



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:

E131102

CLAIMANTS:

Richard and Kayleene Ball
29020 Berlin Road
Sweet Home, OR 97386

MEASURE 37 PROPERTY
IDENTIFICATION:

Township 13S, Range 1W, Section 13
Tax lot 113
Linn County

The claimants, Richard and Kayleene Ball, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 22, 2006, for property located at 29020 Berlin Road, near Sweet Home, in Linn 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 two home site approvals in the election material. The Measure 37 waiver issued for this claim describes two home sites. Therefore, the claimants may qualify for a maximum of two 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, Richard and Kayleene Ball, filed a Measure 37 claim, M131102, with the state on November 22, 2006. The claimants filed a Measure 37 claim, M37-179-06, with Linn County on November 21, 2006. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Linn 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, Richard and Kayleene Ball are the owners of fee title to the property as shown in the Linn County deed records and, therefore, are owners of the property under Measure 49.

Linn 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 Linn County, outside the urban growth boundary and outside the city limits of the nearest city, Sweet Home.

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 Farm/Forest (F/F) by Linn 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.

The claimants' property consists of 5.09 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the two 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 two 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

Linn County deed records indicate that claimant Richard Ball acquired the property on August 9, 1977, and claimant Kayleene Ball acquired the property on June 7, 1996. Therefore, for purposes of Measure 49, the claimants' acquisition date is August 9, 1977.

The claimants acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Linn 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 Agriculture, Residential and Timber Use (ART-5) by Linn County. Linn County's ART-5 zone included a fixed minimum acreage standard of five acres. However, the Commission had not acknowledged that zone for compliance with the goals when the claimants acquired the property on August 9, 1977. Accordingly, the statewide planning goals, and in particular Goals 3 and 4 and ORS chapter 215 applied directly to the Measure 37 claim property when the claimants acquired it.

On July 18, 1985, the Commission acknowledged the application of Linn County's Farm/Forest (F/F) zone to the Measure 37 claim property. The Commission's acknowledgement of Linn County's F/F zone confirmed that zone's compliance with Goals 3 and 4 and ORS chapter 215. The Linn County F/F zone required 40 acres for the creation of a new lot or parcel on which a dwelling could be established.¹ The claimants' property consists of 5.09 acres, and is developed with one dwelling. Therefore on the claimants' acquisition date, they could not have established any additional 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 (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, including existing development. Those amendments provide, in relevant part, that subject to consistency with local land use regulations in effect when they acquired the Measure

¹ While the F/F zone did not generally have a specific minimum lot size, the zone did specify a minimum acreage requirement of 40 acres for the development of a farm or forest dwelling on a lot or parcel.

37 claim property, claimants whose property consists of less than 20 acres were lawfully permitted to establish one home site, including existing development.

The Measure 37 claim property consists of 5.09 acres and is developed with one dwelling. Therefore, based on the analysis under SB 1049 (2010), it appears that the claimants do not qualify for any additional home sites under Measure 49.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on March 10, 2010. 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. Specifically, claimant Richard Ball submitted comments questioning the department's conclusion that under SB 1049 (2010) he is not entitled to an additional home site on his 5.09-acre property, after he was granted a waiver under Measure 37.

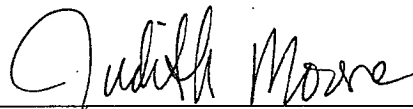
Under Measure 37, the claimants were granted a waiver of the regulations that were enacted or adopted after they acquired the property, to allow them to apply to the county for approval of a use that was allowed at the time they acquired the property. That waiver itself did not authorize or approve any development. As explained above, under Section 6 of Measure 49, claimants are entitled to up to three home sites but only to the extent the claimants were lawfully permitted to establish those home sites when they acquired the property. In this case, when the claimants acquired the subject property, it was zoned by ART-5 by Linn County, which generally required five acres for the creation of a new lot or parcel on which a dwelling could be established. However, because the county's ART-5 zone was not acknowledged when the claimants acquired the property, they were also required to comply with the statewide planning goals then in effect. As further explained above, because of uncertainty regarding the application of those goals, SB 1049 (2010) amended Measure 49 to define the number of home sites authorized, based on the acreage of the subject property. Under SB 1049 (2010), a claimant who owns less than 20 acres is entitled to one home site, including any development already on the property. The claimants' property consists of 5.09 acres, and is already developed with a dwelling. Therefore, under both the zoning in effect when they acquired the property and under SB 1049 (2010), the claimants are not lawfully permitted to establish any further development on the property.

III. CONCLUSION

Based on the analysis above, the claimants do not qualify for Measure 49 home site approvals because the claimants were not lawfully permitted to establish any additional lots, parcels or dwellings on the subject property 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 27th 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.