



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:** E133336

**CLAIMANTS:** Thomas E. and Ellen E. Baird  
6965 SW Ventura Drive  
Tigard, Oregon 97226

**MEASURE 37 PROPERTY IDENTIFICATION:** Township 2S, Range 2W, Section 27  
Tax lot 501  
Washington County

**AGENT CONTACT INFORMATION:** Caroline E.K. MacLaren  
Black Helterline LLP  
1900 Fox Tower  
805 SW Broadway  
Portland, Oregon 97205

The claimants, Thomas and Ellen Baird, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located along SW Wunderli Canyon Road, near Sherwood, in Washington 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 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 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, Thomas and Ellen Baird, filed a Measure 37 claim, M133336, with the state on December 1, 2006. The claimants filed a Measure 37 claim, 37CL0756, with Washington 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 Washington 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 and trust documents submitted by the claimants, Thomas and Ellen Baird are the settlors of a revocable trust into which they conveyed the Measure 37 claim property and, therefore, are owners of the property under Measure 49.

Washington 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 Washington County, outside the urban growth boundary and outside the city limits of the nearest city, Sherwood.

**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 Agriculture Forest (AF-20) by Washington 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, for the establishment of a dwelling in conjunction with farm use, 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 farm 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**

Washington County deed records indicate that the claimants acquired the property on May 4, 1985.

On May 4, 1985, the Measure 37 claim property was subject to Washington County's acknowledged Agriculture Forest (AF-20) zone. Washington County's acknowledged AF-20 zone allowed for the establishment of a dwelling on a vacant lot or parcel if certain criteria were met as determined by an administrative review.<sup>1</sup> There is no evidence in the record that the claimants could have satisfied the criteria for establishment of a farm dwelling. However, in Washington County Decision (84-559) the county determined that the 3.17-acre subject property qualified for a non-farm dwelling when the claimants acquired it. The county acknowledges that today the 3.17-acre high value property would not qualify for a non-farm dwelling.

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<sup>1</sup>The Preliminary Evaluation recognized that Washington County's AF-20 zone generally required a minimum of 20 acres for the establishment of a parcel on which a dwelling could be established. Washington County submitted comments indicating that the AF-20 zone did not have a minimum acreage standard on the claimant's date of acquisition. As the county correctly clarifies, the 20-acre standard in effect in 1985 was not the exclusive means through which a dwelling in conjunction with a farm use could be established on AF-20 zoned land. In fact, although the department has determined generally that a farm dwelling could be established on a lot or parcel of at least 20 acres, under the county's code, 20 acres would not necessarily have been sufficient to satisfy the county standard. As is relevant here, the acknowledged county code that applied when the claimants acquired the property provided in section 430-37.2.A for dwellings in conjunction with farm use on lots or parcels less than 20 acres if the lot or parcel:

"(a) has produced at least \$10,000 in annual gross farm income in two consecutive calendar years out of the three calendar years before the year in which the application for the dwelling was made, or  
(b) is planted in perennials capable of producing upon harvest, an average of at least \$10,000 in annual gross farm income, \* \* \*."

The county is correct that the standards in effect in 1985 when the claimants acquired the property provided different alternatives for applicants to seek approval to establish a dwelling in conjunction with farm use. However, the evidence in the record does not establish that the claimants could have satisfied the requirements of subsection (2)(a) or (2)(b) at that time. Nor have the county or the claimants suggested that evidence could potentially be obtained that would indicate that the claimants could have satisfied those criteria on the 3.17-acre subject property.

## II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on December 14, 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 Order and Home Site Authorization. Specifically, the claimants' attorney and the county submitted comments alleging that the non-farm dwelling standards have substantively changed over time so that the claimants are currently prohibited from establishing the non-farm dwelling for which they were approved when they acquired the subject property. The claimants also submitted a letter from Washington County dated February 5, 2007 in which the County states that the claimants are currently prohibited from establishing a non-farm dwelling on the Measure 37 claim property.

The county and claimants cite, as evidence that the standards have changed, the Washington County Decision (84-559) in which the county approved an application to establish a non-farm dwelling on the Measure 37 claim property. Because the county approved a non-farm dwelling on the property in 1984, and the county acknowledges that the property does not qualify for a non-farm dwelling today, the county and the claimant's attorney argue the standards for evaluating non-farm dwellings have substantively changed since the claimants acquired the property.

Non-farm dwellings are subject to criteria that have not substantively changed over time. However, the Measure 37 claim property is located in a county to which the provisions of the Marginal Lands Act of 1983 applied. The Marginal Lands Act (MLA) allowed counties to designate certain less productive, lower quality resource lands as "marginal" lands. ORS 215.213; 215.283 (1983). Once designated, counties could then authorize marginal lands for uses not permitted in EFU zones, including residential development. The MLA provided counties with the option to designate marginal lands, but a county that elected the marginal lands option was required to apply the criteria for approval of a dwelling pursuant to ORS 215.213(1)-(3). ORS 215.288(2). Washington County chose to designate marginal lands. Under the applicable review provisions, Washington County could permit a non-farm dwelling on parcels composed of predominately Class IV to Class VIII soils *if* the dwelling would be situated upon land generally unsuitable for the production of livestock and crops, would not force a significant change in or cost of the accepted farm practices in the area, and complied with other conditions the county considered necessary. ORS 215.213(3) (emphasis added.) In 1993, HB 3661 amended ORS 215.213 and retained the 1983 provisions for non-farm dwellings for marginal lands counties. However, in 1994, OAR 660-033-020(8) clarified the definition of "High-Value Farmland" as applied to ORS 215.213 and affirmatively recognized that under the existing language in ORS 215.213, some Class IV soils would be considered high value farmland. Included in the articulation of high-value Class IV soils was Laurelwood soils, which is the classification of the Class IV soils on the subject property.

In Washington County Decision 84-559 the county approved the partition of a 13.71-acre parcel into one 10-acre parcel and one 3.71-acre parcel, and the establishment of a non-farm dwelling on the 3.71-acre parcel, which is now the Measure 37 claim property. In evaluating the request, the Washington County Staff Report recognized that approximately 40 percent of the soils were

class III and an additional approximately 40 percent were class IV, but were in crop production. As a result, and after evaluation of the current use of the property, the staff report found that the applicant had "not submitted evidence of why this land cannot continue to be farmed." However, the Hearings Officer reversed the staff report finding with a finding that "the applicant has presented sufficient factual evidence to explain why the existing land in parcel A could not continue to be farmed." Thus, Decision 84-559 concluded that the applicant satisfied the standards for establishment of a non-farm dwelling.

The county has determined that under the existing non-farm dwelling standards, the claimants' property in this case consists of high-value farm land and therefore does not qualify for a non-farm dwelling. On the date the claimants acquired the property they had a lawfully approved permit to establish a non-farm dwelling on the property, which applied the non-farm standards then in effect. Because subsequent rule revisions confirmed that the property is high-value farmland, they would not be lawfully permitted to obtain that non-farm dwelling today. Consequently, while the non-farm dwelling standards have generally not substantively changed since the state land use planning system was adopted, in this case the 1994 rule definition of high-value farmland as applied to class IV soils in marginal lands counties could be construed as a substantive change in the criteria.

### **III. CONCLUSION**

Based on the analysis above, the claimants qualify for one home site. However, 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 claimant and information from Washington County, the Measure 37 claim property includes one undeveloped lot or parcel. There is no contiguous property under the same ownership. Therefore, the one home site approval the claimants qualify for under Section 6 of Measure 49 will authorize the claimants to establish 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 dwelling based on this home site authorization must comply with all applicable standards governing the siting or development of the dwelling. However, those standards must not be applied in a manner that prohibits the establishment of the 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 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 approval that is the subject of this order.
4. The number of dwellings a claimant may establish under this home site authorization is reduced by the number of 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 dwellings to be either greater than or less than the number of dwellings actually in existence on the Measure 37 claim property or contiguous property under the same ownership, then the number of additional 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 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.
7. The claimants may use a home site approval to convert a 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 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 dwellings to convert to authorized home sites.
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

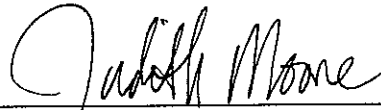
described in a Measure 37 waiver for the property. Therefore, if a claimant has been determined in a final judgment or final order that is not subject to further appeal to have a common law vested right as described in Section 5(3) of Measure 49 to any use on the Measure 37 claim property, then this 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.
10. Because the property is located in an exclusive farm use zone, the owner must comply with the requirements of ORS 215.293 before beginning construction.
11. 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 dwellings within 10 years of the conveyance. 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 10<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.