



OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT

ORS 195.300 to ORS 195.336 (MEASURE 49) SUPPLEMENTAL REVIEW
OF MEASURE 37 CLAIM
Amended Final Order of Denial

STATE ELECTION NUMBER:

E131266

CLAIMANTS:

Daniel B. and Kendra C. Cawley
5465 SW 149th Avenue
Beaverton, OR 97007

MEASURE 37 PROPERTY
IDENTIFICATION:

Township 3S, Range 3W, Section 22
Tax lot 809
Yamhill County

The claimants, Daniel and Kendra Cawley, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 27, 2006, for property located on Fairview Drive, near Dundee, in Yamhill 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 one home site approval in the election material. The Measure 37 waiver issued for this claim describes one home site. Therefore, the claimants may qualify for a maximum of one home site approval 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, Daniel and Kendra Cawley, filed a Measure 37 claim, M131266, with the state on November 27, 2006. The claimants filed a Measure 37 claim, M37-126-06, with Yamhill County before December 26, 2006. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Yamhill 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, Daniel and Kendra Cawley are the owners of fee title to the property as shown in the Yamhill County deed records and, therefore, are owners of the property under Measure 49.

Yamhill 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 Yamhill County, outside the urban growth boundary and outside the city limits of the nearest city, Dundee.

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 (EF-20) by Yamhill 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 (EFU). Applicable provisions of ORS chapter 215 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, provide standards for the establishment of a dwelling in an EFU zone. In general and subject to some exceptions, those standards require that the property be a minimum of 80 acres in size in an EFU zone and generate a minimum annual income from the sale of farm products.

The combined effect of the standards for the establishment of a dwelling in an EFU zone is to prohibit the claimants from establishing a dwelling on the Measure 37 claim property.

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 one home site 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

Yamhill County deed records indicate that the claimants acquired the property on April 13, 1988.

On April 13, 1988, the Measure 37 claim property was subject to Yamhill County's acknowledged Exclusive Farm Use (EF-40).¹ Yamhill County's EF-40 zone required at least 40 acres for the establishment of a new lot or parcel for the placement of a dwelling. It also included a discretionary process (Section 402.06) through which a dwelling could be approved on a smaller lot or parcel, subject to compliance with specified discretionary criteria and subject to approval of a farm management plan. The Measure 37 claim property consists of 8.72 acres, and there is no evidence in the record that establishes that the claimants qualified for a dwelling based on the standards in effect in 1988.

Measure 49, Section 6(6)(f) requires that "[o]n 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 this section." This requirement does not reinstate a historic process whereby claimants could prospectively apply to become permitted to establish one or more dwellings. Rather, to establish that a claimant "lawfully was permitted" requires that the use was outright permitted (i.e., without additional discretionary application process) or that there is evidence in the record that the claimant met the requirements at that time for approval using the process then in effect (prior to the imposition of more restrictive zoning). The claimants have not provided evidence into the record to establish that they met the requirements to qualify for a dwelling under the discretionary process in existence at that time.

Based on the evidence in the record the claimants lawfully could not have established a home site on the Measure 37 claim property on their date of acquisition.

¹ The county records reflect that the property may have also been partially in the Agriculture/Forestry Large Holding (AF-20) zone. However, the claimant's attorney disputes this designation.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on September 11, 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 Decision of Denial. As discussed above, the claimants submitted comments asserting that because they intend to develop and submit a farm management plan in the future, they would have been eligible to establish a dwelling on their property in 1988. However, the record does not establish that the claimants would have been lawfully permitted to establish a dwelling based on the standards in effect in 1988.

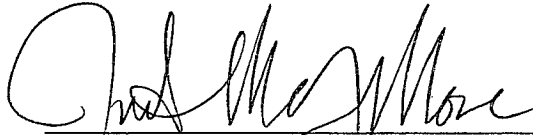
Following the issuance of the final order on this claim, the claimants' attorney submitted a request for reconsideration. The request for reconsideration takes issue with the zoning of the property at acquisition, asserting that it was fully zoned EF-40, rather than split-zoned AF-20 and EF-40. He also asserts that the EF-40 zone then in effect included a process for conditional approval of a dwelling on a lot or parcel less than 40 acres, and that, upon authorization from the department, the claimants would avail themselves of that historic process to apply to the county under the criteria then in effect, to prospectively become lawfully permitted to establish a dwelling. However, even assuming the property was fully zoned EF-40 when the claimants acquired it in 1988, Measure 49 does not re-establish the applicability of historic local processes. Measure 49 requires that a claimant lawfully was permitted to establish one or more dwellings at the time they acquired the property. The claimants in this case were not lawfully permitted to establish a dwelling as required under Section 6(6)(f) of Measure 49.

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 the dwellings on the claimants' date of acquisition.

IT IS HEREBY ORDERED that this Final Order of Denial is entered by the Director of the Department of Land Conservation and Development as a final order of the department and the Land Conservation and Development Commission under ORS 197.300 to ORS 195.336 and OAR 660-041-0000 to 660-041-0160.

FOR THE DEPARTMENT AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:



Judith Moore, Division Manager
Dept. of Land Conservation and Development
Dated this 24th day of March 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 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.