



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:

E130097

CLAIMANTS:

Glen N. and Deanna G. White
2151 Bunker Ridge Road S
Salem, OR 97306

MEASURE 37 PROPERTY
IDENTIFICATION:

Township 8S, Range 3W, Section 32D
Tax lot 2000
Marion County

The claimants, Glen and Deanna White, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on September 22, 2006 for property located at 2151 Bunker Ridge S, near Salem, in Marion 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 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 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, Glen and Deanna White, filed a Measure 37 claim, M130097, with the state on September 22, 2006. The claimants filed a Measure 37 claim, M06-93, with Marion County on September 19, 2006. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Marion 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, Glen and Deanna White are the owners of fee title to the property as shown in the Marion County deed records and, therefore, are owners of the property under Measure 49.

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

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 Special Agriculture (SA) by Marion 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 claimants' property consists of 12.05 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the three home sites the claimants 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 claimants, it does not appear that the establishment of the three home sites 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

Marion County deed records indicate that Glen White acquired the southern portion (lot 8 of Bunker Hill Fruit Farms Subdivision) of the property on December 26, 1978, and Deanna White acquired the southern portion (lot 8) of the property on June 23, 1983. Therefore, for purposes of Measure 49, the claimants' acquisition date of the southern portion of the property is December 26, 1978. The property is developed with a dwelling.

The claimants acquired the southern portion of the Measure 37 property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Marion County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On December 28, 1978, that portion of the Measure 37 claim property was zoned Residential Agriculture (RA) by Marion County. Marion County's RA zone included a fixed minimum acreage standard of at least 6,000 square feet, if the property was served by a sanitary sewer system, for the creation of a new lot or parcel on which a dwelling could be established. If the property was not served by a sanitary sewer system, the lot area was increased to conform with the requirements of Marion County. Because the property was not subject to an acknowledged zone, when the claimants acquired it on December 26, 1978, the statewide planning goals, and in particular Goal 3 and ORS chapter 215 applied directly to the Measure 37 claim property.

On October 18, 1981, the Commission acknowledged the application of Marion County's Special Agriculture (SA) zone to the Measure 37 claim property. The Commission's acknowledgement of Marion County's SA zone confirmed that zone's compliance with Goal 3 and ORS chapter 215. Marion County's acknowledged SA zone generally required 20 acres for the creation of a new lot or parcel on which a dwelling could be established.¹ The southern portion of the Measure 37 claim property consists of 8.09 acres. Therefore, on the claimants' acquisition date, they could not have established any home sites in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations.

However, because of uncertainty during the time period between adoption of the statewide planning goals in 1975 and each county's acknowledgment of its plan and land use regulations regarding the factual and legal requirements for establishing compliance with the statewide planning goals, the 2010 Legislative Assembly amended Measure 49. Senate Bill (SB) 1049

¹ While the SA zone did allow for parcels smaller than 20 acres, the claimants have not provided any evidence that, in this case, smaller parcels would be appropriate for "intensive commercial agriculture enterprises" as required by the SA zone.

(2010) specifies the number of home sites considered lawfully permitted, for purposes of Measure 49, for property acquired during this period unless the record for the claim otherwise demonstrates the number of home sites that a claimant would have been lawfully permitted to establish. Those amendments provide, in relevant part, that subject to consistency with local land use regulations in effect when they acquired the Measure 37 claim property, claimants whose property consists of less than 20 acres were lawfully permitted to establish one home site, including existing development.

The southern portion of the Measure 37 claim property consists of 8.09 acres and is developed with a dwelling. Therefore, based on the analysis under SB 1049 (2010), the claimants were not lawfully permitted to establish any home sites on the southern portion of the Measure 37 claim property on their date of acquisition.

Marion County deed records indicate that the claimants acquired the northern portion (lot 7 of Bunker Hill Fruit Farms Subdivision) of the property on October 9, 1987.

On October 9, 1987, the Measure 37 claim property was subject to Marion County's acknowledged Special Agriculture (SA) zone. Marion County's SA zone generally required 20 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property including the southern portion (lot 8) and the northern portion (lot 7) together consists of 12.05 acres. Therefore, the claimants lawfully could not have established any home sites on their date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

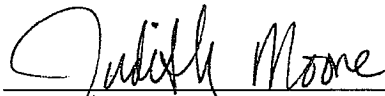
The department issued its Preliminary Evaluation for this claim on September 23, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. The claimants commented that the mention of a 1979 partition approval in Marion County's Measure 37 report is proof that the claimants were lawfully permitted to establish additional lots or parcels at the time they acquired the property. Section 2(4) of SB 1049 states that, as an alternative to the standard analysis of SB 1049 described in Section 7 above, "if the record of the claim includes a county evaluation and determination of the compliance or noncompliance of the requested residential use with the applicable statewide land use planning goals, the Department of Land Conservation and Development may defer to that analysis." In this case, the record of the claim does not include any information as to the analysis undertaken by Marion County as part of the 1979 partition approval.

III. CONCLUSION

Based on the preliminary analysis, the claimants do not qualify for Measure 49 home site approvals because the claimants were not lawfully permitted to establish the lots, parcels or dwellings 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, Division Manager
Dept. of Land Conservation and Development
Dated this 6th 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.