



**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: E130403

CLAIMANTS: Victor W. and Marianne D. Kaczynski
8320 Cooper Spur Road
Parkdale, OR 97041

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 2S, Range 2W, Section 36
Tax lot 1100
Washington County

The claimants, Victor and Marianne Kaczynski, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on October 24, 2006, for property located on SW Kruger Road, near Sherwood, 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 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, Victor and Marianne Kaczynski, filed a Measure 37 claim, M130403, with the state on October 24, 2006. The claimants filed a Measure 37 claim, 37CL0539, with Washington County on September 28, 2006. 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, Victor and Marianne Kaczynski 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, Sherwood.

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 Agriculture and Forest (AF-5) by Washington County, in accordance with Goal 14, which prohibits the urban use of rural land and requires local comprehensive plans to identify and separate urbanizable from rural land in order to provide for the orderly and efficient transition from rural to urban use. State laws, namely Goal 14 and OAR 660-004-0040, prohibit the establishment of a new lot or parcel less than 20 acres for property within a mile of the UGB for the Portland metropolitan area. Because the claimants' property is within a mile of the Portland metropolitan area UGB all new lots or parcels must be at least 20 acres in size.

The claimants' property consists of 6.79 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property two of 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, the establishment of the three home sites for which the claimants 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

Washington County deed records indicate that the claimants acquired the property on September 18, 1981.

The claimants acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Commission acknowledged Washington County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. At that time, the Measure 37 claim property was zoned AF-5 by Washington County. However, because the Commission had not acknowledged that zone for compliance with the goals, when the claimants acquired the property on September 18, 1981, the statewide planning goals, and in particular Goal 14 applied directly to the Measure 37 claim property when the claimants acquired it.

On July 31, 1984, the Commission acknowledged the application of Washington County's AF-5 zone to the Measure 37 claim property. The Commission's acknowledgement of Washington County's AF-5 zone confirmed that zone's compliance with Goal 14. Washington County's acknowledged AF-5 zone required 5 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consists of 6.79 acres. Therefore, on the claimants' acquisition date, they could only have established one home site on the subject AF-5 zoned property. The claimants do not qualify for three home sites on the property because the claimants have not shown that a direct application of the Goals would have allowed the claimants to establish additional home sites.

The claimants submitted comments to the preliminary evaluation, disputing this conclusion. The claimants argue that when they acquired the property in 1981, they could have availed themselves of a discretionary, conditional use process that potentially could have allowed them to develop the property at a somewhat higher density than otherwise allowed in the AF-5 zone. Specifically, Washington County Code, chapter 240 (1975 edition), provided a process to allow discretionary review and approval of an Exurban Planned Residential Development, which allowed for clustering of individual lots in the AF-5 zone, and some minor reduction in the minimum lot size, based on a calculation determined by the number of acres of the site divided by an established divisor. The claimants would not have been allowed to divide the AF-5 zoned property as requested into parcels as small as 2.5 acres absent an approval following this rigorous and fact-dependent, discretionary review process.

Measure 49 allows a claimant to establish the number of lots, parcels and dwellings that would have been lawfully permitted at the time the claimant acquired the property. The claimants would not lawfully have been permitted a use that could have potentially been approved, and only following a fact-specific, discretionary evaluation that, in fact, did not occur.

II. COMMENTS ON THE PRELIMINARY EVALUATION

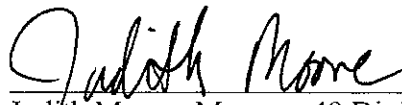
The department issued its Preliminary Evaluation for this claim on April 8, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. As discussed above, the claimant submitted comments, which have been considered and taken into account by the department in the issuance of this Final Order of Denial.

III. CONCLUSION

Based on the analysis above, the claimants, Victor and Marianne Kaczynski, do not qualify for any Measure 49 home site approvals because the claimants were not lawfully permitted to establish the requested lots, parcels or dwellings on the claimants' date of acquisition and no land use regulation currently prohibits the claimants from establishing a dwelling on the existing lot or parcel.

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 30TH day of September 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.