



**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:

E130451¹

CLAIMANT:

James McCormack
64631 Alder Slope Road
Enterprise, OR 97828

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 2S, Range 44E, Section 9
Tax lot 2100
Wallowa County

The claimant, James McCormack, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on October 27, 2006, for property located at 82029 Black Marble Lane, near Enterprise, in Wallowa 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 has 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.

I. ANALYSIS OF CLAIM

A. Maximum Number of Home Sites for Which the Claimant 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 62 home sites. Therefore, the claimant may qualify for a maximum of three home site approvals under Section 6 of Measure 49.

¹ The claimant also has claim E130450 for property that is not contiguous to tax lot 2100.

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, James McCormack, filed a Measure 37 claim, M130451, with the state on October 27, 2006. The claimant filed a Measure 37 claim, 2006-015, with Wallowa County on March 28, 2006. The state claim was filed prior to December 4, 2006.

The claimant timely filed a Measure 37 claim with both the state and Wallowa 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 claimant, James McCormack is the trustee of an irrevocable trust into which the Measure 37 property has been conveyed and, therefore, is an owner of the property under Measure 49.

Wallowa County has confirmed that the claimant is the current owner 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 Wallowa County, outside the urban growth boundary and outside the city limits of the nearest city, Enterprise.

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 Wallowa 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. In addition, counties may adopt minimum lot or parcel sizes greater than 80 acres. Wallowa County's EFU zone requires a minimum of 160 acres for the establishment of a dwelling on a lot or parcel.

The claimant's property consists of 156.40 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, it does not appear that the establishment of the three home sites 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

Wallowa County deed records indicate that the claimant acquired the property on February 4, 1989.²

On February 4, 1989, the Measure 37 claim property was subject to Wallowa County's acknowledged Exclusive Farm Use (EFU) zone. Wallowa County's EFU zone required 160 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimant's property consists of 156.40 acres, and is developed with one dwelling. Therefore, the claimant lawfully could not have established any additional home sites on his date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on December 28, 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 submitted comments asserting that his date of acquisition was not October 25, 2003, but rather the date on which the property was conveyed into a revocable trust of which he was the trustee: June 12, 1982. The department agrees that October 25, 2003 is not the claimant's acquisition date. Measure 49 defines "owner" as the trustee of a revocable trust of which the trustee is also a settlor, or the trustee of an irrevocable trust. Because the claimant was not a settlor of the trust in 1982, the claimant's ownership date under Measure 49 is February 4, 1989, the date the trust became irrevocable.

The claimant also submitted comments from his agent asserting that "whether the applicable acquisition date was in 1989 (when the trust became irrevocable) or 1981 (when [James McCormack] was conveyed fee title as trustee of the trust), the applicable date for the 160-acre minimum lot size was in 1995...". While the current version of the Wallowa County code was

² The Measure 37 waiver issued for this claim identified the claimant's acquisition date as June 12, 1982, the date the claim property was transferred into a revocable trust for the benefit of the trustor, Charles Guy McCormack, of which claimant was a trustee.

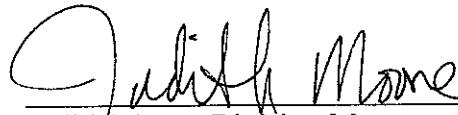
enacted in 1995 and does include a minimum lot size of 160 acres under the EFU zone, it does not follow that the EFU zone's 160-acre minimum lot size was not in effect prior to 1995. Information from Wallowa County indicates that the EFU zone has included a 160-acre minimum lot size since the acknowledgment of that zone on July 7, 1978.

III. CONCLUSION

Based on the analysis above, the claimant does not qualify for Measure 49 home site approvals 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 12 day of April 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.