



OREGON DEPARTMENT OF LAND CONSERVATION AND  
DEVELOPMENT

ORS 195.300 to ORS 195.336 (MEASURE 49) SUPPLEMENTAL REVIEW  
OF MEASURE 37 CLAIM  
Final Order and Home Site Authorization

STATE ELECTION NUMBER:  
CLAIMANTS:

E131750A and E131752A<sup>1,2,3,4</sup>  
Morgan and Engle, Inc.  
3299 Doerner Cutoff Road  
Roseburg, OR 97470

Dwight C. and Valda C. Morgan  
3299 Doerner Cutoff Road  
Roseburg, OR 97470

MEASURE 37 PROPERTY  
IDENTIFICATION:

Township 27S, Range 7W  
Section 16, Tax lots 201, 202, 203, and 205  
Section 17, Tax lot 401  
Section 21, Tax lots 100, 101 and 102  
Douglas County

The claimants, Morgan and Engle, Inc. and Dwight and Valda Morgan, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 29, 2006, for property located near Roseburg, 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

<sup>1</sup> Claim E131750 has been divided into two claims because the claim includes multiple tax lots or parcels that are not in the same ownership. E131750A refers to tax lots 201, 202, 203, 401, 100, 101 and 102 and claimants Dwight Morgan, Valda Morgan, and Morgan and Engle, Inc. E131750B refers to tax lots 300 and 200 and claimants Dwight Morgan and Valda Morgan. A letter from Douglas County received in response to the preliminary evaluations for claims 131750A and 131750B indicates that the property in these two claims consists of two separate legal lots. In reliance on this information, the Department considers tax lots 201, 202, 203, 401, 101, 102, 205, 100 (section 21), and contiguous tax lot 100 (section 20), which is not claim property, as one legal parcel in this final order. Based on the County's comment, the department has re-assessed how the Measure 37 claim property must be split between claims 131750A and 131750B.

<sup>2</sup> Claim E131752 has been divided into two claims because the claim includes multiple tax lots or parcels that are not in the same ownership. E131752A refers to tax lot 205, and claimant Morgan and Engle, Inc. E131752B refers to tax lots 204, 202, 1303, 1304, 1305 and 3300 and claimants Dwight and Valda Morgan.

<sup>3</sup> Claims E131750A and E131752A have been combined into one claim because the properties are contiguous. Per OAR 660-041-0150 the Department of Land Conservation and Development will combine multiple claims into one claim if the Measure 37 claim property contains multiple contiguous lots or parcels that are in the same ownership.

<sup>4</sup> The claimant Morgan and Engle, Inc also has three claims, E131752B, E131751 and E131750B, for property that is not contiguous to tax lots 100 and 205.

allows the Department of Land Conservation and Development (the department) to authorize up to three home site approvals to qualified claimants.

This Final Order and Home Site Authorization 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 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 180 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 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 claimants, Morgan and Engle, Inc. and Dwight and Valda Morgan, filed Measure 37 claims, M131750 and M131752, with the state on November 29, 2006. The claimant filed Measure 37 claims, M37-179 and M37-180, with Douglas County on November 30, 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 deeds and trust documents submitted by the claimants, Dwight and Valda Morgan are the settlors of a revocable trust into which they conveyed tax lots 201, 202, 203, 401, 101 and 102 of the Measure 37 claim property and, therefore, are owners of the property under Measure 49.

Dwight and Valda Morgan have not established their ownership of tax lots 205 and 100 for the purposes of Measure 49, and are therefore not entitled to relief on this portion of the Measure 37 claim property.

According to the deeds submitted by the claimants, Morgan and Engle, Inc. is the owner of fee title to tax lots 205 and 100 of the Measure 37 claim property as shown in the Douglas County deed records and, therefore, is an owner of the property under Measure 49.

Morgan and Engle, Inc. has not established its ownership of tax lots tax lots 201, 202, 203, 401, 101 and 102 for the purposes of Measure 49, and are therefore not entitled to relief on this portion of the Measure 37 claim 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, Roseburg.

**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 - 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.

The claimants' property consists of 330.75 acres that make up a single tract. Therefore, state land use regulations prohibit the claimants 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 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**

Douglas County deed records indicate that claimant Dwight Morgan acquired tax lots 201 (17.88 acres), 202 (18.49 acres), 203 (2.97 acres), 401 (32.21 acres), 101 (21.97 acres) and 102 (147.23 acres) on November 27, 1990, and claimant Valda Morgan acquired tax lots 201, 202, 203, 401,

101 and 102 on April 21, 1992. Therefore, for purposes of Measure 49, the claimants Dwight and Valda Morgan's acquisition date of tax lots 201, 202, 203, 401, 101 and 102 is November 27, 1990.

Douglas County deed records indicate that the claimant Morgan and Engle, Inc. acquired tax lots 205 (34.4 acres) and 100 (55.60 acres) of the Measure 37 claim property on May 27, 1993.

On November 27, 1990, the Measure 37 claim property consisted of tax lots 201, 202, 203, 401, 101 and 102 and was subject to Douglas County's acknowledged Exclusive Farm Use - Grazing (FG) zone. Douglas County's FG zone required 200 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consists of 240.75 acres. Therefore, the claimants lawfully could have established one dwelling on tax lots 201, 202, 203, 401, 101 and 102 of the Measure 37 claim property.

On May 27, 1993, the entire Measure 37 claim property was subject to Douglas County's acknowledged Exclusive Farm Use - Grazing (FG) zone. Douglas County's FG zone required 200 acres for the creation of a new lot or parcel on which a dwelling could be established. The Measure 37 claim property subject to the FG zone consisted of 330.75 acres. Therefore, the claimants lawfully could have established up to one dwelling on tax lots 205 and 100 of the Measure 37 claim property on their date of acquisition.

## II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on January 26, 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 and Home Site Authorization.

Specifically, Douglas County submitted comments indicating that Measure 37 claim property analyzed in claims E 131750A and E 131750B are two legal lots. In reliance on this comment, the department has re-assessed how the Measure 37 property must be divided between claims 131750A and 131750B. Tax lots 201, 202, 203, 401, 101, 102, 205, and 100 (Section 21) of the Measure 37 claim property are addressed in this final order because Douglas County indicates they are one legal lot.

An agent for the claimants submitted a comment stating that Fred H. Engle and Dwight C. Morgan, who serve as the president and secretary of the claimant corporation, acquired the property at an earlier date, and that the department should rely on that earlier date as the claimant's date of acquisition. That a non-claimant member of a corporation's board may have owned the Measure 37 property at an earlier date does not affect a claimant's eligibility for relief under Measure 49. Morgan and Engle Inc. is separate and distinct legal entity from Fred H. Engle and Dwight C. Morgan. Therefore, the acquisition date for the claimant, Morgan and Engle Inc. is May 27, 1993.

The agent also asserts that the claimants could have established three dwellings on the Measure 37 claim property based upon numerous county ordinances in effect on the claimant's date of

acquisition. The ability to obtain additional lots or parcels under these provisions would have required county approval under a number of discretionary standards. Measure 49 allows a claimant to establish the number of lots, parcels and dwellings that would have been lawfully permitted at the time a claimant acquired the property. A use is not lawfully permitted when approval of the use on a claimant's acquisition date would have required a discretionary review process and the record for the claim does not include any evidence that the claimant did or could have met the standards under such a review process.

The agent also asserts that the claimant has a vested right to establish three dwellings on the property, which it considers as three separate lots of record. However, whether the claimant has a vested right to complete a non-conforming use cannot be addressed by the department in its supplemental review of a Measure 37 claim under Measure 49.

### **III. CONCLUSION**

Based on the analysis above, the claimants qualify for one home site on the Measure 37 claim property. However, this relief applies to Dwight and Valda Morgan only as to tax lots 201, 202, 203, 401, 101 and 102 and to Morgan and Engle, Inc. only as to tax lots 205 and 100.

The number of lots, parcels or dwellings that a claimant may establish pursuant to a home site authorization is reduced by the number of lots, parcels or dwellings currently in existence on the Measure 37 claim property and any contiguous property under the same ownership according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49.

Based on the documentation provided by the claimants and information from Douglas County, the Measure 37 claim property includes a portion of one lot or parcel and no dwellings. As demonstrated by information from Douglas County, the claimants Dwight and Valda Morgan also own tax lot 100 (T27S R7W S20) which is contiguous to the Measure 37 claim property. The contiguous property under the same ownership constitutes the remaining portion of the legal parcel analyzed in this claim and includes no dwellings. Together, the Measure 37 claim property and the contiguous property in the same ownership include one lot or parcel and no dwellings. Therefore, the one home site approval the claimants qualify for under Section 6 of Measure 49 will authorize the claimants to establish no additional lots or parcels and one dwelling on the Measure 37 claim property.

### **IV. HOME SITE AUTHORIZATION**

Based on the analysis set forth above, this claim is approved, and the claimants qualify for one home site approval. As explained in section III above, after taking into account the number of existing lots, parcels or dwellings, the claimants are authorized for no additional lots or parcels and one dwelling on the property on which the claimants are eligible for Measure 49 relief, subject to the following terms:

1. Each dwelling must be on a separate lot or parcel, and must be contained within the property on which the claimants are eligible for Measure 49 relief. The establishment of a land division or dwelling based on this home site authorization must comply with all applicable standards governing the siting or development of the land division or dwelling. However,

those standards must not be applied in a manner that prohibits the establishment of the land division or dwelling, unless the standards are reasonably necessary to avoid or abate a nuisance, to protect public health or safety, or to carry out federal law.

2. This home site authorization will not authorize the establishment of a land division or dwelling in violation of a land use regulation described in ORS 195.305(3) or in violation of any other law that is not a land use regulation as defined by ORS 195.300(14).
3. A claimant is not eligible for more than 20 home site approvals under Sections 5 to 11 of Measure 49 regardless of how many properties a claimant owns or how many claims a claimant filed. If the claimants have developed the limit of twenty home sites under Measure 49, the claimants are no longer eligible for the home site approvals that are the subject of this order.
4. The number of lots, parcels or dwellings a claimant may establish under this home site authorization is reduced by the number of lots, parcels and dwellings currently in existence on the Measure 37 claim property and contiguous property in the same ownership, regardless of whether evidence of their existence has been provided to the department. If, based on the information available to the department, the department has calculated the number of currently existing lots, parcels or dwellings to be either greater than or less than the number of lots, parcels or dwellings actually in existence on the Measure 37 claim property or contiguous property under the same ownership, then the number of additional lots, parcels or dwellings a claimant may establish pursuant to this home site authorization must be adjusted according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49. Statements in this final order regarding the number of lots, parcels or dwellings currently existing on the Measure 37 claim property and contiguous property are not a determination on the current legal status of those lots, parcels or dwellings.
5. Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimants may choose to convert any temporary dwelling currently located on the property on which the claimants are eligible for Measure 49 relief to an authorized home site pursuant to a home site approval. Otherwise, any temporary dwelling is subject to the terms of the local permit requirements under which it was approved, and is subject to removal at the end of the term for which it is allowed.
6. A home site approval only authorizes the establishment of a new lot, parcel or dwelling on the property on which the claimants are eligible for Measure 49 relief. No additional development is authorized on contiguous property for which no Measure 37 claim was filed or on Measure 37 claim property on which the claimants are not eligible for Measure 49 relief. A lot or parcel established pursuant to a home site approval must either be the site of a dwelling that is currently in existence or be the site of a dwelling that may be established pursuant to the home site approval.
7. The claimants may use a home site approval to convert a lot, parcel or dwelling currently located on the property on which the claimants are eligible for Measure 49 relief to an authorized home site. If the number of lots, parcels or dwellings existing on the property on

which the claimants are eligible for Measure 49 relief exceeds the number of home site approvals the claimants qualify for under a home site authorization, the claimants may select which existing lots, parcels or dwellings to convert to authorized home sites; or may reconfigure existing lots, parcels or dwellings so that the number is equivalent to the number of home site approvals.

8. The claimants may not implement the relief described in this Measure 49 home site authorization if a claimant has been determined to have a common law vested right to a use described in a Measure 37 waiver for the property. Therefore, if a claimant has been determined in a final judgment or final order that is not subject to further appeal to have a common law vested right as described in Section 5(3) of Measure 49 to any use on the Measure 37 claim property, then this Measure 49 Home Site Authorization is void. However, so long as no claimant has been determined in such a final judgment or final order to have a common law vested right to a use described in a Measure 37 waiver for the property, a use that has been completed on the property pursuant to a Measure 37 waiver may be converted to an authorized home site.
9. A home site approval does not authorize the establishment of a new dwelling on a lot or parcel that already contains one or more dwellings. The claimants may be required to alter the configuration of the lots or parcels currently in existence on the Measure 37 claim property and contiguous property so that each additional dwelling established on the property on which the claimants are eligible for Measure 49 relief, pursuant to this home site authorization, is sited on a separate lot or parcel.
10. Because the property is located in an exclusive farm use zone, the home site authorization does not authorize new lots or parcels that exceed five acres. However, existing or remnant lots or parcels may exceed five acres. Before beginning construction, the owner must comply with the requirements of ORS 215.293. Further, the home site authorization will not authorize new lots or parcels that exceed two acres if the new lots or parcels are located on high-value farmland, on high-value forestland or on land within a ground water restricted area. However, existing or remnant lots or parcels may exceed two acres.
11. Because the property is located in an exclusive farm use zone, Measure 49 requires new home sites to be clustered so as to maximize suitability of the remnant lot or parcel for farm or forest use. Further, if an owner of the property is authorized by other home site authorizations to subdivide, partition, or establish dwellings on other Measure 37 claim properties, Measure 49 authorizes the owner to cluster some or all of the authorized lots, parcels or dwellings that would otherwise be located on land in an exclusive farm use zone, a forest zone or a mixed farm and forest zone on a single Measure 37 claim property that is zoned residential use or is located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone but is less suitable for farm or forest use than the other Measure 37 claim properties.
12. If the claimants transferred ownership interest in the Measure 37 claim property prior to the date of this order, this order is rendered invalid and authorizes no home site approvals. Provided this order is valid when issued, a home site approval authorized under this order

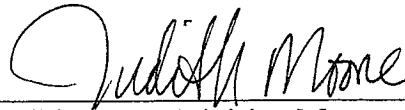


runs with the property and transfers with the property. A home site approval will not expire, except that if a claimant who received this home site authorization later conveys the property to a party other than the claimant's spouse or the trustee of a revocable trust in which the claimant is the settlor, the subsequent owner of the property must establish the authorized lots, parcels and dwellings within 10 years of the conveyance. A lot or parcel lawfully created based on this home site authorization will remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law. A dwelling lawfully created based on a home site approval is a permitted use.

13. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, this home site authorization will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the subject property imposed by private parties.

IT IS HEREBY ORDERED that this Final Order and Home Site Authorization 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 20<sup>th</sup> day of May 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.