



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: D135054

CLAIMANT: Gail O. Frost
3243 Vale Road
Klamath Falls, OR 97603

MEASURE 37 PROPERTY
IDENTIFICATION: Township 39S, Range 10E, Section 7A
Tax lot 800
Klamath County

The claimant, Gail Frost, filed a claim with Klamath County under ORS 197.352 (2005) (Measure 37) on November 9, 2006, for property located at 3243 Vale Road, near Klamath Falls, in Klamath County. The claimant did not file a state Measure 37 claim. ORS 195.300 to ORS 195.336 (Measure 49), as amended by Senate Bill 1049 (SB 1049) entitles claimants who filed Measure 37 claims only with the county in which the claim property is located 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 claimant has elected supplemental review of her Klamath County Measure 37 claim under SB 1049, and has submitted the \$2500 fee required by Section 7(2) of SB 1049 for that review.

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

I. ANALYSIS OF CLAIM

A. Maximum Relief for Which the Claimant May Qualify

Under Measure 49, as amended by SB 1049, 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 Section 6 of Measure 49, as amended by SB 1049, the claimant 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To qualify for approval of a dwelling under Measure 49, as amended by SB 1049, a claimant must have filed, and not withdrawn, a valid Measure 37 claim with the county in which the claim property is located before Measure 49 became effective on December 6, 2007; and the county must have provided a certified copy of the claim to the department no later than June 30, 2010.

Findings of Fact and Conclusions

The claimant, Gail Frost, filed a Measure 37 claim, M37 56-06, with Klamath County on November 9, 2006. Klamath County provided a certified copy of that claim to the department on June 30, 2010.

The claimant filed a timely Measure 37 claim with Klamath County in order to be eligible for supplemental review under SB 1049.

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 to the county by the claimant, Gail Frost, is the owner of fee title to the property as shown in the Klamath County deed records and, therefore, is an owner of the property under Measure 49.

Klamath County has confirmed that the claimant is the current owner 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 Klamath County, outside any urban growth boundary and outside the city boundary of the nearest city, Klamath Falls.

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-Cropland (EFU-C) by Klamath 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 claimant’s property consists of 5.0 acres in one parcel and is developed with one dwelling. Therefore, state land use regulations prohibit the claimant from establishing one additional dwelling on the Measure 37 claim property and a parcel on which to site that dwelling.

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 claimant, it does not appear that the establishment of the dwelling 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

Klamath County deed records indicate that the claimant acquired the property on August 15, 1983.

The Measure 37 claim property consists of 5.0 acres, and is developed with one dwelling.

The claimant acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Klamath County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On August 15, 1983, the Measure 37 claim property was zoned Exclusive Farm Use (EFU) by Klamath County. Klamath County's EFU zone did not include a fixed minimum acreage standard. However, the Commission had not acknowledged that zone for compliance with the goals when the claimant acquired the property on August 15, 1983. Accordingly, the statewide planning goals, and in particular Goal 3, and ORS chapter 215 applied directly to the Measure 37 claim property when the claimant acquired it.

On August 6, 1984, the Commission acknowledged the application of Klamath County's Exclusive Farm Use-Cropland (EFU-C) zone to the Measure 37 claim property. The Commission's acknowledgement of Klamath County's EFU-C zone confirmed that zone's compliance with Goal 3 and ORS chapter 215. Although Klamath County's EFU-C zone was acknowledged to comply with the statewide planning goals, the zone did not establish a fixed minimum acreage standard for the creation of a lot or parcel on which a dwelling could be established. Rather, applications for division and development were evaluated on a case-by-case basis to ensure compliance with the Goals and the applicable requirements of ORS chapter 215. The claimant's property consists of 5.0 acres, and is developed with one dwelling. Therefore, on the claimant's acquisition date, she could not have established any additional parcels on which a dwelling could be established in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations without evidence to demonstrate that the establishment of an additional dwelling on the property would have been consistent with the statewide planning goals and ORS chapter 215 as required by the zoning ordinance.

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 less than 20 acres were lawfully permitted to establish one home site, including existing development.

The Measure 37 claim property consists of 5.0 acres and is developed with one dwelling. Therefore, based on the analysis under SB 1049 (2010), the claimant was not lawfully permitted to establish any additional dwellings under Measure 49, as amended by SB 1049.

II. COMMENTS ON THE PRELIMINARY EVALUATION

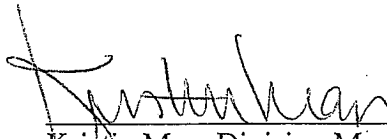
The department issued its Preliminary Evaluation for this claim on December 16, 2010. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. No written comments were received in response to the 28-day notice.

III. CONCLUSION

Based on the analysis above, the claimant does not qualify for relief under Section 6 of Measure 49, as amended by SB 1049 because the claimant was not lawfully permitted to establish a dwelling on the claimant's date of acquisition.

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 January, 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.