



**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:**

H130457

**CLAIMANT:**

Linda Lee M. Hyde  
623 NW Pacific Grove Drive  
Beaverton, OR 97006

**MEASURE 37 PROPERTY  
IDENTIFICATION:**

Township 2N, Range 3W, Section 27  
Tax lot 2004  
Washington County

The claimant, Linda Hyde, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on October 27, 2006, for property located near North Plains, 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 claimant elected supplemental review of her 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. However, as initially enacted in 2007, a claimant was not eligible for relief under Measure 49 if the claimant did not file a Measure 49 election within 90 days of the department mailing the election packet. Linda Hyde was not entitled to Measure 49 relief on that basis.

However, the Oregon State Legislative Assembly subsequently amended this Measure 49 requirement through the passage of House Bill 3225 (Chapter 855 (2009 Laws)) (HB 3225). As a result, this requirement no longer prevents the claimant, Lynda Hyde, from obtaining Measure 49 relief. The claimant elected to seek relief under Measure 49, as amended by HB 3225, and submitted the \$175 fee required by Section 18 of HB 3225 in order to have the claim reviewed.

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 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 one home site approval in the election material. The Measure 37 waiver issued for this claim describes one home site. Therefore, the claimant 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, as amended by HB 3225, 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 the state before Measure 49 became effective on December 6, 2007. If the claimant filed their state Measure 37 claim after December 4, 2006, the claimant must also have either (a) filed the claim in compliance with the provisions of OAR 660-041-0020 then in effect; (b) submitted a land use application as described in OAR 660-041-0020 then in effect prior to June 28, 2007; or (c) filed a Measure 37 claim with the county on or before December 4, 2006.

### **Findings of Fact and Conclusions**

The claimant, Linda Hyde, filed a Measure 37 claim, M130457, with the state on October 27, 2006. The claimant filed a Measure 37 claim, 37CL0371, with Washington County on September 30, 2005. The state claim was filed prior to December 4, 2006 and the claimant also filed a county Measure 37 claim on or before December 4, 2006.

The claimant filed a timely Measure 37 claim with the state along with any additional claims or applications that the claimant had to have filed in order to be eligible for review under Measure 49, as amended by HB 3225.

### **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 claimant, Linda Hyde is the owner of fee title to the property as shown in the Washington County deed records and, therefore, is an owner of the property under Measure 49.

Washington 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 Majority of the Measure 37 Claim Property Is Located Outside Any Urban Growth Boundary and Outside the Boundaries of Any City or the Measure 37 Claim Property is Located within the Boundaries of A City and Entirely Outside Any Urban Growth Boundary**

Either the majority of the Measure 37 claim property must be located entirely outside any urban growth boundary and outside the boundaries of any city or the Measure 37 Claim Property must be located within the boundaries of a city and entirely outside any urban growth boundary.

#### **Findings of Fact and Conclusions:**

The Measure 37 claim property is located in Washington County and the property is located outside any urban growth boundary and outside the city boundary of the nearest city, North Plains.

### **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 claimant's property consists of 16.31 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the one home site 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 one home site 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**

Washington County deed records indicate that the claimant acquired the property on February 5, 1993.

On February 5, 1993, the 16.31-acres 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. Washington County's EFU zone also permitted the establishment of a dwelling in conjunction with farm use on lots or parcels of less than 76 acres if certain criteria were met as determined by an administrative review process. However, the claimant has not submitted any documentation establishing that the claimant satisfied the discretionary standards and criteria then in effect for establishing a dwelling on the 16.31 acre property when the claimant acquired it. Therefore because the claimant has not provided documentation to establish that under the discretionary review process and standards described in Washington County's land development ordinance, the claimant would have been lawfully permitted to establish a dwelling on the Measure 37 claim property when the claimant acquired the property, the claimant does not qualify for any home sites

## II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on June 4, 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, the claimant's attorney challenges the department's premise that under Measure 49, the claimant was required to be lawfully permitted to establish the requested dwelling when she acquired the property. Instead, the attorney argues that department should approve the claimant's request to allow the claimant to apply to the county for approval of a dwelling, based on the standards in effect when the claimant acquired the property. The county has also submitted comments, essentially requesting that the state issue a "conditional" approval, to allow the claimant to apply for a dwelling today, using the discretionary approval standards in effect when she acquired the property in February, 1993.

It appears that the county, the claimant's attorney and the department generally agree as to the applicable standards in effect when the claimant acquired the property. As the county described those standards in its response to the Preliminary Evaluation:

"In February 1993, Section 430-37.2A(2) allowed the establishment of a dwelling upon demonstration that the property had either produced \$10,000 gross annual income two consecutive calendar years out of the last 3 years OR that the property was planted in a perennial crop capable of producing upon harvest an average of at least \$10,000 in gross annual income."

Accordingly, in order to be lawfully permitted to establish a dwelling in 1993, the claimant would have been required to have satisfied either of these two alternative standards for establishing a dwelling. The claimant has not provided any evidence that in February, 1993 (and prior to the more restrictive zoning that became effect beginning in August, 1993), she either "had produced \$10,000 gross annual income two consecutive calendar years out of the last 3 years" or at that time "the property was planted in a perennial crop capable of producing upon harvest an average of at least \$10,000 in gross income." Rather, the claimant's attorney appears to argue that in order to be eligible for relief under Measure 49, the claimant was not required to be lawfully permitted to establish a dwelling at the time she acquired the property. Instead he asserts that the claimant should be entitled to apply to the county today for approval of a use that was allowed in 1993. The county endorses this proposed "conditional" approval process, explaining "The County has recommended in the past that for claims that are directly affected by these standards, that the State issue a decision that requires the claimant to demonstrate that they meet this standard prior to issuance of a building permit as we did with the M37 decisions. The State should determine whether this review should be based on the old income standards in effect in February 1993 or use current income standards."

The difficulty with the county's proposed "conditional" process is that it is not authorized by the language of Measure 49. The statute does not permit the department to issue "conditional" authorizations. Measure 49, 8 (7) requires:

“The department’s final order ...on a claim under section 6 or 7 of this 2007 Act must either deny the claim or approve the claim. If the order or decision approves the claim, the order or decision must state the number of home site approvals issued for the property and may contain other terms that are necessary to ensure that the use of the property is lawful.”

Measure 49, thus, requires the department to make a final determination regarding the number of home site approvals authorized. It does not allow the department to conditionally approve an authorization, subject to a county process that would determine whether a claimant was lawfully permitted to establish a use.

In addition, Measure 49 does not allow the department to authorize a “process” that was allowed at the time the claimant acquired the property. Rather, it specifically states that a claimant is eligible for one or more home site approvals if the claimant was lawfully permitted to establish that use at the time of acquisition. A county process that might have been allowed at that time is not a “use” that the department is allowed to authorize.

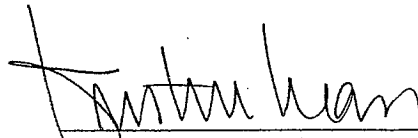
Moreover, a county process that analyzes the property today does not establish that in 1993 the claimant satisfied (or could have at that time satisfied) the mandatory approval criteria for establishing a home site. Measure 49 allows the department to authorize a use that a claimant was lawfully permitted to establish when the claimant acquired the claim property. In February, 1993, and prior to the imposition of more restrictive zoning in August, 1993, the claimant would have been lawfully permitted to establish a dwelling in the county’s EFU zone only if she had either “produced \$10,000 gross annual income two consecutive calendar years out of the last 3 years or that the property was planted in a perennial crop capable of producing upon harvest an average of at least \$10,000 in gross annual income.” The claimant has not provided any evidence that she satisfied either of these standards during that time.

### **III. CONCLUSION**

Based on the analysis above, the claimant does not qualify for Measure 49 home site approvals because the claimant was not lawfully permitted to establish the lots, parcels or dwellings on the claimant’s date of acquisition.

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:



Kristin May, Division Manager  
Dept. of Land Conservation and Development  
Dated this 20<sup>th</sup> day of August 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.