



**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**

January 23, 2009

STATE ELECTION NUMBER: E124529B¹

CLAIMANT: Thomas Marlow
1932 Woodson Loop
Eugene, Oregon 97405

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 18S, Range 1W, Section 32
Tax lot 1005
Lane County

AGENT CONTACT INFORMATION: Steve Cornacchia
Hershner Hunter, LLP
180 East 11th Avenue
Eugene, Oregon 97401

The claimant, Thomas Marlow, filed a claim under ORS 197.352 (2005) (Measure 37) on March 21, 2006 for property located near Fall Creek, in Lane 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 elected supplemental review of his 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.

¹ Claim E124529 has been divided into three claims because the claim includes multiple tax lots or parcels that are not in the same ownership. E124529B refers to tax lot 1005 and claimant Thomas Marlow. E124529A refers to tax lot 1000 and claimants Gary Marlow, Maxine Marlow, Kearney Simpson and Patricia Simpson. E124529C refers to tax lots 1001 and 1003 and claimant Jerry Dilley.

I. ANALYSIS OF CLAIM

A. Maximum Number of Home Sites for Which the Claimant/s 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 claimant has requested three home site approvals in the election material. The Measure 37 waiver issued for this claim describes two to five-acre 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, Thomas Marlow, filed a Measure 37 claim, M124529, with the state on March 21, 2006. The claimant filed a Measure 37 claim, PA06-5346, with Lane County on March 2, 2006. The state claim was filed prior to December 4, 2006. The claimant timely filed a Measure 37 claim with both the state and Lane 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 claimants, Thomas Marlow is the owner of fee title to the property as shown in the Lane County deed records and, therefore, is an owner of the property

under Measure 49. Lane County has confirmed that the claimant is the current owner 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 is located in Lane County, outside the urban growth boundary and outside of any city near the community of Fall 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 (E40) by Lane 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 (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 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. 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 Lane County’s E40 zone, which requires a minimum lot size of 40 acres.

The claimant’s property consists of 17.70 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, the establishment of the three home sites for which the claimant may qualify 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

Lane County deed records indicate that the claimant acquired the property on March 3, 1982.²

On March 3, 1982 the Measure 37 claim property was subject to state statutes, the statewide planning goals and implementing regulations. On the claimant’s date of acquisition the property was zoned Farm Forest-20 by Lane County. However, because the Commission had not acknowledged the county’s comprehensive plan and land use regulations as being in compliance with the statewide planning goals, the statewide planning goals and Goal 3 in particular, and ORS ch. 215 applied directly to the claimant’s property.

On January 19, 1991 the Commission acknowledged the application of Lane County’s E40 zone to the Measure 37 claim property. The Commission’s acknowledgement of Lane County’s E40 zone confirmed that zone’s compliance with Goal 3 and ORS ch. 215. Lane County’s acknowledged E40 zone required 40 acres for the establishment of a dwelling on a lot or parcel.

² Claimant included an unrecorded land sale contract with his claim and again with a comment from the claimant’s agent received by the Department on October 1, 2008 in response to the Preliminary Evaluation. Unrecorded documents do not establish ownership for purposes of Measure 49.

The claimant's property consists of 17.70 acres. Therefore, the claimant lawfully could not have established any home sites on his acquisition date in the zone that was ultimately acknowledged to comply with the law that controlled the establishment of dwellings and land divisions on the property on the claimant's date of acquisition. The claimant does not qualify for any home sites, because the claimant has not shown that a direct application of the Goals and ORS ch. 215 would have allowed the claimant to establish additional home sites.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on September 23, 2008. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties.

The claimant's attorney submitted a comment in response to the Preliminary Evaluation, which included a copy of the unrecorded contract through which the claimant initially acquired an interest in the property. The attorney argues that the claimant should be considered an owner of the Measure 37 claim property as of the date of this unrecorded contract. However, Section 21(1) of Measure 49 states that a claimant's acquisition date is "the date the claimant became the owner of the property as shown in the deed records." Because the unrecorded land sale contract is not reflected in the deed records, the text of Measure 49 requires that the claimant's acquisition date must be based on the recorded deed executed on March 3, 1982.

III. CONCLUSION

Based on the analysis above, the claimant, Thomas Marlow does not qualify for any Measure 49 home site approvals. The claimant was not lawfully permitted to establish the requested lots, parcels or dwellings 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:

_____/S/_____
Richard Whitman, Director
Dept. of Land Conservation and Development
Dated this ____ day of January, 2009.

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.