



**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:

H134476

CLAIMANTS:

Jerry S. Clayton
Polly A. Morse
PO Box 981
Canby, OR 97013

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 40S, Range 3E, Section 30
Tax lot 7500
Jackson County

AGENT CONTACT INFORMATION:

Thomas H. Cutler
Harris Berne Christensen LLP
5000 SW Meadows Road, Suite 500
Lake Oswego, OR 97035

Frank Walker
Frank Walker & Associates
1480 Jamestown Street SE
Salem, OR 97302

The claimants, Jerry Clayton and Polly Morse, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 28, 2007, for property located near Ashland, in Jackson 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 filed a Measure 37 claim with the state after December 4, 2006 but did not comply with the provisions of OAR 660-041-0020, then in effect. Jerry Clayton and Polly Morse 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). As a result, this requirement no longer prevents the claimants, Jerry Clayton and Polly Morse, 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 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.

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, Jerry Clayton and Polly Morse, filed a Measure 37 claim, M134476, with the state on November 28, 2007. The claimants filed a Measure 37 claim, M37 2006-00219, with Jackson County on November 29, 2006. The state claim was filed after December 4, 2006 and the claimants also filed a county Measure 37 claim before 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 deeds submitted by the claimants, Polly Morse is the settlor of a revocable trust into which she conveyed the Measure 37 claim property and, therefore, is an owner of the property under Measure 49.

According to the deeds submitted by the claimants, Jerry Clayton is the owner of fee title to the property as shown in the Jackson County deed records and, therefore, is an owner of the property under Measure 49.

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

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 Forest Resource (FR) by Jackson County, in accordance with ORS chapter 215 and OAR 660, division 6, because the property is "forest land" under Goal 4. Applicable provisions of ORS chapter 215 and OAR 660 division 6, enacted or adopted pursuant to Goal 4, generally prohibit the establishment of a lot or parcel less than 80 acres in size in a forest zone and regulate the establishment of dwellings on new or existing lots or parcels. In addition, counties may adopt larger minimum lot or parcel sizes. Jackson County's FR zone requires a minimum of 160 acres for the establishment of a dwelling on a lot or parcel.

The claimants' property consists of 80 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

Jackson County deed records indicate that claimant Polly Morse acquired the property on September 7, 1980, and claimant Jerry Clayton acquired the property on July 9, 2004. Therefore, for purposes of Measure 49, the claimants' acquisition date is September 7, 1980.

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 Jackson County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On September 7, 1980, the Measure 37 claim property was zoned Forest Resource (FR) by Jackson County. Jackson County's FR zone included a fixed minimum acreage standard of 160 acres. However, the Commission had not acknowledged that zone for compliance with the goals when the claimants acquired the property on September 7, 1980. Accordingly, the statewide planning goals, and in particular Goal 4, and ORS chapter 215 applied directly to the Measure 37 claim property when the claimants acquired it.

On May 16, 1983, the Commission acknowledged the application of Jackson County's Forest Resource (FR) zone to the Measure 37 claim property. The Commission's acknowledgement of Jackson County's FR zone confirmed that zone's compliance with Goal 4 and ORS chapter 215. Jackson County's acknowledged FR zone required 160 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consists of 80 acres. Therefore, on the claimants' acquisition date, they could not have established any home sites 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 Jackson County's FR zone on the claimants' date of acquisition. That zone included a fixed minimum acreage standard of 160 acres. The Measure 37 claim property consists of 80 acres. Therefore, based on the analysis under SB 1049 (2010), the claimants were not lawfully permitted to establish any home sites on the Measure 37 claim property on their date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

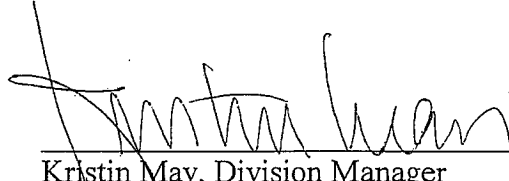
The department issued its Preliminary Evaluation for this claim on July 21, 2010. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. Comments received have been taken into account by the department in the issuance of this Final Order of Denial. Specifically, the claimants' agent appears to assert that claimant Polly Morse actually acquired an interest in the property in 1956. Although the agent included no narrative to explain the documents he asserts establish such an interest, he did submit numerous documents reflecting the claimant's purported association with the property dating to at least 1957. A review of those documents does not substantiate that Polly Morse had any ownership interest in the claim property during that time period. Rather, at most, these documents indicate that Ms. Morse may have had a personal property interest, including some grazing rights, associated with the property. The information submitted by the claimants repeatedly refers to the claim property as personal property in the form of shares in the "Pilot Rock Grazing District also known as the Camp Creek Association." However, none of the many documents submitted indicate, much less establish, that Ms. Morse had a real property ownership interest in the claim property prior to her acquisition of it on September 7, 1980.

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.

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 15th day of November, 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.