



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: E129861

CLAIMANTS: Larry Sumerlin
Jill Sumerlin (aka Susan Sumerlin)
602 Fairlaine Drive
Tillamook, OR 97141

MEASURE 37 PROPERTY IDENTIFICATION: Township 2S, Range 9W, Section 5
Tax lots 1001
Tillamook County

AGENT CONTACT INFORMATION: James D. Zupancic, Esq., CRE
Zupancic Group, Inc.
5335 Meadows Road, Ste 161
Lake Oswego, OR 97035

The claimants, Larry and Jill Sumerlin, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on August 15, 2006, for property located at 2680 McCormick Loop Road, near Tillamook, in Tillamook 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 one 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 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 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, Larry and Jill Sumerlin, filed a Measure 37 claim, M129861, with the state on August 15, 2006. The claimants filed a Measure 37 claim, M06-05, with Tillamook County on August 9, 2006. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Tillamook 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 deeds submitted by the claimants, Larry Sumerlin is the owner of fee title to the property as shown in the Tillamook County deed records and, therefore, is an owner of the property under Measure 49.

Tillamook County has confirmed that claimant Larry Sumerlin is the current owner of the property.

According to the information submitted by the claimants and additional information obtained by the department, Jill Sumerlin is not an owner of the property for the purposes of Measure 49. Jill Sumerlin conveyed her ownership interest in the Measure 37 claim property to claimant Larry Sumerlin on April 15, 2009.

Because this requirement has not been met, claimant Jill Sumerlin is not entitled to any relief under Measure 49, and, therefore, the remaining approval criteria will not be evaluated for this claimant.

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

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 by Tillamook County. State land use regulations, including applicable provisions of ORS chapter 215 and OAR 660, division 33, generally prohibit the establishment of a lot or parcel less than 80 acres in size in an exclusive farm use zone and regulate the establishment of dwellings on new or existing lots or parcels.

The claimant's property consists of 8.10 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the one home site 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 one home site 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

Tillamook County deed records indicate that the claimant acquired the property on October 9, 1987.

On October 9, 1987, the Measure 37 claim property was subject to Tillamook County's acknowledged Farm (F-1) zone. Tillamook County's F-1 zone required 40 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimant's property consists of 8.10 acres. Therefore, the claimant lawfully could not have established the requested one home site on his date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on November 30, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. Comments received have been taken into account by the department in the issuance of this Final Order of Denial. The claimant's agent submitted comments asserting that the claimant was lawfully permitted to establish a dwelling on the 8.1-acre property on his date of acquisition under section 3.002(6) of Tillamook County Land Use Ordinance #33 (12/30/1981). However, that "Provision for a Farm Residence on a Parcel Smaller than 40 Acres", provides for a process under which the claimant could have attempted to obtain authorization for a dwelling. Measure 49 allows a claimant to establish the number of lots, parcels and dwellings that would have been lawfully permitted at the time a claimant acquired the property. A use is not lawfully permitted when approval of the use on a claimant's acquisition date would have required a

highly discretionary review process and the record for the claim does not include any evidence that the claimant could have met the standards under such a review process.

The comments also assert that the claimant is entitled to a home site authorization under section 6(3) of Measure 49. However, that section only provides relief to a claimant who “otherwise qualifies”. The claimant was not lawfully permitted to establish the requested home site and therefore does not “otherwise qualify”.

The comments also point out that a Measure 37 waiver was in fact issued for claim M129861 and asserted that no dwelling exists on the property. This final order reflects those comments and makes no determination regarding whether a dwelling exists on the property.

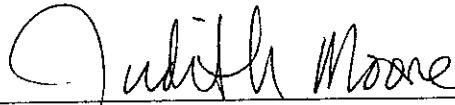
III. CONCLUSION

Based on the analysis above, claimant Jill Sumerlin does not qualify for Measure 49 home site approvals because the claimant no longer owns the Measure 37 claim property.

Based on the analysis above, claimant Larry Sumerlin is not eligible for any relief under Measure 49 because the claimant was not lawfully permitted to establish the 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:



Judith Moore, Division Manager
Dept. of Land Conservation and Development
Dated this 20th day of February 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 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.