



OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT

ORS 195.300 to ORS 195.336 (MEASURE 49) SUPPLEMENTAL REVIEW
OF MEASURE 37 CLAIM
Final Order and Home Site Authorization

STATE ELECTION NUMBER:

H133909

CLAIMANTS:

Richard A. and Nancy H. Magathan
35079 Reith Lane
Astoria, OR 97103

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 7N, Range 10W, Section 1
Tax lots 900, 903 and 904^{1,2}
Clatsop County

The claimants, Richard and Nancy Magathan, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 4, 2006, for property located contiguous to 35079 Reith Lane, near Astoria, in Clatsop 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 7 of Measure 49, which allows the Department of Land Conservation and Development (the department) to authorize up to ten 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 Measure 49 election within 90 days of the department mailing the election packet.

Richard and Nancy Magathan 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, Richard and Nancy Magathan, 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.

¹ The claimants submitted a comment to the preliminary evaluation asserting that they only included the portion of tax lot 900 zoned RA-1 at acquisition in their Measure 37 claim. Information in the claimants' file is ambiguous regarding this point. However, whether or not the remainder of tax lot 900 is considered as claim property is irrelevant to the resolution of this claim. Therefore, this final order only considers the portion of tax lot 900 zoned RA-1 at acquisition and tax lots 903 and 904 as claim property.

² In the Clatsop County Measure 37 report, the county states that two of the tax lots comprising the Measure 37 claim property, tax lots 903 and 904, are one legal parcel. In reliance on that report, this final order considers tax lots 903 and 904 of the Measure 37 claim property as one legal parcel.

This Final Order and Home Site Authorization 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 7 of Measure 49, the number of home site approvals authorized by the department cannot exceed the lesser of the following: ten; 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; or the number of home site approvals with a total value that represents just compensation for the reduction in fair market value caused by the enactment of one or more land use regulations that were the basis for the claim. The claimants have requested ten home site³ approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes more than ten home sites. The appraisal submitted by the claimants demonstrates that the value of up to one additional home site approval is equal to or less than the loss of value caused by the enactment of land use regulations. Therefore, the claimants may qualify for a maximum of one home site approval under Section 7 of Measure 49, in addition to the four home sites currently allowed on the Measure 37 claim property.

B. Qualification Requirements

To qualify for a home site approval under Section 7 of Measure 49, as amended by HB 3225, the claimants must meet each of the following requirements:

1. Property not high-value farm, forest or groundwater restricted

The Measure 37 claim property must not be high-value farmland or high-value forestland, nor in a ground water restricted area, as defined in Section 2 of Measure 49.

Findings of Fact and Conclusions

The Measure 37 claim property is not high-value farmland or high-value forestland, nor in a ground water restricted area.

2. 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

³ The claimants requested "8" lots or parcels and "8" dwellings on their election form for an 8.77-acre portion of the claim property. As noted above, the Measure 37 claim property cannot be amended to remove claim property. The Measure 37 claim property consists of two legal parcels. Therefore, the department interprets the number of home sites requested by the claimants to be eight in addition to the existing parcels, or a total of ten.

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, Richard and Nancy Magathan, filed a Measure 37 claim, M133909, with the state on December 4, 2006. The claimants filed a Measure 37 claim, #06-16, with Clatsop County on July 12, 2006. The state claim was filed on 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.

3. 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 recorded contract of sale and fulfillment deed submitted by the claimants, Richard and Nancy Magathan are the owners of fee title to the property as shown in the Clatsop County deed records and, therefore, are owners of the property under Measure 49.

Clatsop County has confirmed that the claimants are the current owners of the property.

4. 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.

5. 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 Clatsop County and the majority of the property is located outside any urban growth boundary and outside the city boundary of the nearest city, Astoria.

6. 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 8.77-acre portion of tax lot 900 is currently zoned Residential Agriculture (RA-1) by Clatsop County, in accordance with Goal 14, which prohibits the urban use of rural land and requires local comprehensive plans to identify and separate urbanizable from rural land in order to provide for the orderly and efficient transition from rural to urban use. State laws, namely Goal 14 and OAR 660-004-0040, prohibit the establishment of a lot or parcel less than two acres in a rural residential zone established before October 4, 2000, in which the County specified a minimum lot or parcel size of less than two acres.

Tax lots 903 and 904 are currently zoned Residential Agriculture (RA-2) by Clatsop County, in accordance with Goal 14, which prohibits the urban use of rural land and requires local comprehensive plans to identify and separate urbanizable from rural land in order to provide for the orderly and efficient transition from rural to urban use. State laws, namely Goal 14 and OAR 660-004-0040, prohibit the establishment of a lot or parcel less than the size established in the County rural residential zone in existence on October 4, 2000, if the zone in existence on that date had a minimum lot size of two or more acres. Clatsop County's RA-2 zone requires a minimum lot size of two acres.

This portion of the claimants' property consists of 10.99 acres. State land use regulations allow the claimants to establish no more than four home sites. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the one additional home site the claimants may qualify for under Section 7 of Measure 49.

7. 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 one additional home site for which the claimants may qualify on the property is prohibited by land use regulations described in ORS 195.305(3).

8. 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

Clatsop County deed records indicate that the claimants acquired the property on October 9, 1989.

On October 9, 1989, tax lots 903 and 904 were subject to Clatsop County's acknowledged Residential Agriculture (RA-2) zone. Clatsop County's RA-2 zone required two 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 2.12 acres. On October 9, 1989, the northern 8.77-acre portion of tax lot 900 was subject to Clatsop County's acknowledged Residential Agriculture (RA-1) zone. Clatsop County's RA-1 zone required one acre for the creation of a new lot or parcel on which a dwelling could be established. This portion of the claimants' property consists of 8.77 acres. Therefore, the claimants lawfully could have established the one additional home site they may qualify for under Section 7 of Measure 49.

9. The Enactment of One or More Land Use Regulations that are the Basis for this Claim, Caused a Reduction in the Fair Market Value of the Measure 37 Claim Property that is Equal to or Greater than the Fair Market Value of the Home Site Approvals Requested

Sections 7 and 8 of Measure 49 require that the reduction in the fair market value of the property be demonstrated through an appraisal that meets the following requirements:

- 1) The appraisal must be submitted within 180 days after the Measure 49 election is filed with the department.**

The department mailed the claimants a notification letter on October 27, 2009. The claimants submitted an appraisal on April 23, 2010. Therefore, the appraisal was submitted within 180 days of the election filing.

2) The appraisal must be prepared by a person certified under ORS chapter 674 or a person registered under ORS chapter 308.

The appraiser signing the submitted appraisal and appraisal addendum, Haze H.L. Weed, is a state-certified general appraiser; therefore this requirement appears to have been met.

3) The appraisal must comply with the Uniform Standards of Professional Appraisal Practice (USPAP), as authorized by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

An appraisal review commissioned by DLCD has determined that the claimants' appraisal and appraisal addendum filed for the Measure 37 claim property meets the threshold requirements for Uniform Standards of Professional Appraisal Practice compliance; therefore this requirement has been met.⁴

4) The appraisal must expressly determine the highest and best use of the property at the time the land use regulation was enacted and the highest and best use must be determined to be residential use.

The appraisal and appraisal addendum submitted determines that the highest and best use of the Measure 37 claim property at the time the land use regulations were enacted was an 8-lot residential subdivision; therefore, this requirement has been met.

5) The appraisal must show the fair market value of the property one year before and one year after the enactment of the regulation(s) the claimant asserts have resulted in a reduction of the fair market value of the Measure 37 claim property.

The claimants assert that the enactment of a 2-acre minimum lot size in the RA-1 zone by Clatsop County on October 24, 2003, reduced the fair market value of the Measure 37 claim property. In response to the preliminary evaluation, the claimants' appraiser submitted an addendum that provided revised fair market values for an 8.77-acre portion of the Measure 37 claim property of \$152,000 for October 24, 2002, and \$110,000 for October 24, 2004, one year before and one year after the enactment of the land use regulation. Therefore, this requirement has been met.

6) The reduction in fair market value of the Measure 37 property determined by the appraisal shall be adjusted by any ad valorem property taxes not paid, any severance taxes paid and any recapture of additional tax liability that the claimant has paid or will pay for the property if the property is disqualified from special assessment under ORS 308A.703 as required by Section 7(6) and (7).

⁴ The appraisal failed to establish a value on the relevant dates for the entire "Measure 37 Claim Property." OAR 660-041-0160(1) requires that: "A Claimant seeking relief under section 7 of Measure 49 must provide an appraisal for the Measure 37 Claim Property..." OAR 660-041-0010 defines "Measure 37 Claim Property" as the private real property described in a Measure 37 Claim. The property described in the claimants' Measure 37 Claim included tax lots 903 and 904. The submitted appraisal only addresses the northern, 8.77-acre portion of tax lot 900 that was zoned RA-1. However, because it appears there has been no change in zoning affecting tax lots 903 and 904 since the claimants acquired it this omission has no effect on the resolution of this claim.

In the appraisal addendum submitted by the claimants, the reduction in fair market value of the Measure 37 claim property, \$42,000, has been adjusted for interest and reduced by tax savings adjusted for interest for a net loss in fair market value of \$44,186; therefore this requirement has been met.

7) The appraisal must show the present fair market value of each lot, parcel or dwelling that the claimant is seeking under section 7(2) of Measure 49.

The appraisal addendum submitted by the claimants provides a value of \$43,750 for each of the eight lots or parcels that the claimant is seeking under Section 7(2) of Measure 49; therefore, this requirement has been met.

The appraisal addendum submitted by the claimants shows that the enactment of one or more land use regulations that are the basis for this claim, caused a reduction in the fair market value of the Measure 37 Claim Property that is equal to or greater than the fair market value of only one additional home site approval. The appraiser's conclusion that the claimants qualify for a total of eight lots under Measure 49 is erroneous. Whereas the net loss was limited to \$44,186 and given the April 14, 2010 conclusion that each lot contributed \$43,750, the claimants qualify for only one additional home site approval under Measure 49, beyond the four home sites currently allowed.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its amended Preliminary Evaluation for this claim on November 9, 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 and Home Site Authorization.

III. CONCLUSION

Based on the analysis above, the claimants qualify for up to one additional home site. However, the number of lots, parcels or dwellings that a claimant may establish pursuant to a home site authorization is reduced by the number of lots, parcels or dwellings currently in existence on the Measure 37 claim property and any contiguous property under the same ownership according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49.

The number of lots, parcels or dwellings the claimants may be able to establish on the Measure 37 claim property pursuant to the one home site approval is not reduced by the contiguous lots or parcels in the same ownership because it appears that the total number of lots, parcels or dwellings that would exist on the Measure 37 claim property and the contiguous property in the same ownership would not exceed ten if the claimants established one additional lots or parcels and one additional dwelling on the Measure 37 claim property. Therefore, the one home site approval the claimants appear to qualify for under Section 7 of Measure 49 will allow the claimants to establish up to one additional lot or parcel and one additional dwelling on the Measure 37 claim property, in addition to the four allowed under current regulations.

IV. HOME SITE AUTHORIZATION

Based on the analysis set forth above, this claim is approved, and the claimants qualify for one home site approval on the property in addition to the four home sites that are allowed under current land use regulations. As explained in section III above, after taking into account the number of existing lots, parcels or dwellings, the claimants are authorized for one additional lot or parcel and one additional dwelling on the property on which the claimants are eligible for Measure 49 relief, subject to the following terms:

1. Each dwelling must be on a separate lot or parcel, and must be contained within the property on which the claimants are eligible for Measure 49 relief. The establishment of a land division or dwelling based on this home site authorization must comply with all applicable standards governing the siting or development of the land division or dwelling. However, those standards must not be applied in a manner that prohibits the establishment of the land division or dwelling, unless the standards are reasonably necessary to avoid or abate a nuisance, to protect public health or safety, or to carry out federal law.
2. This home site authorization will not authorize the establishment of a land division or dwelling in violation of a land use regulation described in ORS 195.305(3) or in violation of any other law that is not a land use regulation as defined by ORS 195.300(14).
3. A claimant is not eligible for more than 20 home site approvals under Sections 5 to 11 of Measure 49 regardless of how many properties a claimant owns or how many claims a claimant filed. If the claimants have developed the limit of twenty home sites under Measure 49, the claimants are no longer eligible for the home site approvals that are the subject of this order.
4. The number of lots, parcels or dwellings a claimant may establish under this home site authorization is reduced by the number of lots, parcels and dwellings currently in existence on the Measure 37 claim property and contiguous property in the same ownership, regardless of whether evidence of their existence has been provided to the department. If, based on the information available to the department, the department has calculated the number of currently existing lots, parcels or dwellings to be either greater than or less than the number of lots, parcels or dwellings actually in existence on the Measure 37 claim property or contiguous property under the same ownership, then the number of additional lots, parcels or dwellings a claimant may establish pursuant to this home site authorization must be adjusted according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49. Statements in this final order regarding the number of lots, parcels or dwellings currently existing on the Measure 37 claim property and contiguous property are not a determination on the current legal status of those lots, parcels or dwellings.
5. Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimants may choose to convert any temporary dwelling currently located on the property on which the claimants are eligible for Measure 49 relief to an authorized home site pursuant to a home site approval. Otherwise, any temporary dwelling

is subject to the terms of the local permit requirements under which it was approved, and is subject to removal at the end of the term for which it is allowed.

6. A home site approval only authorizes the establishment of a new lot, parcel or dwelling on the property on which the claimants are eligible for Measure 49 relief. No additional development is authorized on contiguous property for which no Measure 37 claim was filed or on Measure 37 claim property on which the claimants are not eligible for Measure 49 relief. A lot or parcel established pursuant to a home site approval must either be the site of a dwelling that is currently in existence or be the site of a dwelling that may be established pursuant to the home site approval.
7. The claimants may use a home site approval to convert a lot, parcel or dwelling currently located on the property on which the claimants are eligible for Measure 49 relief to an authorized home site. If the number of lots, parcels or dwellings existing on the property on which the claimants are eligible for Measure 49 relief exceeds the number of home site approvals the claimants qualify for under a home site authorization, the claimants may select which existing lots, parcels or dwellings to convert to authorized home sites; or may reconfigure existing lots, parcels or dwellings so that the number is equivalent to the number of home site approvals.
8. The claimants may not implement the relief described in this Measure 49 home site authorization if a claimant has been determined to have a common law vested right to a use described in a Measure 37 waiver for the property. Therefore, if a claimant has been determined in a final judgment or final order that is not subject to further appeal to have a common law vested right as described in Section 5(3) of Measure 49 to any use on the Measure 37 claim property, then this Measure 49 Home Site Authorization is void. However, so long as no claimant has been determined in such a final judgment or final order to have a common law vested right to a use described in a Measure 37 waiver for the property, a use that has been completed on the property pursuant to a Measure 37 waiver may be converted to an authorized home site.
9. A home site approval does not authorize the establishment of a new dwelling on a lot or parcel that already contains one or more dwellings. The claimants may be required to alter the configuration of the lots or parcels currently in existence on the Measure 37 claim property and contiguous property so that each additional dwelling established on the property on which the claimants are eligible for Measure 49 relief, pursuant to this home site authorization, is sited on a separate lot or parcel.
10. If the property described in a claim is divided by an urban growth boundary, any new dwelling, lot or parcel established on the property pursuant to a home site approval must be located on the portion of the property outside the urban growth boundary.
11. If an owner of the property is authorized by other home site authorizations to subdivide, partition, or establish dwellings on other Measure 37 claim properties, Measure 49 authorizes the owner to cluster some or all of the authorized lots, parcels or dwellings that would otherwise be located on land in an exclusive farm use zone, a forest zone or a mixed

farm/forest zone on a single Measure 37 claim property that is zoned residential use or is located in an exclusive farm use zone, a forest zone or a mixed farm/forest zone, but is less suitable for farm or forest use than the other Measure 37 claim properties.

12. If the claimants transferred ownership interest in the Measure 37 claim property prior to the date of this order, this order is rendered invalid and authorizes no home site approvals. Provided this order is valid when issued, a home site approval authorized under this order runs with the property and transfers with the property. A home site approval will not expire, except that if a claimant who received this home site authorization later conveys the property to a party other than the claimant's spouse or the trustee of a revocable trust in which the claimant is the settlor, the subsequent owner of the property must establish the authorized lots, parcels and dwellings within 10 years of the conveyance. A lot or parcel lawfully created based on this home site authorization will remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law. A dwelling lawfully created based on a home site approval is a permitted use.
13. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, this home site authorization will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the subject property imposed by private parties.

IT IS HEREBY ORDERED that this Final Order and Home Site Authorization 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:



Richard Whitman, Director
Dept. of Land Conservation and Development
Dated this 3rd day of March 2011.

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.