



**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 Approval**

October 7, 2008

STATE ELECTION NUMBER:

E122333

CLAIMANTS:

Katharine D. Magar
8760 NW Pike Road
Yamhill, Oregon 97148

Billy F. Magar
14800 NE Quarry Road
Newberg, Oregon 97132

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 3S, Range 2W, Section 10
Tax lot 2400¹
Yamhill County

PRIMARY CONTACT INFORMATION:

Katharine D. Magar
8760 NW Pike Road
Yamhill, Oregon 97148

The claimants, Katharine Magar and Billy Magar, filed a claim under ORS 197.352 (2005) (Measure 37) on September 14, 2005, for property located at 14800 Northeast Quarry Road, near Newberg, in Yamhill County. ORS 195.300 to ORS 195.336 (Measure 49) entitles claimants who filed a Measure 37 claim to elect supplemental review of their claim. The claimants elected supplemental review of their Measure 37 claim under Section 6 of Measure 49, which authorizes the Department of Land Conservation and Development (the department) to issue up to three home site approvals to qualified claimants. This Final Order and Home Site Approval is the conclusion of the supplemental review of this claim.

¹ The Measure 37 claim property consisted of tax lot 2400. The property has since been partitioned into three parcels consisting of tax lots 2400, 2402 and 2403.

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 issued 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. The Measure 37 waiver issued for this claim 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 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 claimants, Katharine Magar and Billy Magar, filed a Measure 37 claim, M122333, with the state on September 14, 2005. The claimants filed a Measure 37 claim with Yamhill County on December 28, 2004. The state claim was filed prior to or on December 4, 2006. The claimants timely filed a Measure 37 claim with both the state and Yamhill 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 warranty deed submitted by the claimants, Katharine Magar and Billy Magar are owners of fee title of the property and, therefore, owners of the property under Measure 49. Yamhill County has confirmed that the claimants are the current owners of the property.

3. All Owners 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, tax lot 2400, is located in Yamhill County, at 14800 Northeast Quarry Road, outside the urban growth boundary and outside the city limits of the nearest city, Newberg.

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 (EF-20) by Yamhill County, in accordance with ORS chapter 215 and OAR 660, division 33, because the property is "agricultural land" as defined by Goal 3.² Goal 3 requires agricultural land to be zoned exclusive farm use (EFU). Applicable provisions of ORS chapter 215 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, generally prohibit the establishment of a dwelling on a lot or parcel less than 80 acres in size in an EFU zone. Under ORS 215.780(2)(a), counties may adopt minimum lot sizes smaller than 80 acres, subject to approval by the Land Conservation and Development Commission (the Commission). The Commission has approved Yamhill County's EF-20 zone, which requires a minimum lot size of 20 acres.

The claimants' property consists of 4.75 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the three home sites the claimants may otherwise 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:

² The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils and is located in western Oregon.

- (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, the establishment of home sites on the property is not 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

Yamhill County deed records indicate that the claimants acquired the property on November 8, 1963.

On November 8, 1963, the Measure 37 claim property was not subject to any local or state laws that would have prohibited the claimants from establishing at least three lots or parcels and at least three dwellings. Therefore, the claimants lawfully could have established the three home sites the claimants may qualify for under Section 6 of Measure 49.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on July 31, 2008. 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 up to three home site approvals. However, the number of lots, parcels or dwellings that a claimant is authorized to establish pursuant to home site approvals 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. If a claimant otherwise qualifies for relief under Section 6 of Measure 49, the

claimant will be able to establish at least one additional lot, parcel or dwelling, regardless of the number of lots, parcels or dwellings currently in existence.

Based on the documentation provided by the claimants and the county, the Measure 37 claim property includes three parcels and no dwellings. There is no contiguous property under the same ownership. Therefore, the three home site approvals the claimants qualify for under Section 6 of Measure 49 will authorize the claimants to establish no additional parcels and three additional dwellings on the Measure 37 claim property. Each dwelling must be on a separate parcel, and must be contained within the Measure 37 claim property. The claimants may alter the configuration of the parcels currently in existence on the Measure 37 claim property and contiguous property so that each additional dwelling established on the Measure 37 claim property, pursuant to the home site approvals, is sited on a separate lot or parcel. 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 a claimant has developed the limit of twenty home sites under Measure 49 they are no longer eligible for the home site approvals that are the subject of this order.

IV. HOME SITE APPROVALS

Based on the analysis set forth above, the claimants are authorized to establish no additional lots or parcels and three additional dwellings on the Measure 37 claim property, subject to the following terms:

1. Each dwelling must be on a separate lot or parcel, and must be contained within the Measure 37 claim property. The establishment of a land division or dwelling based on this home site approval 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 approval 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. The number of lots, parcels or dwellings a claimant is authorized to establish under a home site approval 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 lots, parcels or dwellings currently exist on the Measure 37 claim property or on contiguous property under the same ownership and the lots, parcels or dwellings have not been disclosed to the department, then the number of additional lots, parcels or dwellings a claimant may establish pursuant to this home site approval must be reduced according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49.
4. Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimant may choose to convert any temporary dwelling

currently located on the Measure 37 claim property to an authorized home site pursuant to this 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.

5. This home site approval only authorizes the establishment of one or more new lots, parcels or dwellings on the Measure 37 claim property. No additional development is authorized on contiguous property for which no Measure 37 claim was filed. Each lot or parcel established pursuant to this home site approval must either be the site of a dwelling that is currently in existence or be the site of a dwelling that will be established pursuant to this home site approval.
6. This 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 claimant may, and 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 Measure 37 claim property, pursuant to this home site approval, is sited on a separate lot or parcel.
7. This home site approval runs with the property and transfers with the property. This home site approval will not expire, except that if a claimant who received the home site approval 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 approval 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.
8. Because the property is located in an exclusive farm use zone, this home site approval does not authorize any *new* lots or parcels that exceed five acres. However, the remnant lot or parcel (the lot or parcel that the new parcels are created out of) may (and in many cases necessarily will) exceed five acres. If the new lots or parcels are located on high-value farmland, on high-value forestland, or on land within a ground water restricted area, this home site approval does not authorize *new* lots or parcels that exceed two acres (again, the remnant lot or parcel may exceed this size). The determination of whether the new lots or parcels are located on high-value farm or forest land will be made by the county at the time the land division is reviewed. In addition, before beginning construction in a farm use zone, a forest zone or a mixed farm and forest zone, the owner must comply with the requirements of ORS 215.293 (requiring recording of a document prohibiting the owner from filing a lawsuit contesting accepted farm or forest practices).
9. Because the property is located in an exclusive farm use zone, Measure 49 requires new home sites to be clustered so as to maximize suitability of the remnant lot or parcel for farm or forest use. Further, 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.

10. 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 approval will not authorize the use of the property unless the claimant first obtains 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 Approval 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 7th day of October, 2008.

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 it 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.