



**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:

E133022

CLAIMANTS:

Gerald L. and Amy L. Carpenter
53585 Big Creek Road
Myrtle Point, OR 97458

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 29S, Range 11W, Section 14
Tax lot 500
Coos County

The claimants, Gerald and Amy Carpenter, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located at 53585 Big Creek Road, near Myrtle Point, in Coos 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 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, Gerald and Amy Carpenter, filed a Measure 37 claim, M133022, with the state on December 1, 2006. The claimants filed a Measure 37 claim, DJC 142, with Coos County prior to March 21, 2007. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Coos 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, Gerald and Amy Carpenter are the owners of fee title to the property as shown in the Coos County deed records and, therefore, are owners of the property under Measure 49.

Coos 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 Coos County, outside the urban growth boundary and outside the city limits of the nearest city, Myrtle Point.

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 Coos 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 36.33 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

Coos County deed records indicate that the claimants acquired the property on April 5, 1977.

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 Coos County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On April 15, 1977, the Measure 37 claim property was zoned Interim Exclusive Agriculture 20 Acres (IAG-20) and Interim Exclusive Forest Grazing 40 acres (IFG-40) by Coos County. While Coos County's IAG-20 zone included a fixed minimum acreage standard of 20 acres, and the county's IFG-40 zone included a fixed minimum acreage standard of 40 acres. However, the Commission had not acknowledged these zones for compliance with the goals when the claimants acquired the property on April 5, 1977. 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 October 8, 1985, the Commission acknowledged the application of Coos County's Exclusive Farm Use (EFU) zone to the Measure 37 claim property. The Commission's acknowledgement of Coos County's EFU zone confirmed that zone's compliance with Goal 3 and ORS chapter 215. Although Coos County's EFU zone was acknowledged to comply with the Statewide Planning Goals, the zone did not establish a fixed minimum acreage standard for the creation of a lot or parcel on which a dwelling could be established. Rather, applications for division and development were evaluated on a case-by-case basis to ensure compliance with the Goals and the applicable requirements of ORS chapter 215. The Measure 37 claim property consists of 36.33 acres and is developed with one dwelling. Therefore, on the claimants' acquisition date, they could not have established any additional home sites in the zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations, absent compliance with the applicable review criteria.

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 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 approvals 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 Coos County's IAG 20 zone which had a fixed minimum acreage standard of 20 acres and Coos County's IFG 40 zone which had a fixed minimum acreage standard of 40 acres.

The Measure 37 claim property consists of 36.33 acres and is developed with a dwelling. Therefore, based on the analysis under SB 1049 (2010), the claimants do not qualify for any additional home sites under Measure 49.¹

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on March 24, 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, submitted comments argue that Coos County's IAG-20 zone did not have a fixed minimum acreage standard and that the claimants should be entitled to two home sites under SB 1049 as a result. The department disagrees with this assertion. On the claimants' date of acquisition, Coos County's IAG-20 zone included a fixed minimum acreage standard of 20 acres for farm uses and only allowed a dwelling as a permitted use if the dwelling was to be in conjunction with a farm use. In other words, the zone allowed farm dwellings on lots or parcels of at least 20 acres. Non-farm dwellings were permitted only as a conditional use. Notwithstanding the fixed minimum acreage standard, the claimants still do not qualify for relief under Measure 49. Based on the analysis under SB 1049 indicated above, the claimants were not lawfully permitted to establish a dwelling on the IFG-40 zoned portion of tax lot 500; nor were the claimants lawfully permitted to establish any additional home sites on the IAG-20 zoned portion of tax lot 500 because this portion of the Measure 37 claim property already contains a dwelling.

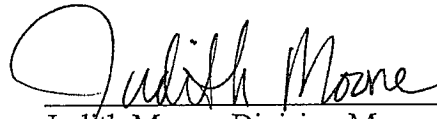
III. CONCLUSION

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 Although DLCD has not estimated the exact acreage of the Measure 37 claim property that was subject to the 20 acre minimum as compared to the exact acreage that was subject to the 40 acre minimum, any possible combination of these standards prohibits claimants from developing any lots, parcels, or dwellings in excess of the one existing home site that is currently located on 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 7th day of June 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.