



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: E131752B¹

CLAIMANT: Morgan & Engle, Inc.
3299 Doerner Cutoff Road
Roseburg, OR 97470

MEASURE 37 PROPERTY IDENTIFICATION: Township 27S, Range 7W²
Section 9, Tax lots 1303, 1304 and 1305
Section 10, Tax lot 3300
Section 15, Tax lot 202
Section 16, Tax lot 204
Douglas County

PRIMARY CONTACT INFORMATION: Dwight Morgan
3299 Doerner Cutoff Road
Roseburg, OR 97470

The claimant, Morgan & Engle, Inc., 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 claimant has elected supplemental review of its 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.

¹ Claim E131752 has been split into two claims, E131752A and E131752B, because the Measure 37 claim sought relief for non-contiguous parcels. Claim E131752A addresses the claimant's eligibility for Measure 49 relief on tax lot 205 and E131752B addresses its relief on tax lots 202, 204, 1303, 1304, 1305 and 3300.

² The claimant did not elect supplemental review under Measure 49 on tax lots 206, 207, 212 (T27S R7W S16) and tax lots 400, 402 and 403 (T27S R7W S17), which were included in its Measure 37 claim. Because the claimant did not elect on these tax lots, no relief will be provided under Measure 49.

I. ANALYSIS OF CLAIM

A. Maximum Number of Home Sites for Which the Claimant May Qualify

Under Section 6 of Measure 49, the number of home site approvals authorized by the department cannot exceed the lesser of the following: three; the number stated by the claimant in the election materials; or the number described in a Measure 37 waiver issued by the state, or if no waiver was issued, the number of home sites described in the Measure 37 claim filed with the state. The claimant has requested three home site approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes 95 home sites.³ Therefore, the claimant 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 claimant, Morgan & Engle, Inc., filed a Measure 37 claim, M131752, with the state on November 29, 2006. The claimant filed a Measure 37 claim, M37-180, with Douglas County on November 30, 2006. The state claim was filed prior to December 4, 2006.

The claimant 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."

³ The Measure 37 waiver described the property and provided relief for tax lots 202, 204, 206, 207, 212, 400, 402, 403, 1303, 1304, 1305 and 3300, which is the property addressed in this report, and tax lots 100 and 205, which is the property addressed in the companion report, E131752A.

Findings of Fact and Conclusions:

According to the deed submitted by the claimant, Morgan & Engle, Inc. is the owner of fee title to the property as shown in the Douglas County deed records and, therefore, is an owner of the property under Measure 49.

Douglas County has confirmed that the claimant is the current owner of the property.

3. All Owners of the Property Have Consented in Writing to the Claim

All owners of the property must consent to the claim in writing.

Findings of Fact and Conclusions:

All owners of the property have consented to the claim in writing.

4. The Property Is Located Entirely Outside Any Urban Growth Boundary and Entirely Outside the Boundaries of Any City

The Measure 37 claim property must be located entirely outside any urban growth boundary and entirely outside the boundaries of any city.

Findings of Fact and Conclusions:

The Measure 37 claim property is located in 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. Those provisions also regulate the establishment of dwellings on new or existing lots or parcels and include restrictions on establishing more than one dwelling on a single tract.

The claimant's property consists of 240 acres that make up a single tract. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the three home sites the claimant may qualify for under Section 6 of Measure 49.

6. The Establishment of the Lot, Parcel or Dwelling Is Not Prohibited by a Land Use Regulation Described in ORS 195.305(3)

ORS 195.305(3) exempts from claims under Measure 49 land use regulations:

- (a) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law;
- (b) Restricting or prohibiting activities for the protection of public health and safety;
- (c) To the extent the land use regulation is required to comply with federal law; or
- (d) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing.

Findings of Fact and Conclusions

Based on the documentation submitted by the claimant, it does not appear that the establishment of the three home sites for which the claimant may qualify on the property is prohibited by land use regulations described in ORS 195.305(3).

7. On the Claimant's Acquisition Date, the Claimant Lawfully Was Permitted to Establish at Least the Number of Lots, Parcels or Dwellings on the Property That Are Authorized Under Section 6 of Measure 49

A claimant's acquisition date is "the date the claimant became the owner of the property as shown in the deed records of the county in which the property is located. If there is more than one claimant for the same property under the same claim and the claimants have different acquisition dates, the acquisition date is the earliest of those dates."

Findings of Fact and Conclusions

Douglas County deed records indicate that the claimant acquired the property on February 4, 1999.

The zoning of the Measure 37 claim property has not changed since the claimant acquired the property. As it is today, on February 4, 1999, the Measure 37 claim property was subject to Douglas County's acknowledged Exclusive Farm Use - Grazing (FG) zone in accordance with Goal 3, as implemented by OAR 660, division 33.

The claimant is not eligible for Measure 49 relief because the zoning and lawfully permitted uses of the claimant's property have not changed since the claimant acquired the property.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on January 8, 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, an agent for the claimant 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 a separate and distinct legal entity from Fred H. Engle and Dwight C. Morgan. Therefore, the acquisition date for the claimant, Morgan & Engle, Inc. is February 4, 1999.

The agent also asserts that the claimant could have established three dwellings on the Measure 37 claim property based upon numerous county ordinances in effect on its date of acquisition. However, claimant has not submitted any proof that the zoning and lawfully permitted uses of the claimant's property have changed since February 4, 1999, and that the claimant is therefore currently prohibited from establishing home sites that it was lawfully permitted to establish on its acquisition date.

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 is an issue to be addressed by Douglas County through procedures in the county's ordinance, and cannot be addressed by the department in its supplemental review of a Measure 37 claim under Measure 49.

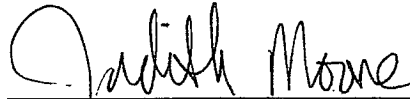
The claimant's neighbors also submitted comments agreeing with the department's analysis.

III. CONCLUSION

Based on the analysis above, the claimant is not eligible for any relief under Measure 49 because the lawfully permitted uses of the claimant's property have not changed since the claimant acquired the property.

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 6th 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.