



**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: E133802

CLAIMANTS: David J. and Denise L. Duyck
41275 NW Reiling Road
Forest Grove, OR 97116

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 1N, Range 3W, Section 7
Tax lot 900
Washington County

AGENT CONTACT INFORMATION: Jim L. Lucas
1911 Mountain View Lane, Suite 400
Forest Grove, OR 97116

The claimants, David and Denise Duyck, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 4, 2006, for property located at 41195 NW Reiling Road, near Forest Grove, 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 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 specific relief requested under Measure 37 was to "partition approximately 92 acres of agricultural land into a separate nonbuildable lot." However, Measure 49 directs the department to authorize an otherwise prohibited number of home sites and does not provide for more specific relief. The claimants have requested two home site approvals in the election material. No

waiver was issued for this claim. The Measure 37 claim filed with the state describes two home sites. Therefore, the claimants may qualify for a maximum of two 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 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, David and Denise Duyck, filed a Measure 37 claim, M133802, with the state on December 4, 2006. The claimants filed a Measure 37 claim, 37CL0827, with Washington County on December 4, 2006. The state claim was filed on 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 submitted by the claimants, David and Denise Duyck are the owners of fee title to the property as shown in the Washington County deed records 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, Forest Grove.

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 (EFU) 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. 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 and regulate the establishment of dwellings on new or existing lots or parcels.

The claimants’ property consists of 95.68 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the two 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 two 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

Washington County deed records indicate that claimant David Duyck acquired the property on October 16, 1989, and claimant Denise Duyck acquired the property on May 5, 1993. Therefore, for purposes of Measure 49, the claimants' acquisition date is October 16, 1989.

On October 16, 1989, the Measure 37 claim property was subject to Washington County's acknowledged Exclusive Farm Use (EFU) zone. Washington County's EFU zone required 76 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consists of 95.68 acres and is developed with a dwelling. Therefore, the claimants lawfully could not have established an additional home site on their date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on December 2, 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 of Denial. Specifically, the claimants' attorney submitted two comments. In their first comment, the claimants clarified that, in fact, they did not desire two home sites. Rather, they desired a partition to allow the land surrounding the existing dwelling to be partitioned off, and to create a remainder, non-buildable 90-acre farm parcel. However, because the relief available under Measure 49 is statutorily limited to the issuance of home sites, DLCD interpreted the relief requested to be the establishment of two home sites. To the extent claimants desired only to partition a non-buildable parcel, that relief is beyond the scope of Measure 49.

In their second comment, the claimants' attorney further clarified that, in fact, the claimants do desire two home sites. The claimants assert that at the time they acquired their EFU-zoned 95.68-acre property, the county's code would have allowed them to consider the property to be 96 acres, and that the county's acknowledged code allowed farm dwellings on 20-acre parcels. Accordingly, the claimants argue that they could retain their 76-acre developed parcel, and create

a new 20-acre home site under Measure 49. The county's code in effect when the claimants acquired the property would not have allowed such a partition and development. Even assuming the county would have construed the property to be 96 acres, contrary to the claimant's assertions, the code did not provide for partitions to establish dwellings on 20-acre parcels. Washington County Code Section 424-8 (1986) provided a discretionary process for the "Creation of Farm Related Parcels of Twenty Acres or More."¹ It did not allow dwellings on 20-acre parcels, and would not have allowed, as the claimant requests, a partition to create two parcels of less than 76 acres, and the development of a dwelling on each of those parcels.²

III. CONCLUSION

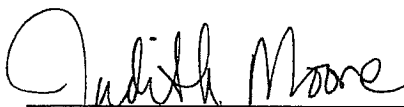
Based on the analysis above, the claimants do not qualify for Measure 49 home site approvals because the claimants were not lawfully permitted to establish the lots, parcels or dwellings on the claimants' date of acquisition.

¹ In a comment letter, the claimant's attorney incorrectly identifies Section 424-8 as "Create [sic] of Farm Related Dwelling of 20 acres or more."

² In contrast to Section 424-8, Section 424-2 of the county's code then in effect allowed for the "Creation of Farm Related Parcels Eligible for Farm Related Dwellings on Less than Seventy-Six (76) acres." As with the provisions of Section 424-8 for the creation of parcels of twenty acres or more, Section 424-2 required a review and approval to establish compliance with discretionary approval criteria. The claimants do not assert they complied with those criteria at the time they 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 1st day of April 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.