



**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: E129419

CLAIMANTS: Scott and Patty Bertsch
28345 SW Burkhalter Road
Hillsboro, OR 97123

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 1S, Range 2W, Section 29
Tax lot 1401
Washington County

AGENT CONTACT INFORMATION: Bruce Vincent
Bruce Vincent Consulting, LLC
825 NE 20th Avenue, Suite 300
Portland, OR 97232

The claimants, Scott and Patty Bertsch, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on May 30, 2006, for property located on the north side of SW Burkhalter Road, approximately 1,200 feet west of its intersection with SW Rood Bridge Road, near Hillsboro, in Washington 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 claimants have elected supplemental review of their 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 Claimants 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 material; 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 one home site approval in the election material. The Measure 37

waiver issued for this claim describes one home site. Therefore, the claimants may qualify for a maximum of one home site approval under Section 6 of Measure 49.

B. Qualification Requirements

To qualify for a home site approval under Section 6 of Measure 49, the claimants 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, Scott and Patty Bertsch, filed a Measure 37 claim, M129419, with the state on November 26, 2006. The claimants filed a Measure 37 claim, 37CL0343, with Washington County on September 7, 2005. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Washington 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, Scott and Patty Bertsch are the owners of fee title to the property as shown in the Washington County deed records and, therefore, are owners of the property under Measure 49.

Washington 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 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 Washington County, outside the urban growth boundary and outside the city limits of the nearest city, Hillsboro.

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 Washington 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, provide standards for the establishment of a dwelling in an EFU zone. In general and subject to some exceptions, those standards currently require that the property be a minimum of 80 acres in size in an EFU zone and generate a minimum annual income from the sale of farm products.

The combined effect of the standards for the establishment of a dwelling in an EFU zone is to prohibit the claimants from establishing a 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 one home site 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

Washington County deed records indicate that the claimants acquired the property on September 9, 1987.

On September 9, 1987, the Measure 37 claim property was subject to Washington County's acknowledged Exclusive Farm Use (EFU) zone. In general, Washington County's EFU zone required no less than 20 acres for the establishment of a dwelling on a vacant lot or parcel. The Measure 37 claim property consists of 3.17 acres. Therefore, the claimants lawfully could not have established a home site on the Measure 37 claim property on their date of acquisition, based on the 20-acre standard.

As the county and the claimants' agent and attorney correctly clarify, the 20-acre standard in effect in 1987 was not the exclusive means through which a dwelling could be established on EFU or AF-20 zoned land. In fact, although the department has determined generally that a dwelling could be established on a lot or parcel of at least 20 acres, under the county's code, 20 acres would not necessarily have been sufficient to satisfy the county standard. As relevant here, the acknowledged county code section, 430-37.2.A(1) provided that "a dwelling in the EFU, AF-20 or EFC District may be approved upon a finding that the proposed dwelling is customarily required to conduct the proposed farm use" and required the applicant to provide information to establish that the lot or parcel:

"(a) is not smaller than the average farm or woodlot in the County, and in no case less than twenty (20) acres, producing at least \$2,500 annual in gross income from the crops, livestock or forest products to be raised on the farm operation or woodlot; or

(b) Has produced at least \$10,000 in annual gross farm income in two (2) consecutive calendar years out of three (3) calendar years before the year in which the application for the dwelling was made, or is planted in perennials capable of producing upon harvest, an average of at least \$10,000 in gross annual income; * * *."

The claimants' agent and attorney comment that these provisions would have allowed dwellings on lots or parcels less than 20 acres. The claimants' attorney argues that this claim should be approved because subsection (1)(b) would allow "farm dwellings based upon a parcel's capability to produce the minimum annual gross income as set forth in subsection (1)(b)." The County "recommends approval of this claim with a condition requiring the Claimant demonstrate to the County through a land use application that they can meet the 1986 farm dwelling standards."

The county and claimants' agents are correct that the standards in effect in 1987 when the claimants acquired the property provided different alternatives for applicants to establish that a "proposed dwelling is customarily required to conduct the proposed farm use." However, the evidence in the record does not establish that the claimants would have satisfied the requirements of subsection (1)(b) at that time. A condition, as recommended by the County, to require the claimants to currently meet the 1986 farm dwelling standards, does not establish that at the time the claimants acquired the property the claimants lawfully were permitted to establish a dwelling under those standards. Specifically, there is no evidence in the record to establish that between the time the claimants acquired the property in 1987 and the time the more restrictive regulations became effective in 1993 the property "produced at least \$10,000 in annual gross farm income in two (2) consecutive calendar years out of three (3) calendar years before the year in which the application for the dwelling was made, or [was] planted in perennials capable of producing upon harvest, an average of at least \$10,000 in gross annual income." That it is possible that the claimants could potentially satisfy that standard today does not establish that they satisfied or could have satisfied that standard at the time they acquired the property or during the period during which the county's code would have permitted the claimants to establish that use.

Based on the evidence in the record, the claim does not establish that on the claimants' acquisition date, and based on the standards then in effect, the claimants lawfully were permitted to establish the dwelling they now seek to develop.

II. COMMENTS ON THE PRELIMINARY EVALUATION

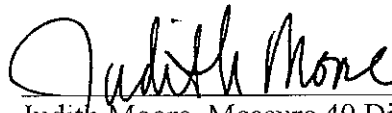
The department issued its Preliminary Evaluation for this claim on May 14, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. As discussed above, the department received comments from the claimant, the county, the claimants' agent and the claimants' attorney. These comments have been taken into account by the department in the issuance of this Final Order of Denial.

III. CONCLUSION

Based on the analysis above, the claimants do not qualify for a Measure 49 home site approval because the claimants were not lawfully permitted to establish the desired dwelling on the claimants' 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:



Judith Moore, Measure 49 Division Manager
Dept. of Land Conservation and Development
Dated this 24th day of August 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.