



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: E118740C¹

CLAIMANTS: Bernalou J. Rosebrook
PO Box 46
Beavercreek, OR 97004

MEASURE 37 PROPERTY IDENTIFICATION: Township 3S, Range 2E, Section 25
Tax lot 1002W1
Clackamas County

AGENT CONTACT INFORMATION: Kristen S. David
Bowerman & David, PC
PO Box 100
Oregon City, OR 97045

The claimant, Bernalou Rosebrook, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on July 11, 2005, for property located near the community of Beavercreek, in Clackamas 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 claimant has elected supplemental review of her 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.

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 Claimant 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

¹ Claim E118740 has been divided into three claims because the claim includes multiple tax lots or parcels that are not in the same ownership or are not contiguous. E118740A addresses tax lots 100, 101, 300, 800 and 2400 and claimants John and Bernalou Rosebrook. E118562B addresses tax lot 900 and claimant John Rosebrook. E118740C addresses tax lot 1002W1 and claimant Bernalou Rosebrook.

was issued, the number of home sites described in the Measure 37 claim filed with the state. The claimant has requested three home site approvals in the election material. The Measure 37 waiver issued for this claim describes an unspecified number of home sites. Therefore, the claimant 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, the claimant must meet each of the following requirements:

1. Timeliness of Claim

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 claimant, Bernalou Rosebrook, filed a Measure 37 claim, M118740, with the state on July 11, 2005. The claimant filed a Measure 37 claim, ZC199-05, with Clackamas County on July 11, 2005. The state claim was filed prior to December 4, 2006.

The claimant 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 submitted by the claimant, Bernalou Rosebrook is the owner of fee title to the property as shown in the Clackamas County deed records.

Clackamas 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 Property Is Located Entirely Outside Any Urban Growth Boundary and Entirely Outside the Boundaries of Any City

The Measure 37 claim property must be located entirely outside any urban growth boundary and entirely outside the boundaries of any city.

Findings of Fact and Conclusions:

The Measure 37 claim property is located in Clackamas County, outside any urban growth boundary and outside any city limits, near the community of Beaver Creek.

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 regulate the establishment of dwellings on new or existing lots or parcels.

The claimant's property consists of 71.29 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the three home sites the claimant 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 claimant, it does not appear that the establishment of the three home sites for which the claimant 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 claimant acquired the property on April 20, 1994.²

On April 20, 1994, the Measure 37 claim property was subject to Clackamas County's acknowledged Exclusive Farm Use (EFU-20) zone, which at that time had a minimum lot size requirement of 80 acres. Clackamas County's EFU zone allowed for the establishment of a dwelling on an existing lot or parcel if certain criteria were met as determined by an administrative review process. Neither the claimant nor the claimant's attorney have submitted any documentation demonstrating that the claimant satisfied the standards and criteria then in effect for establishing a dwelling on the 71.29-acre property when the claimant acquired it. Further, state law in effect when the claimants acquired the property, specifically ORS 215.780 (1993 edition), required a minimum lot size of 80 acres for most resource lands, and further restricted residential development. The state law in effect on April 20, 1994, would have prohibited the claimants from lawfully partitioning the Measure 37 claim property into lots smaller than 80 acres. Therefore, the claimant lawfully could not have established any home sites on her date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on March 24, 2010. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. As indicated above, comments received from the claimant's attorney regarding the

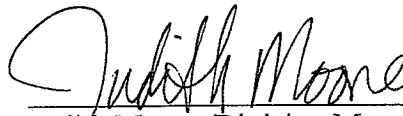
² The preliminary evaluation issued for this claim erroneously stated the claimant's acquisition date was April 10, 2008. The department has revised the lawfully permitted analysis based on the correct acquisition date of April 20, 1994 for purposes of this final order.

III. CONCLUSION

Based on the analysis above, the claimant is not eligible for any relief under Measure 49 because the claimant would not have been lawfully permitted to establish any lots, parcels or dwellings when she acquired the property.

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:



Judith Moore, Division Manager
Dept. of Land Conservation and Development
Dated this 26th day of May 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.