



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 Authorization

STATE ELECTION NUMBER:

D129466B¹

CLAIMANTS:

Richard B. and Marleen M. Carroll
10909 S Ridgetop Drive
Molalla, OR 97038

MEASURE 37 PROPERTY

IDENTIFICATION:

Township 5S, Range 1E
Section 35, Tax lot 100
Section 36, Tax lots 400 and 500
Clackamas County

The claimants, Richard and Marleen Carroll, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on June 6, 2006, for property located at 10477 S Comer Creek Drive, near Molalla, in Clackamas County. ORS 195.300 to ORS 195.336 (Measure 49) entitled 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. However, the claimants did not submit an appraisal consistent with the requirements in Section 8(5) of Measure 49 and did not change their election to request relief under Section 6 of Measure 49. Therefore, the claimants were not entitled to relief under Section 7 of Measure 49. ORS 195.300 to ORS 195.336 (Measure 49), as amended by Senate Bill 1049 (SB 1049) now entitles claimants who elected review under Section 7 but did not submit an appraisal consistent with the requirements in Section 8(5) of Measure 49 to elect supplemental state review of their claims; and allows the Department of Land Conservation and Development (the department) to authorize one dwelling approval to qualified claimants and, if the property does not include a vacant parcel for the dwelling, a parcel on which to site the dwelling.

The claimants have elected supplemental review of their Measure 37 claim under SB 1049, and have submitted the \$2500 fee required by Section 7(2) of SB 1049 for that review.

This Final Order and Authorization is the conclusion of the supplemental review of this claim.

¹ Claim E129466 was split into two claims, E129466A and D129466B, because the Measure 37 claim sought relief for non-contiguous parcels. The claimants were eligible for relief under Measure 49 for Claim E129466A which addressed tax lot 1100 (T5S R2E S22). A final order under Measure 49 on claim E129466A was issued on February 17, 2010. D129466B addresses their relief on tax lots 100, 400 and 500.

I. ANALYSIS OF CLAIM

A. Maximum Relief for Which the Claimants May Qualify

Under Measure 49, as amended by SB1049, the department may authorize one dwelling approval and, if the property does not include a vacant parcel for that dwelling, a parcel on which to site the dwelling.

B. Qualification Requirements

To qualify for a dwelling approval under Measure 49, as amended by SB1049, the claimants must meet each of the following requirements:

1. Timeliness of Claim

To qualify for approval of a dwelling under Measure 49, as amended by SB 1049, a claimant must have filed a Measure 37 claim for the property with either the state or the county in which the property is located on or before June 28, 2007, and must have filed a Measure 37 claim with both the state and the county before Measure 49 became effective on December 6, 2007. If the state Measure 37 claim was filed after December 4, 2006, the claim must also have been filed in compliance with the provisions of OAR 660-041-0020 then in effect.

Findings of Fact and Conclusions

The claimants, Richard and Marleen Carroll, filed a Measure 37 claim, M129466, with the state on June 6, 2006. The claimants filed a Measure 37 claim, ZC062-06, with Clackamas County on May 4, 2006. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Clackamas County.

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 land sale contract submitted by the claimants, Richard and Marleen Carroll are the owners of fee title to tax lot 400 of the Measure 37 claim property as shown in the Clackamas County deed records and are the purchasers under a recorded land sale contract in force for tax lots 100 and 500 of the Measure 37 claim property and, therefore, are owners of the property under Measure 49.

Clackamas 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 Clackamas County, outside any urban growth boundary and outside the city boundary of the nearest city, Molalla.

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 Clackamas 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 generate a minimum annual income from the sale of farm products.

The claimants’ property consists of 229.67 acres in three parcels and is undeveloped. Therefore, the combined effect of state land use regulations on the establishment of a dwelling in an EFU zone is to prohibit the claimants from establishing one dwelling on the Measure 37 claim property.

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 dwelling 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

Clackamas County deed records indicate that the claimants acquired tax lot 100 (50.66 acres) and 500 (176.61 acres) on May 13, 1977, and tax lot 400 (2.4 acres) on July 2, 1992. Combined, the Measure 37 claim property consists of 229.67 acres, and appears to currently be undeveloped.

The claimants acquired tax lots 100 and 500 of the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Clackamas County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On May 13, 1977, the Measure 37 claim property was zoned Exclusive Farm Use-20 (EFU-20) by Clackamas County. Clackamas County's EFU-20 zone required a minimum of 20 acres for the establishment of a new lot or parcel and allowed a dwelling on an existing lot or parcel. However, the Commission had not acknowledged that zone for compliance with the goals when the claimants acquired tax lots 100 and 500 of the Measure 37 claim property on May 13, 1977. Accordingly, the statewide planning goals, and in particular Goal 3, and ORS chapter 215 applied directly to tax lots 100 and 500 of the Measure 37 claim property when the claimants acquired it.

On December 21, 1982, the Commission acknowledged the application of Clackamas County's Exclusive Farm Use-20 (EFU-20) zone to the Measure 37 claim property. The Commission's acknowledgement of Clackamas County's EFU-20 zone confirmed that zone's compliance with

Goal 3 and ORS chapter 215. Clackamas County's acknowledged EFU-20 zone required 20 acres for the creation of a new lot or parcel on which a dwelling could be established. Tax lots 100 and 500 of the claimants' property consist of 227.27 acres. Therefore, on the claimants' acquisition date, they could have established one dwelling on tax lots 100 and 500 of the Measure 37 claim property 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. 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 subject to consistency with local land use regulations in effect when they acquired the Measure 37 claim property, claimants whose property consists of at least 40 acres were lawfully permitted to establish up to three home sites.

When the claimants acquired tax lot 400 on July 2, 1992, the entirety of the Measure 37 claim property was subject to Clackamas County's acknowledged Exclusive Farm Use-20 (EFU-20) zone. Clackamas County's EFU-20 zone required 20 acres for the creation of a new lot or parcel on which a dwelling could be established.

The claimants' property consists of 229.67 acres and is undeveloped. Therefore, based on the analysis under SB 1049, the claimants were lawfully permitted to establish a dwelling on the Measure 37 claim property when they acquired it.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on November 8, 2010. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. No written comments were received in response to the 28-day notice.

III. CONCLUSION

Based on the analysis above, the claimants qualify for one dwelling. Because the property includes a vacant parcel, the dwelling must be sited on the existing parcel within the Measure 37 claim property, and the claimants do not qualify to create an additional parcel on which to site the dwelling. Therefore, the one dwelling approval the claimants qualify for under Measure 49, as amended by SB 1049, will authorize the claimants to establish one dwelling on the Measure 37 claim property.

IV. AUTHORIZATION

Based on the analysis set forth above, this claim is approved, and the claimants qualify for one dwelling approval. As explained in section III above, the claimants are authorized for one

dwelling on the property on which the claimants are eligible for Measure 49 relief, subject to the following terms:

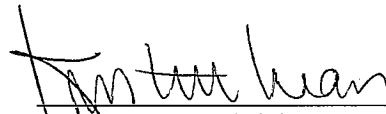
1. The establishment of a dwelling based on a Measure 49 authorization must comply with all applicable standards governing siting or development. However, those standards must not be applied in a manner that prohibits the establishment of the dwelling unless the standards are reasonably necessary to avoid or abate a nuisance, to protect public health or safety, or to carry out federal law.
2. An authorization under Measure 49 does not allow the establishment of a 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.
4. Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimants may choose to convert a 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 Measure 49 dwelling 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.
5. An authorization under Measure 49 only allows the establishment of a new dwelling on the property for 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 a claimant is not eligible for Measure 49 relief.
6. The claimants may use an authorization to convert an unauthorized or nonconforming dwelling currently located on the claim property into an allowed use.
7. The claimants may not implement the relief described in a Measure 49 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 any Measure 49 authorization for the property will be 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 authorized using this approval.
8. An authorization under Measure 49 does not allow the establishment of a new dwelling on a lot or parcel that already contains one or more dwellings. The claimants may be required to

partition a lot or parcel currently in existence on the Measure 37 claim property so that the authorized dwelling established on the property is sited on a separate lot or parcel.

9. If the property described in a claim is divided by an urban growth boundary, any new dwelling, and the lot or parcel for that dwelling that is established on the property pursuant to this authorization must be located on the portion of the property outside the urban growth boundary.
10. Because the property is located in an exclusive farm use zone, the owner must comply with the requirements of ORS 215.293 before beginning construction.
11. If an owner of the property is authorized by other home site approvals 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 and 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 and forest zone but is less suitable for farm or forest use than the other Measure 37 claim properties.
12. Once the department issues a final authorization, a dwelling established pursuant to that authorization will run with the property and will transfer with the property. An authorization will not expire, except that if a claimant who received an 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 dwelling and lot or parcel, within 10 years of the conveyance. A dwelling lawfully created based on this authorization is a permitted use.

IT IS HEREBY ORDERED that this Final Order and 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:



Kristin May, Division Manager

Dept. of Land Conservation and Development

Dated this 13th day of December, 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.