

Department of Land Conservation and Development
635 Capitol St NE, Suite 150
Salem, OR 97301

CERTIFICATE OF SERVICE

For E130928 DILLAHAY, I certify that I served the attached FINAL
ORDER on the claimant(s), agent(s), and county as listed on the document,
and the attached FINAL ORDER on;

(See Attached List)

by mailing a full, true and correct copy of the corresponding document to the
person(s) listed above, on the date set forth below.

DATED this 2 day of May, 2011.

Name: 
Measure 49 Correspondence Specialist

NAME

ARTHUR C. DILLAHAY
ZACK P. MITTGE

ORGANIZATION

HUTCHINSON COX COONS DUPRII 200 FORUM BUILDING 777 HIGH S EUGENE, OR 97401
DOUGLAS COUNTY PLANNING JUSTICE BLDG RM 100

ADDRESS

950 HOOVER HILL RD

CITY_STATE_ZIP

WINSTON, OR 97496
ROSEBURG, OR 97470



**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 on Remand**

STATE ELECTION NUMBER: E130928

CLAIMANTS: Arthur C. and Monika Dillahay
950 Hoover Hill Road
Winston, OR 97496

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 28S, Range 7W, Section 35
Tax lot 300
Douglas County

**AGENT/
PRIMARY CONTACT INFORMATION:** Zack P. Mittge
Hutchinson, Cox, Coons, DuPriest, Orr &
Sherlock, PC
200 Forum Building
777 High Street
Eugene, OR 97401

The claimants, Arthur and Monika Dillahay, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 20, 2006, for property located at 950 Hoover Hill Road, near Winston, in Douglas 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 on remand 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. No waiver was issued for this claim. The Measure 37 claim filed with the state 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, Arthur and Monika Dillahay, filed a Measure 37 claim, M130928, with the state on November 20, 2006. The claimants filed a Measure 37 claim, M37-22, with Douglas County on April 25, 2006. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Douglas 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, Arthur and Monika Dillahay are the owners of fee title to the property as shown in the Douglas County deed records and, therefore, are owners of the property under Measure 49.

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

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 entire claim property consists of one tax lot on 51.55 acres.

Approximately 6 acres of the property are located north of Hoover Hill Road and currently zoned Exclusive Farm Use – Grazing (FG) by Douglas 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.

Approximately 45 acres of the property are located south of Hoover Hill Road and currently zoned Farm Forest (FF) by Douglas County, in accordance with Goals 3 and 4, as implemented by OAR 660-006-0050. State land use regulations, including applicable provisions of ORS chapter 215 and OAR 660, divisions 6 and 33, generally prohibit the establishment of a lot or parcel less than 80 acres in size in a mixed farm/forest zone and regulate the establishment of dwellings on new or existing lots or parcels.

Based on the property’s current zoning, the claimants are prohibited 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

BACKGROUND

Douglas County deed records indicate that the claimants acquired the property on December 17, 1992. As it is now, on December 17, 1992, the northern, 6-acre portion of the Measure 37 claim property was subject to Douglas County's acknowledged Exclusive Farm Use – Grazing (FG) zone, and the southern 45 acre portion was subject to Douglas County's acknowledged Farm Forest (FF) zone. At that time, the minimum parcel size in Douglas County's FF zone required 200 acres and the FG zone required 80 acres for the creation of a new lot or parcel on which a dwelling could be established.¹ Both zones included provisions through which applicants could submit conditional use applications to the county to authorize division and development on parcels less than the minimum parcel size.

Under Section 6 of Measure 49, a claimant is authorized for up to three homesites if the claimant was "lawfully permitted" to establish that use when the claimant acquired the property. The

¹ In the original final order on this claim, the department incorrectly stated that in 1992 both the FF and FG zones required a minimum of 75 acres for the creation of a new parcel.

department has concluded that a use is not lawfully permitted for purposes of Measure 49 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 evidence that the claimant could have met the standards under such a review process. In other words, Measure 49 provides relief when the claim includes evidence when they acquired the property the claimants lawfully could have obtained approval to establish the use. Conversely, if they were not lawfully permitted to establish the use when they acquired the property, Measure 49 does not allow them to establish that use now.

In this claim, the claimants provided no evidence that, when they acquired the property in 1992, they could have satisfied all of standards under any one of the conditional uses provided for in the applicable local ordinances for approval of a partition and development of any additional parcels and dwellings on the property. Accordingly, on supplemental review the department concluded that when they acquired the property, the claimants could not lawfully have established any additional dwellings on the claimants' 51.55-acre property, which is currently developed with one dwelling.

Following denial of the claim, the claimants challenged the department's determination through a petition for review in Douglas County Circuit Court. The court found that the department did not adequately articulate its evaluation of the evidence in the record. The judgment remanded the order to the department "for further review and a determination of the Petitioners' claim based upon substantial evidence in the agency record supported by substantial reasoning."

As described above and in the department's original order, when the claimants acquired the property it was split zoned FF and FG and the zoning remains the same. As the court's decision explains:

"At the time of acquisition, the Douglas County Comprehensive Plan revised in May, 29, 1991 had as its main goal to preserve and maintain agricultural lands. The objective of the Plan's Resource Management was to protect agricultural lands from nonfarm encroachments and promote and encourage agricultural activities on designated Agriculture lands. The objective of the Plan's Land Use was to minimize conflicts between agricultural and non-agricultural uses. * * * In DCLD's [Douglas County Land Use and Development] 1991 Ordinance, Article 5, (FF), Section 3.5.200 lists the Property Development Standards for Farm Forest lands. In Section 3.5.200, Subsection 1a. lists the minimum lot or parcel size as 200 acres. However, Subsection 1b. lists three exceptions that may apply, reducing the minimum lot or parcel size below 200 acres when approved through listed Administrative Action processes. The exceptions include lots or parcels between 75 and 200 acres, lots or parcels below 75 acres, and lots or parcel size for nonfarm related dwellings approved through the Administrative Action process while ensuring that adequate sanitation facilities, may be accommodated, that negative impacts to surrounding agricultural lands are minimized and is consistent with the Agricultural Land Use Policies of the Comprehensive Plan.

APPLICABLE APPROVAL CRITERIA IN 1992

Approximately 45 acres of the 51.55-acre subject property are located in the FF zone. When the claimants acquired the property in 1992, it included less than the minimize parcel size of 200 acres, and included less than 75 acres, which was the minimum available under the first exception in Section 3.5.200 to the 200-acre minimize parcel size requirement (i.e., parcels between 75 and 200). Accordingly, at the time the claimants acquired the property, they would have been lawfully permitted to divide and further develop their property only upon establishing compliance with the following criteria through the county's conditional use process:

In 1992, Douglas County's land development ordinance, Section 3.5.200, Property Development Standards, contained the standards for the creation of a lot of parcel in the FF-zone:

1. Size – The creation of a lot or parcel shall be subject to the following:
 - a. The minimum lot or parcel size shall be 200 acres.
 - b. The following exceptions may apply:
 - (1) * * *
 - (2) Lot or parcel size may be reduced below 75 acres through the Administrative Action process contained in §2.060.4.h, subject to the provisions of Article 42 of this chapter, and the Agricultural Land Use Policies and Forest Land Policies of the Comprehensive Plan.
 - (3) Lot or parcel size for nonfarm related dwellings approved through the Administrative action process, §2.060.1.h may be established, ensuring that adequate sanitation facilities may be accommodated, that negative impacts to surrounding agricultural lands are minimized and is consistent with the Agricultural Land Use Policies of the Comprehensive Plan.

The remaining 6 acres of the property are zoned FG. The FG-zone had the same “exceptions” to the 200-acre minimum lot or parcel size except that, instead of a general reference to compliance with the Agricultural Land Use Policies and Forest Land Policies of the Comprehensive Plan, the provisions of Section 3.3.200(b)(2) and (3) required consistency with “Agricultural Land Use Interim Policy Implementation provision No 7.a and 7.c of the Comprehensive Plan.”

For the creation of lots or parcels of less than 75 acres, Section 2.060.4(h) required Planning Commission review and approval of land divisions in both the FG and FF zones, based on the criteria in Article 42. Article 42, at Section 3.42.100(4) contained the following criteria for approval for land divisions of less than 75 acres in the FF zone:

4. Land divisions proposed under this article for lands zoned FF and resulting in parcel size less than 75 acres, shall be processed pursuant to * * * 2.060.4.h.
 - a. A five year site development and management plan for permitted agricultural or timber uses shall accompany any request. Applications shall specify type and amounts of crops or animals, or both, to be raised. A Soil test for all croplands shall be made to verify suitability of the property for such crops.

- b. Proposed divisions shall conform to the following criteria:
- (1) The proposed division is compatible with farm or forest uses in the area, and does not interfere with farm or forest practices;
 - (2) The proposed division is consistent with the farm and forest use policies as provided for in the Comprehensive Plan;
 - (3) The proposed division does not materially alter the stability of the overall land use pattern in the area nor substantially add to the demand for increased use of road or other public facilities and services; and
 - (4) The proposed division provides for resultant parcels of sufficient size to ensure:
 - (a) That farm or forest uses will be the primary use on such lands;
 - (b) That nonfarm/nonforest uses (e.g., dwellings) are incidental to the primary use as an agricultural or forestry operation; and
 - (c) That farm or forest practices keep taking place.
 - (5) The Director may impose reasonable conditions on divisions of land under this article to ensure consistency and compatibility of the request with the Forest or Agricultural Lands Policies of the Douglas County Comprehensive Plan.
 - (6) Prior to action on a land division under this article, the Director shall seek expert review and comment on the application and site development plan. Sources for the expert review include but are not limited to the OSU Extension Service, Soil Conservation Service, and State Department of Forestry. The evaluation reports of available experts shall be used by the Director in acting upon an administrative review of a division request.

Article 42, at Section 3.42.100(3), contained the following criteria for approval for land divisions in the FG zone of below 75 acres for agricultural grazing lands and below 20 acres for agricultural croplands, as follows:

3. Divisions of agricultural grazing lands below 75 acres and agricultural croplands below 20 acres, as provided by Agricultural Lands Interim Policy Implementation Statement No. 7 of the Comprehensive Plan, shall be processed pursuant to §2.060.4.h.

a. Following a quasi-judicial review, such divisions may be determined to create commercial agricultural entities when Findings are made that the resulting units of land:

- (1) Will be appropriate for the continuation of existing commercial agricultural enterprise in the area;
 - (2) Will contribute in a substantial way to the existing agricultural economy; and
 - (3) Will help maintain agricultural processors and established farm markets;
- or one of the following conditions exist:

- (4) The division is necessary in order to establish labor-intensive agricultural activity meeting the definition of Farm Use in ORS 215.203(2) and the criteria of (1) – (3) of this section.
- (5) The division is required to obtain financing for construction of housing to be occupied by persons necessary for and engaged in the operation of the farm.
- (6) The division is necessary in order to secure a real estate loan under the Farm Storage Facility Loan Program administered by the United States Department of Agriculture Stabilization and Conservation Service.

b. In the review of such divisions, the following factors may be considered in the development of the required findings:

- (1) Farm or Forest Management Plan;
- (2) Existing commercial agricultural activity within the area;
- (3) Types of crops grown in the area, typical yields and market availability;
- (4) The area in which the agricultural activity is conducted;
- (5) Soil Conservation Service Soil Capability Classification and soil type;
- (6) Land use designations of the Comprehensive Plan Maps and other relevant information from the Agricultural Element of the Comprehensive Plan; and
- (7) The average commercial farm unit size within the area relative to crops and yields typical to the area and land use patterns in the area of the proposed division.

As stated above, for non-farm dwellings in the FF-zone, Section 3.5.200(b)(3) of the county code in effect in 1992 allowed divisions for those dwellings subject to compliance with statutory, comprehensive plan and code criteria. As they are today, divisions in the FG zone were subject to the same provisions, with the addition of a specific reference to “Interim Policy Implementation No.7.d of the Comprehensive Plan, which provided:

“Divisions of agricultural lands for non-farm uses shall be consistent with all existing ordinances and the following criteria:

- (1) Any residential use which might occur on a proposed parcel will not seriously interfere with usual farm practices on adjacent agricultural lands.
- (2) The creation of any new parcels and subsequent development of any residential use upon them will not materially alter the stability of the area’s land use pattern.”

In addition to the specific comprehensive policy called out for the FG-zone, the Comprehensive Plan in effect in 1992 enumerated numerous Agricultural Land Use Policies, each of which were applicable to a request to site a non-farm dwelling on resource land, and each of them premised on the stated objective “to minimize conflicts between agricultural land nonagricultural uses.” As those policies specifically related to partitions for the siting of nonfarm dwellings, the implementation policies included:

- d. Divisions of agricultural lands for nonfarm uses shall be consistent with all existing ordinances and the following criteria:
- (1) Any residential use which might occur on a proposed parcel will not seriously interfere with usual farm practices on adjacent agricultural lands;
 - (2) The creation of any new parcels and subsequent development of any residential use upon them will not materially later the stability of the area's land use pattern.
 - (3) The proposed division or use of the proposed parcels will not eliminate or substantially reduce the commercial agricultural potential of the area nor be inconsistent with the Agricultural Policies of this Plan;
 - (4) Such divisions are consistent with the provisions of ORS 215.213(2) and (3), ORS 215.243 and ORS 215.263 as applicable.
- Or one or more of the following conditions apply:
- (5) The parcel to be created will be sold to an adjoining farm operate and such transaction does not result in the creation of an additional parcel or building site.
 - (6) The proposed division will create a separate parcel for a second dwelling which exists on the property, and creation of the parcel is consistent with criteria (1) through (4) listed above.
 - (7) The division clearly follows a physical feature which functionally divides and thus hinders normal farming activities, and creation of the parcel is consistent with criteria (1) through (4) listed above.

The applicable statutory provisions effecting effect in 1992 actually included 215.283 (3), ORS 215.243 and 215.263.² As it does today, ORS 215.243 established the state's agricultural land use policy; ORS 215.263 established the standards for review of land divisions in exclusive farm use zones and the criteria for approval. With regard to divisions of land for nonfarm dwellings, in 1992 ORS 215.263(4) provided:

"The governing body of a county may approve a division of land in an exclusive farm use zone for a dwelling not provided in conjunction with farm use only if the dwelling has been approved under ORS 215.213(3) and ORS 215.283(3), whichever is applicable.

ORS 215.283(3) provided:

"Subject to ORS 215.288, single-family residential dwellings, not provided in conjunction with farm use, may be established, subject to approval of the governing body or its designate in any area zoned for exclusive farm use upon a finding that each such proposed dwelling:

- (a) is compatible with farm uses described in ORS 215.203(2) and is consistent with the intent and purposes set forth in ORS 215.243;
- (b) Does not interfere seriously with accepted farming practices, as defined in ORS 215.203(2)(c), on adjacent lands devoted to farm use;

² The comprehensive plan referenced ORS 215.213(2) and (3). However, in 1992, ORS 215.213(2) applied only to counties that had adopted "marginal lands" criteria. "Non-marginal lands" counties were subject to the provisions of ORS 215.283(3).

- (c) Does not materially alter the stability of the overall land use pattern of the area;
- (d) is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract;
- (e) Complies with other conditions as the governing body or its designate considers necessary.

APPLICATION OF CRITERIA TO SUPPLEMENTAL REVIEW REQUESTS

To be lawfully permitted to divide the 51.55-acre EFU-zoned property into even smaller parcels for additional dwellings when the claimants acquired the property in 1992, they would have had to apply to the county for approval for either a farm-use related partition or for a partition for non-farm dwellings. As explained in the original order and above, these processes involved a high degree of discretion and required compliance with numerous factual criteria; the fact that the processes were available was not an indication of whether an applicant could comply with the criteria, all of which were premised on the stated objective to preserve the agricultural use of the area. The record of this claim does not establish compliance with each of the approval criteria for the claimants' requested three lot division for either farm or non-farm related parcels on the 51.55-acre parcel.

SECTION 3.5.200(B)(2) (FF-ZONE) AND SECTION 3.3.200(B)(2) (FG-ZONE): Farm Divisions/Dwellings

The claimants first assert they would have been lawfully permitted to establish a three lot partition and farm-related dwellings under the provisions for small lot commercial farm or forest use. The department makes the following findings and conclusions and determines that claimants have failed to establish that they lawfully were permitted to establish three lots of less than the minimum lot size to be developed with farm-related dwellings.

The claim includes claimants' county Measure 37 waiver. The waiver is not evidence of compliance with any of the approval criteria in effect in 1992. The waiver only waived the land use regulations enacted or adopted by the county after the claimants acquired the property, and allowed the claimants to apply for a use under the discretionary criteria in effect when the claimants acquired the property. Specifically, the waiver states that it "entitles you to apply for division and dwellings under standards that applied in 1992. Review in 1992 was discretionary *and could have resulted in an approval or denial*" (emphasis added).

The department finds no evidence in the claim that supports the claimants' contention that they did or could have complied with any of the 1992 approval criteria for approval of a small lot commercial agricultural or forest use in the FF-zoned portion of the property under the following standards:

- a. A five year site development and management plan for permitted agricultural or timber uses shall accompany any request. Applications shall**

specify type and amounts of crops or animals, or both, to be raised. A Soil test for all croplands shall be made to verify suitability of the property for such crops.

The claim includes no evidence of a five year site development and management plan for permitted agricultural or timber uses. The claimants did not include any evidence of the types and amounts of crops or animals to be raised with a soils test to verify the suitability of the property for particular crops in 1992. Without any evidence of a site development or management plan with those required elements, the claimants have not established that, in 1992, they did or could have meet this threshold requirement that would have been necessary for them to obtain approval of a conditional use permit for any additional farm-related parcels and dwellings.

b. Proposed divisions shall conform to the following criteria:

(1) The proposed division is compatible with farm or forest uses in the area, and does not interfere with farm or forest practices;

The claim does not include any documentation or discussion regarding the farm or forest uses in the area in 1992. Without such baseline information, the claim fails to establish that any partition of the property for any additional dwellings would not have interfered with practices in the area in 1992.

(2) The proposed division is consistent with the farm and forest use policies as provided for in the Comprehensive Plan;

The claim does not identify the relevant comprehensive plan policies or make any evidentiary showing of consistency with those policies.

(3) The proposed division does not materially alter the stability of the overall land use pattern in the area nor substantially add to the demand for increased use of road or other public facilities and services; and

The claim does not contain any evidence regarding the land use pattern in the area of the subject property in 1992. Nor does it include any evidence or evaluation of the effect of a partition and development on the demands for use of road or other public facilities and services in existence in 1992. Without that factual evidence, the claimants have not established compliance with this criterion.

(4) The proposed division provides for resultant parcels of sufficient size to ensure:

(a) That farm or forest uses will be the primary use on such lands;

(b) That nonfarm/nonforest uses (e.g., dwellings) are incidental to the primary use as an agricultural or forestry operation; and

(c) That farm or forest practices keep taking place.

The claim includes no evidence or evaluation of any proposed farm or forest use, and therefore what size was sufficient in 1992 to ensure the farm or forest use would be the primary use on the partitioned parcels, that dwellings would be incidental to that operation, or that, with the partition, the farm/forest practice would continue. Without that threshold evidence and evaluation, compliance with this criterion could not be evaluated.

(5) The Director may impose reasonable conditions on divisions of land under this article to ensure consistency and compatibility of the request with the Forest or Agricultural Lands Policies of the Douglas County Comprehensive Plan.

Because the claim does not include any evidence regarding compliance with the applicable comprehensive plan policies, no evaluation of how the partition and development would ensure consistency and compatibility with those policies is possible.

(6) Prior to action on a land division under this article, the Director shall seek expert review and comment on the application and site development plan. Sources for the expert review include but are not limited to the OSU Extension Service, Soil Conservation Service, and State Department of Forestry. The evaluation reports of available experts shall be used by the Director in acting upon an administrative review of a division request.

The claimants submitted into the record a Soil Conservation Service map for Douglas County. The map depicts the soils of the entire county, but does not include any evaluation of the subject property or any qualitative assessment of how the soils relate to compliance with the approval criteria for a three lot partition for farm related dwellings on the subject property. On its face, the map does not provide the necessary review and comment to allow a determination of the soils in relation to partition and development of the property. In fact, the argument provided regarding the soils conservation map indicates that map was provided to support an argument that some of the soils *do not support continuation of the farm use* on the property (see discussion below at pp 17-18).

The claim also contains no evidence that the claimants could have complied with any of the 1992 standards for approval of a partition of less than 20 acres of agricultural cropland in the FG-zoned portion of the property:

Following a quasi-judicial review, such divisions may be determined to create commercial agricultural entities when Findings are made that the resulting units of land:

- (1) Will be appropriate for the continuation of existing commercial agricultural enterprise in the area;**
- (2) Will contribute in a substantial way to the existing agricultural economy; and**

- (3) Will help maintain agricultural processors and established farm markets;**
- or one of the following conditions exist:**
- (4) The division is necessary in order to establish labor-intensive agricultural activity meeting the definition of Farm Use in ORS 215.203(2) and the criteria of (1) – (3) of this section.**
- (5) The division is required to obtain financing for construction of housing to be occupied by persons necessary for and engaged in the operation of the farm.**
- (6) The division is necessary in order to secure a real estate loan under the Farm Storage Facility Loan Program administered by the United States Department of Agriculture Stabilization and Conservation Service.**

The claim includes no factual evidence regarding the commercial agricultural enterprises in the area in 1992. Without that evidence, whether a partition would be appropriate for the continuation of that enterprise can not be evaluated. Nor does the claim include any evidence as to how the partition would contribute to the existing agricultural economy or to help maintain agricultural processes and established farm markets. It also does not purport to establish that in 1992 such a division was necessary to establish labor intensive agricultural activities or was necessary to obtain financing for construction of housing for persons necessary for and engaged in the operation of the farm; or was necessary to secure a loan. In short, the department finds that the claim lacks any evidence that, had the claimants applied for such a partition in 1992, they would have satisfied the mandatory approval criteria.

b. In the review of such divisions, the following factors may be considered in the development of the required findings:

- (1) Farm or Forest Management Plan;**
- (2) Existing commercial agricultural activity within the area;**
- (3) Types of crops grown in the area, typical yields and market availability;**
- (4) The area in which the agricultural activity is conducted;**
- (5) Soil Conservation Service Soil Capability Classification and soil type;**
- (6) Land use designations of the Comprehensive Plan Maps and other relevant information from the Agricultural Element of the Comprehensive Plan; and**
- (7) The average commercial farm unit size within the area relative to crops and yields typical to the area and land use patterns in the area of the proposed division.**

As discussed above with regard to the criteria for approval of a partition in the FF-zone, the claim included no evidence regarding any of the seven factors. Without any evidence, the department finds claimants have not established that, when they acquired the property in 1992, they were lawfully permitted to divide the property for additional farm-related dwellings.

**SECTION 3.5.200(B)(3) (FF ZONE) AND SECTION 3.3.200(B)(3) (FG ZONE):
NON-FARM DIVISIONS/DWELLINGS**

In the alternative, the claimants argue they qualified for a three lot partition to allow three non-farm dwellings when they acquired the 51.55-acre resource property in 1992. The department makes the following findings and conclusions and determines that claimants have failed to establish that they lawfully were permitted to divide that resource property into three parcels for non-farm dwellings.

As they are today, under the applicable statutory and code provisions in 1992, non-farm dwellings were an exception to the state's policy to preserve resource property for resource uses. As the Court of Appeals recognized in 1987, with regard to standards substantially similar to those in effect in Douglas County in 1992, "[t]he legislature has imposed substantial restrictions of the construction of non-farm dwellings in EFU zones. See ORS 215.213 (3); ORS 215.283 (3). The clear intent is that non-farm dwellings be the exception and that approval of them be difficult to obtain." *Cherry Lane, Inc. v. Jackson County*, 84 Or App 196, 199 fn 3 (1987). In this claim, the claimants did not provide the requisite evidentiary basis to establish compliance with each of the approval criteria for a three lot partition of the 51.55 acre parcel for nonfarm dwellings. Specifically, the claim does not establish compliance with any of the following criteria applicable to divisions for non-farm related dwellings in the FF-zone:

(3) Lot or parcel size for non-farm related dwellings approved through the Administrative Action process, §2.060.1.h may be established, ensuring that adequate sanitation facilities may be accommodated, that negative impacts to surrounding agricultural lands are minimized, and is consistent with the Agricultural Land Use Policies of the Comprehensive Plan."

In response to the preliminary evaluation, the claimant's attorney asserted in a footnote that "[t]he Dillahay property contains sufficient area to locate adequate sanitation facilities without adverse impacts on surrounding properties." The claim, however, includes no indication of whether the claimants could have satisfied this standard in 1992, and no evidence to support this conclusion. The attorney's opinion that the property has "sufficient" area is not evidence. Further, without a factual evaluation of the surrounding properties as they existed in 1992, there is no evidentiary basis for the conclusion that a non-farm division and development of non-farm dwellings on the property would not have negative impacts on the surrounding agricultural lands.

Under the standards in effect in 1992, assessment of impacts to surrounding agricultural properties required a specific, factual evaluation of the surrounding agricultural lands.³ The claim does not include that required factual evaluation. In response to the preliminary evaluation, the claimants' attorney included in a footnote, a statement regarding the current nature of surrounding property. He opined that "the non-farm dwellings would certainly not materially alter the overall land use pattern of small lot residential development in the area." That conclusion is not supported by factual evidence regarding surrounding agricultural lands,

³ See, for example, *Sweeten v. Clackamas County*, 17 Or LUBA 1234 (1989); *Blosser v. Yamhill County*, 18 Or LUBA 253 (1989); *Stefan v. Yamhill County*, 18 Or LUBA 820 (1990), all of which describe the heavy evidentiary burden and factual evaluation necessary to justify approval of a non-farm dwelling in an EFU zone.

and in any event does not provide any description or evaluation of the property in 1992. Such a factual foundation is critical to determine whether the claimants could have complied with all the criteria for approval of non-farm dwellings, and a three lot partition to accommodate those dwellings, on the 51-acre EFU-zoned property in 1992.

The Comprehensive Plan Agricultural Land Use Policies applicable to non-farm dwelling requests in 1992, all premised on the stated objective “to minimize conflicts between agricultural land nonagricultural uses” required findings that:

- e. Divisions of agricultural lands for nonfarm uses shall be consistent with all existing ordinances and the following criteria:**
 - (8) Any residential use which might occur on a proposed parcel will not seriously interfere with usual farm practices on adjacent agricultural lands;**
 - (9) The creation of any new parcels and subsequent development of any residential use upon them will not materially alter the stability of the area’s land use pattern.**
 - (10) The proposed division or use of the proposed parcels will not eliminate or substantially reduce the commercial agricultural potential of the area nor be inconsistent with the Agricultural Policies of this Plan;**
 - (11) Such divisions are consistent with the provisions of ORS 215.213(2) and (3) [ORS 215.283(3) in 1992], ORS 215.243 and ORS 215.263 as applicable.**
 - Or one or more of the following conditions apply:**
 - (12) The parcel to be created will be sold to an adjoining farm operate and such transaction does not result in the creation of an additional parcel or building site.**
 - (13) The proposed division will create a separate parcel for a second dwelling which exists on the property, and creation of the parcel is consistent with criteria (1) through (4) listed above.**
 - (14) The division clearly follows a physical feature which functionally divides and thus hinders normal farming activities, and creation of the parcel is consistent with criteria (1) through (4) listed above.**

Divisions in the FG zone were subject to the same provisions, with the addition of a specific reference to “Interim Policy Implementation No.7.d of the Comprehensive Plan.” That policy provided:

- “Divisions of agricultural lands for non-farm uses shall be consistent with all existing ordinances and the following criteria:**
 - (3) Any residential use which might occur on a proposed parcel will not seriously interfere with usual farm practices on adjacent agricultural lands.**
 - (4) The creation of any new parcels and subsequent development of any residential use upon them will not materially alter the stability of the area’s land use pattern.”**

The claim does not provide the factual evidence necessary to establish compliance with any of these criteria. Without any evidence of the “usual farm practices on adjacent agricultural lands” the claimants have not established that the proposed non-farm dwellings would not “seriously interfere with the usual farm practices on adjacent agricultural lands.” Without any evidence of the land use pattern of the area, the claimants have not satisfied the requirement that the division and development would not materially alter the stability of the overall land use pattern of the area.⁴ Without any evidence of the commercial agricultural potential of the area, or the other requirements of the comprehensive plan policies in effect in 1992, the claimants have not established that a three lot partition for non-farm dwellings would not eliminate or substantially reduce the commercial agricultural potential of the area, or that it would not be inconsistent with the plan’s Agricultural Policies.

The claimants’ attorney provided testimony in response to the preliminary evaluation that because the statutory requirements in effect in 1992 did not include a minimum lot size requirement for nonfarm dwellings, the three lot partition for three non-farm dwellings on the 51.55-acre property then in farm use, complied with the statutory requirements. However, without any factual evidence of how conversion of 51.55-acres of farm land complied with ORS 215.283, ORS 215.243 and ORS 215.263, the fact that those statutes did not in 1992 (and do not today) include minimum parcel sizes for non-farm dwellings, is not evidence that the claimants’ conversion of the resource land for the use of non-farm dwellings satisfied those statutory requirements. In fact, the statutory provisions reflect the established policy to preserve agricultural land for agricultural uses and to limit non-farm uses.

Under ORS 215.263 (1991 edition), a partition of EFU-zoned land for non-farm use could only be evaluated and approved after the county determined that the non-farm dwelling satisfied all of the applicable criteria. *See Cherry Lane*, 84 Or App at 199, fn 3 (Under ORS 215.263(4) “[o]nly after the county is convinced that a particular proposed non-farm dwelling would be proper may it approve a partition of EFU land to accommodate the dwelling.”).

In 1992 in Douglas County, ORS 215.283(3) allowed counties to approve non-farm dwellings only upon compliance as follows:

Subject to ORS 215.288, single-family residential dwellings, not provided in conjunction with farm use, may be established, subject to approval of the governing body or its designate in any area zoned for exclusive farm use upon a finding that each such proposed dwelling:

(a) is compatible with farm uses described in ORS 215.203(2) and is consistent with the intent and purposes set forth in ORS 215.243;

⁴ *In Sweeten v. Clackamas County*, 17 Or LUBA at 1245-1246, LUBA set out the following three-step inquiry the county was required following in order to determine whether a nonfarm dwelling would materially alter the stability of the overall land use pattern of an area:

“First, the county must select an area for consideration. * * * Second, the county must examine the types of uses existing in the selected area. * * * Third, the county must determine that the proposed nonfarm dwelling will not materially alter the stability of the existing uses in the selected area.”

- (b) Does not interfere seriously with accepted farming practices, as defined in ORS 215.203(2)(c), on adjacent lands devoted to farm use;**
- (c) Does not materially alter the stability of the overall land use pattern of the area;**
- (d) is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract;**
- (e) Complies with other conditions as the governing body or its designate considers necessary.**

The claim does not include evidence demonstrating how division of the 51-acre EFU-zoned property into three parcels for non-farm dwellings is compatible with the farm uses described in ORS 215.203(2), or that conversion to non-farm use would not interfere seriously with accepted farming practices on adjacent lands.⁵ Nor is there any explanation of how such non-farm dwellings would be consistent with the intent and purposes of the state's agricultural land use policy set forth in ORS 215.243.⁶ As described above, the claim also lacks any evidence showing that such a division for non-farm dwellings would not materially alter the stability of the overall land use pattern of the area.

The only document that could be construed to be factual evidence related to the claim, the NRSC County Soil Survey, is not evidence of compliance with any of these mandatory approval criteria. The claimants' attorney submitted this survey in response to the preliminary evaluation, and in the petition for judicial review of the agency's final order, he explained how the information in that survey related to the soils on portions of the claimants' property. The attorney's conclusion that the NRCS survey depicts that some of the soils on the 51.55-acre

⁵ ORS 215.203(2)(a) (1991 edition) described farm use as "The current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops for the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry, or any combination thereof. "Farm use" includes the preparation and storage of the products raised on such land for human use and animal use and disposal by marketing or otherwise. "Farm use" also includes the propagation, cultivation, maintenance and harvesting of aquatic species."

ORS 215.203(2)(c) (1991 edition) described "accepted farming practices" as "a mode of operation that is common to farms of a similar nature, necessary for the operation of such farms to obtain a profit in money, and customarily utilized in conjunction with farm use."

⁶ ORS 215.243 (1991 edition), the state's agricultural land use policy, states:

- (1) Open land used for agricultural use is an efficient means of conserving natural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state, whether living in rural, urban or metropolitan areas of the state.
- (2) The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation.
- (3) Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.
- (4) Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones."

property are better suited for non-farm development is not a basis upon which the department could determine that in 1992 the claimants were lawfully permitted to partition the property into three parcels for non-farm dwellings. The soils survey does not establish that those portions of the property with “inferior” soils could not lawfully be put to farm use. More importantly, the law in 1992 (and today) required the county to consider the entire tract of land to determine whether it was “unsuitable for farm use.” *Smith v. Clackamas County*, 313 Or 519 (1992). It could not divide a tract of property by concluding that some soils on some portions of the property were not suitable for farm use.⁷

The department finds that the NRCS map is not evidence that in 1992 the claimants were lawfully permitted to partition the EFU-zoned farm into three parcels for non-farm dwellings, and that the claimants have not otherwise established compliance with each of the approval criteria to justify converting the farm property to non-farm use.

II. CONCLUSION


The fact that a process was available through which an property owner could apply to the county for review of an application for a partition to create a parcel of less than the minimum lot size for farm related or non-farm dwellings, does not alone establish that a claimant was lawfully permitted to establish that use. In 1992 and today approval of substandard parcels and additional dwellings on resource land was and is the “exception.” Absent specific evidence of how partition and development would satisfy each of mandatory approval criteria, the claimants have failed to demonstrate that they were lawfully permitted to divide their farm into three home sites on their acquisition date.

Based on the analysis herein, the claimants do not qualify for Measure 49 home site approvals because the claimants were not lawfully permitted to establish the additional lots, parcels or dwellings on the claimants’ date of acquisition.

⁷ The Supreme Court explained in that case that “[e]ach proposed dwelling is subject to approval of the local decision-making body, approval that must be based on findings specific to that particular proposed use. Required findings include that the dwelling: is compatible farm uses; is consistent with the intent and purposes set forth in ORS 215.243; does not interfere seriously with farming practices on adjacent lands; and does not materially alter the stability of the overall land use pattern of the area. All of those findings look to the surrounding land, not just the smaller area designated by its owner for a proposed change in use. * * * The decision-making county must find in each case that a proposed non-farm dwelling is consistent with the state land use policy set forth in ORS 215.243 to preserve large blocks of agricultural land even though that substantially limits alternative uses.” *Smith v. Clackamas County*, 313 Or at 527.

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:



Jerry Lidz, Director
Dept. of Land Conservation and Development
Dated this 2 day of May 2011.

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.