



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:

H134352

CLAIMANTS:

Merle Kidwell
Kathy Kidwell
Richard G. Furrer
58166 NW Wilson River Highway
Forest Grove, OR 97116

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 2N, Range 5W, Section 23
Tax lot 800¹
Washington County

AGENT CONTACT INFORMATION:

David B. Smith
Attorney at Law
6950 SW Hampton Street, Suite 232
Tigard, OR 97223

The claimants, Merle Kidwell, Kathy Kidwell and Richard Furrer, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on April 30, 2007, for property located at 58166 NW Wilson River Highway, near Forest Grove, in Washington 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 filed a Measure 37 claim with the state after December 4, 2006, but did not comply with the provisions of OAR 660-041-0020, then in effect. Merle Kidwell, Kathy Kidwell and Richard Furrer were not entitled to Measure 49 relief on that basis.

¹ The Measure 37 claim property consists of tax lots 800 (T2N R5W S23) and 300 (T2N R5W S23BA). The claimants did not elect supplemental review for tax lot 300. While a claim cannot be amended to remove claim property, analysis of a claimants' eligibility for relief on a portion of claim property may, in some cases, be immaterial. In this case whether the claimants are eligible for relief on tax lots 300 is not relevant to the analysis of whether the claimants are eligible for relief on tax lot 800. Therefore, although tax lot 300 is part of the Measure 37 claim property, review of the claimants' eligibility for relief on tax lot 300 is omitted and all references to Measure 37 claim property refer only to tax lot 800.

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, Merle Kidwell, Kathy Kidwell and Richard Furrer, 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. No waiver was issued for this claim. The Measure 37 claim filed with the state 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, Merle Kidwell, Kathy Kidwell and Richard Furrer, filed a Measure 37 claim, M134352, with the state on April 30, 2007. The claimants filed a Measure 37 claim, 37CL0532, with Washington County on September 18, 2006. The state claim was filed after December 4, 2006 and the claimants also filed a county Measure 37 claim on or before 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 deeds submitted by the claimants, Merle Kidwell, Kathy Kidwell and Richard Furrer are the owners of fee title to the property as shown in the Washington County deed records and, therefore, are owners of the property under Measure 49.

Washington 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 Washington County and the property is located outside any urban growth boundary and outside the city boundary of the nearest city, Forest Grove.

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 Forest and Conservation (EFC) by Washington 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 claimants’ property consists of 30.02 acres and is developed with a dwelling. 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

Washington County deed records indicate that claimant Richard Furrer acquired the property on February 3, 1981, and claimants Merle Kidwell and Kathy Kidwell acquired the property on

September 18, 2000.² Therefore, for purposes of Measure 49, the claimants' acquisition date is February 3, 1981.

The claimants acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Washington County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On February 3, 1981, the Measure 37 claim property was zoned Forest Resource and Conservation (FRC-38) by Washington County. Washington County's FRC-38 zone included a fixed minimum acreage standard of 38 acres, and allowed the establishment of a dwelling on an existing parcel. However, the Commission had not acknowledged that zone for compliance with the goals when the claimants acquired the property on February 3, 1981. Accordingly, the statewide planning goals, and in particular Goal 4 and ORS chapter 215, applied directly to the Measure 37 claim property when the claimants acquired it.

On July 31, 1984, the Commission acknowledged the application of Washington County's Exclusive Forest and Conservation (EFC) zone to the Measure 37 claim property. The Commission's acknowledgement of Washington County's EFC zone confirmed that zone's compliance with Goal 4 and ORS chapter 215. Washington County's acknowledged EFC zone required 76 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consists of 30.02 acres and is established with one dwelling. Therefore, on the claimants' acquisition date, they could not have established any additional home sites in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations.

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 claimants acquired the subject property.

The Measure 37 claim property was subject to Washington County's FRC-38 zone on the claimants' date of acquisition. That zone included a fixed minimum acreage standard of 38 acres, and allowed the establishment of a dwelling on an existing parcel. The Measure 37 claim property consists of 30.02 acres and is developed with one dwelling. Therefore, based on the analysis under SB 1049 (2010), the claimants were not lawfully permitted to establish any additional home sites on the Measure 37 claim property on their date of acquisition.

² The claimants Merle Kidwell and Kathy Kidwell include an unrecorded land sale contract with their claim. Unrecorded documents do not establish ownership for purposes of Measure 49.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on June 4, 2010. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. Comments received by the claimants, the county, and the claimants' state representative have been taken into account by the department in the issuance of this Final Order of Denial. The commenters assert that the claimants were lawfully entitled to three "lots of exception," on which three dwellings could be established. Included with the comments were several lots of exception approvals and staff reports for Washington County properties in the FRC-38 zone. The county asserts that under the county's lot of exception provisions, (Section 146-1.2 of the 1975 Washington County Code) the minimum lot size in the FRC-38 zone was 10 acres. However, although the provisions of Section 146-1.2c. provided that "No lot created pursuant to Section 146-1.2 shall be less than ten (10) acres", the county's code did not entitle any applicant to a developable, ten-acre parcel in the FRC district. Rather, absent a variance or conditional use approval, Section 146-1.1 states that the "minimum lot area shall be thirty-eight (38) acres." Further, none of the variance approvals attached to the comments approved any variance to allow a lot size as small as ten acres. Nor do the comments establish that any of the examples of properties that were approved for lot of exception variances share the same characteristics as the subject property or required a similar variance. More significantly, each of the decisions demonstrates that the applicants for lots of exception were required to apply for and have their variance applications reviewed against discretionary approval criteria by the county hearings official following a public hearing process.³

A claimant is not lawfully permitted to a use when that use required a variance that was only conditionally allowed following a discretionary approval process. The County's FRC-38 zone had a minimum lot size of 38 acres. The claimant's property consists of 30 acres and is already developed with a dwelling. Under SB 1049 (2010), the claimants were not lawfully permitted to establish any additional home sites on the Measure 37 claim property on their date of acquisition.

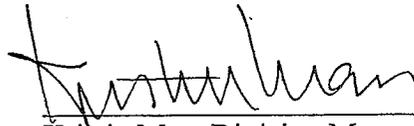
III. CONCLUSION

Based on the analysis above, the claimant do not qualify for Measure 49 home site approvals because the claimants were not lawfully permitted to establish the lots, parcels or dwellings on the claimants' date of acquisition.

³ One of the lot of exception examples provided by both the county and the claimant involved a request for a lot of exception to create a 17-acre, developed parcel, from a 99-acre parent parcel. (The parent parcel was further divided into a 38-acre parcel and a 44-acre parcel.) The applicant initially partitioned the property without following the lot of exception process and was found to be in violation of the county code. In correspondence to the applicant's attorney, the then-county planning director explained "There are several ways in which one may propose to create a lot of less than 38 acres in the FRC-38 District. Each requires an application and some form of review and action. The Department offers a 'pre-application conference' as a way of evaluating potential application procedures and such a conference is required prior to actual submission of an application."

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 23rd 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.