



**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:

E132868¹

CLAIMANTS:

Floyd J. and Mimi K. Stout
19230 Alsea Highway
Alsea, OR 97324

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 14S, Range 7W, Section 6
Tax lots 900 and 1700
Benton County

The claimants, Floyd and Mimi Stout, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located at 19230 Alsea Highway near the community of Alsea, in Benton 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 three home site approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes more than three home sites. Therefore, the claimants may qualify for a maximum of three home site approvals under Section 6 of Measure 49.

¹ The claimants also have a claim, E132869, for property that is not contiguous to tax lots 900 and 1700.

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, Floyd and Mimi Stout, filed a Measure 37 claim, M132868, with the state on December 1, 2006. The claimants filed a Measure 37 claim, M37-06-069, with Benton County on December 1, 2006. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Benton 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, Floyd and Mimi Stout are the owners of fee title to tax lot 1700 of the Measure 37 claim property as shown in the Benton County deed records and, therefore, are owners of tax lot 1700 of the Measure 37 claim property under Measure 49. Benton County has confirmed that the claimants are the current owners of tax lot 1700 of the Measure 37 claim property.

According to the information submitted by the claimants, Floyd and Mimi Stout are not established owners of tax lot 900 of the Measure 37 claim property for the purposes of Measure 49. The claimants included an unrecorded warranty deed dated April 22, 1971 for tax lot 900. Unrecorded documents do not establish ownership for purposes of Measure 49.²

² As is relevant here, Section 2(16)(a) of Measure 49 (2007) defines an owner as "the owner of fee title to the property as shown in the deed records of the county where the property is located". A search of Benton County deed records did not return any ownership documents establishing the claimants' date of acquisition of tax lot 900 of the Measure 37 claim property for purposes of Measure 49.

Because this requirement has not been met with respect to tax lot 900 of the Measure 37 claim property, the remainder of the approval criteria will only be evaluated for tax lot 1700 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 Benton County, outside any urban growth boundary and outside any city limits, near the community of Alsea.

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:

Tax lot 1700 of the Measure 37 claim property is currently zoned Exclusive Farm Use (EFU) by Benton 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.

Tax lot 1700 of the Measure 37 claim property consists of 47.53 acres. Therefore, state land use regulations prohibit the claimants 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

Benton County deed records indicate that the claimants acquired tax lot 1700 of the Measure 37 claim property on February 6, 1989.

On February 6, 1989, the Measure 37 claim property was subject to Benton County's acknowledged Exclusive Farm Use (EFU) zone. Although Benton County's EFU zone was acknowledged to comply with the Statewide Planning Goals, that zone did not establish a fixed minimum acreage standard for the creation of a lot or parcel on which a dwelling could be established. Rather, applications for division and development were evaluated on a case-by-case basis to ensure compliance with the Goals and the applicable requirements of ORS chapter 215. Because of uncertainty regarding the historic application of the county's acknowledged plan, the 2010 Legislative Assembly amended Measure 49. Senate Bill (SB) 1049 (2010) specifies that, for purposes of determining the number of home site approvals that would have been lawfully permitted when a claimant acquired Measure 37 claim property that was subject to an acknowledged resource zone that without a fixed minimum acreage standard, the minimum acreage standard is 40 acres unless the record for the claim demonstrates that the claimant was lawfully permitted to establish a home site on a lot or parcel of a different acreage. Tax lot 1700 of the Measure 37 claim property consists of 47.53 and is developed with two dwellings.

Therefore, the claimants lawfully could not have established any additional home sites on their date of acquisition of tax lot 1700.³

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on June 10, 2010. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. No written comments were received in response to the 28-day notice as of the date of this Final Order.⁴

III. CONCLUSION

Based on the analysis above, the claimants do not qualify for Measure 49 home site approvals on tax lot 900 of the Measure 37 claim property because the claimants are not owners of tax lot 900 for purposes of Measure 49.

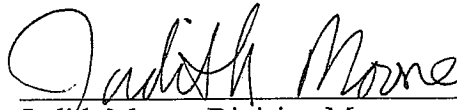
Based on the analysis above, the claimants do not qualify for Measure 49 home site approvals on tax lot 1700 of the Measure 37 claim property because they were not lawfully permitted to establish any additional lots, parcels or dwellings on their date of acquisition.

³ On the claimants' acquisition date they may have been lawfully permitted to establish one home site on the Measure 37 claim property. However, because it appears that the Measure 37 claim property already includes at least one lot or parcel that is developed with two dwellings, an authorization of one home site approval would not appear to provide the claimants with any benefit.

⁴ The 28-day comment period for the preliminary evaluation on this claim closes on July 8, 2010. If comments are received after issuance of this final order, but before the close of the 28-day comment period, the department will evaluate all comments and issue an amended final order.

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 29th day of June 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.