



**OREGON DEPARTMENT OF LAND CONSERVATION AND  
DEVELOPMENT**

**ORS 195.300 to ORS 195.336 (MEASURE 49) SUPPLEMENTAL REVIEW  
OF MEASURE 37 CLAIM**

**Amended Final Order and Home Site Authorization on Reconsideration**

**STATE ELECTION NUMBER:**

H132487

**CLAIMANTS:**

Gayle L. and Marlene S. Kirkpatrick  
14091 Cessna Street  
Aurora, OR 97002

**MEASURE 37 PROPERTY  
IDENTIFICATION:**

Township 4S, Range 1E, Section 20  
Tax lot 506  
Clackamas County

**AGENT CONTACT INFORMATION:**

Steven W. Abel  
Stoel Rives LLP  
900 SW 5<sup>th</sup> Avenue, Suite 2600  
Portland, OR 97204

The claimants, Gayle and Marlene Kirkpatrick, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located near Canby, in Clackamas 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 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. 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. Gayle and Marlene Kirkpatrick were 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). HB 3225 extends the time period during which claimants were required to elect relief under Measure 49 to 120 days. As a result, this requirement no longer prevents the claimants, Gayle and Marlene Kirkpatrick, from obtaining Measure 49 relief. The claimants 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 Amended Final Order and Home Site Authorization on Reconsideration 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 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, as amended by HB 3225, 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 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 claimants, Gayle and Marlene Kirkpatrick, filed a Measure 37 claim, M132487, with the state on December 1, 2006. The claimants filed a Measure 37 claim, ZC737-06, with Clackamas County on December 1, 2006. The state claim was filed prior to December 4, 2006.

The claimants filed a timely Measure 37 claim with the state along with any additional claims or applications that the claimants 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 recorded assignment of contract submitted by the claimants, Gayle and Marlene Kirkpatrick are the purchasers under a recorded land sale contract in force for the property and, therefore, are owners of the property under Measure 49.

Clackamas 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 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 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 Clackamas County and the property is located outside any urban growth boundary and outside the city boundary of the nearest city, Canby.

**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 Clackamas 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 8.40 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**

Clackamas County deed records indicate that the claimants acquired the property on November 20, 1982.

The claimants acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Clackamas County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On November 20, 1982, the Measure 37 claim property was zoned Exclusive Farm Use-20 (EFU-20) by Clackamas County. Clackamas County's EFU-20 zone included a fixed minimum acreage standard of 20 acres and allowed for the establishment of a dwelling on a vacant lot or parcel of at least five acres only if certain criteria were met as determined through an administrative review process. However, the Commission had not acknowledged that zone for compliance with the goals when the claimants acquired the property on November 20, 1982. Accordingly, the statewide planning goals, and in particular Goal 3, and ORS chapter 215 applied directly to the Measure 37 claim property when the claimants acquired it.

On December 21, 1982, the Commission acknowledged the application of Clackamas County's Exclusive Farm Use-20 (EFU-20) zone to the Measure 37 claim property. The Commission's acknowledgement of Clackamas County's EFU-20 zone confirmed that zone's compliance with Goal 3 and ORS chapter 215. Clackamas County's acknowledged EFU-20 zone required 20 acres for the creation of a new lot or parcel on which a dwelling could be established, or 5 acres for the development of a dwelling on a pre-existing vacant lot or parcel, subject to compliance with specified criteria as determined through a discretionary administrative review process. The claimants' property consists of 8.40 acres. Therefore, on the claimants' acquisition date, absent compliance with that administrative process, they could not have established one home site in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations.

However, because of uncertainty during the time period between adoption of the statewide planning goals in 1975 and each county's acknowledgment of its plan and land use regulations regarding the factual and legal requirements for establishing compliance with the statewide planning goals, the 2010 Legislative Assembly amended Measure 49. Senate Bill (SB) 1049 (2010) specifies the number of home sites considered lawfully permitted, for purposes of Measure 49, for property acquired during this period unless the record for the claim otherwise demonstrates the number of home sites that a claimant would have been lawfully permitted to establish. Those amendments provide, in relevant part, that eligibility for home site approval is subject to consistency with local land use regulations in effect when the claimant acquired the subject property.

The Measure 37 claim property was subject to Clackamas County's EFU-20 zone on the claimants' date of acquisition. That zone included a fixed minimum acreage standard of 20 acres for the creation of a new lot or parcel on which a dwelling could be established and allowed for the establishment of a dwelling on a vacant lot or parcel of at least five acres only if certain criteria were met as determined by an administrative review process. The claimants have not submitted any documentation establishing that the claimants satisfied the standards and criteria then in effect for establishing a dwelling on the 8.40 acre property when the claimant acquired it. There is no evidence in the record that the claimants could have satisfied the criteria for establishment of a farm dwelling. However, the Measure 37 claim property is one of only two lots in a previously established 24-lot subdivision approved in 1972 that had not been residentially developed prior to 1982. The other lot (tax lot 503, which lies adjacent to the claim property) received approval from Clackamas County for a non-farm dwelling in 1986, and has since been established with a dwelling. In their request for reconsideration, the claimants have submitted the non-farm dwelling approval for tax lot 503 and have provided additional factual evidence to establish that the claim property could have satisfied each of the approval criteria to qualify for a non farm dwelling.

When the claimants acquired the property in 1982, Clackamas County could permit a non-farm dwelling on parcels composed of predominately Class II 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.)<sup>1</sup> In 1993, HB 3661, in part, resulted in a re-codification of the non-farm dwelling standards in non-marginal lands counties to ORS 215.284. The department subsequently adopted amendments to OAR 660-033-0120 and -130, which clarified the definition "High-Value Farmland." The result of those rule amendments was to more clearly preclude the establishment of non-farm dwellings in the Willamette Valley on high-value, Class II soils. Given the evidence presented on reconsideration that the subject property is located on Class II high-value soils, the department concludes that, because location of non-farm dwellings on Class II high value soils was not clearly precluded in 1982, in fact the claimants could have qualified for a non-farm dwelling when they acquired the property in 1982, but are precluded from qualifying under the current standards.

As explained above, qualification for a non-farm dwelling in 1982 required compliance with discretionary approval criteria. Although the claimants did not obtain approval for a non-farm dwelling prior to imposition of the more restrictive soils standards, in their reconsideration materials, the claimants have provided facts to establish how their property would have satisfied each of those criteria. In addition, the claimants have included the 1986 non-farm dwelling approval of the similarly-situated parcel immediately adjacent to theirs. While not dispositive as to whether the subject property would satisfy the standards, that decision evaluates the surrounding properties, and establishes at that time, along with the subject property, the property subject to that approval was one of two undeveloped parcels in an otherwise fully developed residential subdivision, and that development of a non-farm dwelling on that property would comply with each of the criteria in CCZO 401.05(A), listed above. Combined with the factual demonstration provided by the claimants on reconsideration, this county approval provides evidence that, in 1982 when the claimants acquired the property, they could have satisfied the criteria for approval of a non-farm dwelling.

In sum, on the date the claimants acquired the property they could have satisfied all the approval criteria to be lawfully permitted to establish a non-farm dwelling on the property, under the non-farm standards then in effect. Because of subsequent rule revisions that rendered properties with Class II, high-value soils ineligible for a non-farm dwelling, they would not be lawfully permitted to obtain that non-farm dwelling today. Therefore, based on the analysis under SB 1049 (2010), the claimants could have established one home site when they acquired the Measure 37 claim property.

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<sup>1</sup> Under Clackamas County Zoning Ordinance (CCZO) 401.05(A), the applicable review provisions applicable when the claimants acquired the property, the county could approve a non farm dwelling upon finding that the dwelling:

1. Is compatible with farm uses described in subsection 401.03 of this Ordinance and is consistent with the intent and purpose set forth in ORS 215.243;
2. Does not interfere seriously with accepted farming practices, as defined in subsection 401.03 of this Ordinance, on adjacent lands devoted to farm use;
3. Does not materially alter the stability of the overall land use pattern of the area;
4. Is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract;
5. Will not be in conflict with the Comprehensive Plan or detrimental to surrounding property;
6. Either will not seriously interfere with the preservation of big game winter range identified on Comprehensive Plan Map III-3 or can be adequately mitigated \* \* \*; and
7. Complies with such other conditions as the Planning Director considers necessary.

## II. COMMENTS ON THE PRELIMINARY EVALUATION AND FINAL ORDER

The department issued its Preliminary Evaluation for this claim on July 22, 2010. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. Comments received, including comments from two neighbors and the claimants' attorney, were taken into account by the department in the issuance of the Final Order of Denial on September 27, 2010. On November 23, 2010, the claimants requested reconsideration of that final order. Based on the evidence provided on reconsideration, the department issues this Amended Final Order and Home Site Authorization on Reconsideration.<sup>2</sup>

As explained in the final order, the law allowing a non-farm dwelling in the County's EFU zone has not become materially more restrictive since the land use program was established; while there have been minor revisions, the non-farm dwelling standards have generally remained constant since 1975.<sup>4</sup> However, upon reconsideration, the claimants have now established how, in this instance, a change in the soils standards rendered their property ineligible for a non farm dwelling after 1993, whereas prior to that date, their high-value soils would not have precluded approval of a non farm dwelling, provided they could meet fairly stringent approval 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 claimants and information from Clackamas 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.

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<sup>2</sup> Another property owner commented on the preliminary evaluation, raising issues regarding street maintenance, flooding potential and capacity of other public services to serve additional development. The issues raised in this comment are appropriately dealt with by Clackamas County at the time the claimants seek land use approval based on the Home Site authorization and are therefore, not specifically addressed in this Final Order

<sup>4</sup> ORS 215.284 and OAR 660-033-0130 provide the criteria for the establishment of a non-farm-related dwelling in an EFU zone. Non-farm dwellings are subject to criteria that have not substantively changed since the claimant acquired 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 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.

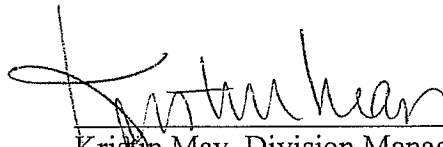


6. A home site approval only authorizes the establishment of a new dwelling on the property on which the claimants are eligible for Measure 49 relief. No additional development is authorized on contiguous property for which no Measure 37 claim was filed.
7. The claimants may use a home site approval 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 dwelling 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 obtains 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 Amended Final Order and Home Site Authorization on Reconsideration 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 10<sup>th</sup> day of January, 2011.

#### **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.