist of approximately 16.92 acres that are a portion of a single tract. 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 qualify on the property located outside the urban growth boundary 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

Lane County deed records indicate that the claimants acquired the northern 14.67 acres of tax lot 1100 and the northern 2.25 acres of tax lot 1200 located outside of the urban growth boundary on January 13, 1995.

On January 13, 1995, this portion of the Measure 37 claim property was subject to Lane County's acknowledged Exclusive Farm Use (E40) zone. As it does today, Lane County's E40 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 16.92 acres. The claim property is part of a tract that is developed with one dwelling. Although Lane County's land development ordinance included provisions outlining a discretionary review process and discretionary standards under which a property owner could obtain approval for a dwelling on a vacant lot or parcel of less than 40 acres the current record does not establish that the claimants would have been able to satisfy the requirements under such a review. Furthermore, Lane County's E40 zone included restrictions on establishing more than one dwelling on a single tract. Therefore the claimants do not qualify for any home sites.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on August 4, 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, the claimants' attorney asserts that because the claimants would not have been required to get a partition of their property in order to apply to the county for a farm-related dwelling when they acquired the property in 1995, "the Department should find that the claimants are entitled to apply to the county for dwellings that it could have applied for under the rules in effect at the time they required the property. No partition is necessary." However, the department's decision on this claim was not dependent on whether the claimants would need a partition of their property. Measure 49 does not authorize the department to approve the use of a process that was in effect when the claimants acquired the property; it allows only for the department to approve one or more home sites if those home sites would have been lawfully permitted at that time. A use of property was not lawfully permitted if it was not allowed absent review and approval following a discretionary approval process, where the record does not include documentation to establish that the claimants did or could have satisfied those discretionary criteria. Moreover, as relevant to this claim, when the claimants acquired the property in 1995, the county prohibited the establishment of more than one dwelling on a single tract.

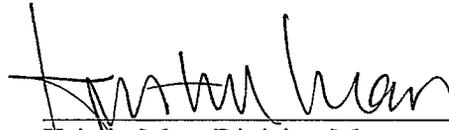
III. CONCLUSION

Based on the analysis above, the claimants Michael and Michelle Miller do not qualify for Measure 49 home site approvals on the northern 14.67 acres of tax lot 1100 and the northern 2.25 acres of tax lot 1200 of the Measure 37 claim property located outside of the urban growth boundary because the claimants were not lawfully permitted to establish the lots, parcels or dwellings on the claimants' date of acquisition.

Based on the preliminary analysis, the claimants, Michael and Michelle Miller, do not qualify for Measure 49 home site approvals on the southern 0.5 acre of tax lot 1100 and the southern 2.6 acres of tax lot 1200 of the Measure 37 claim property because this portion of the claim property is located inside an urban growth boundary.

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 21st day of September, 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.