



**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:

E118367

CLAIMANTS:

James D. and Carol L. Silke
680 Tyler Street
Eugene, OR 97402

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 19S, Range 12W, Section 2522
Tax lot 1800¹
Lane County

AGENT CONTACT INFORMATION:

Bill Kloos
Law Office of Bill Kloos PC
375 W. 4th Street
Eugene, OR 97401

The claimants, James and Carol Silke, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on April 28, 2005, for property located at 83315 Erhart Road, near Florence, in Lane 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.²

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

¹ The Measure 37 claim property consisted of tax lot 1800. Tax lot 1800 has since been partitioned into tax lots 2200, 2300, 2400, 2500, 2600, 2700 and 2800.

² The claimants initially elected to have their claim reviewed under Section 7 of Measure 49, but amended their election to request review under Section 6.

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 supplemental review under Section 6. The Measure 37 waiver issued for this claim describes fourteen 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, 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, James and Carol Silke, filed a Measure 37 claim, M118367, with the state on April 28, 2005. The claimants filed a Measure 37 claim, PA05-5537, with Lane County on April 27, 2005. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Lane 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, James and Carol Silke are the owners of fee title to the property as shown in the Lane County deed records and, therefore, are owners of the property under Measure 49.

Lane 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 Lane County, outside the urban growth boundary and outside the city limits of the nearest city, Dunes City.

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 Rural Residential (R1) by Lane County, in accordance with Goal 14, which prohibits the urban use of rural land and requires local comprehensive plans to identify and separate urbanizable from rural land in order to provide for the orderly and efficient transition from rural to urban use. State laws, namely Goal 14 and OAR 660-004-0040, prohibit the establishment of a lot or parcel less than two acres in a rural residential zone established before October 4, 2000, in which the County specified a minimum lot or parcel size of less than two acres.

The claimants' property consists of 14.29 acres. Therefore, no state law prohibits the claimants from establishing on the Measure 37 claim property at least the three home sites the claimants may qualify for under Section 6 of Measure 49. Because this requirement has not been met, the claimants are not entitled to any relief under Measure 49, and, therefore, the remaining approval criteria will not be evaluated.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on December 15, 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. An agent for the claimants submitted comments asserting that because the claimants divided their property into seven 2-acre lots following submission of their Measure 49 election, their relief eligibility should not be analyzed under Section 6(2), but rather

under Section 6(3) of Measure 49 because the property currently includes more than three lots or parcels that may be developed with dwellings. The department disagrees with the agent's interpretation of when Section 6(3) is applicable.

However, even if the department accepted the agent's argument regarding the applicability of Section 6(3), the department could not authorize the requested home site approval. Section 6(3) reads: "Notwithstanding subsection (2) of this section, a claimant that otherwise qualifies for relief under this section may establish at least one additional lot, parcel or dwelling on the property." Therefore, a claimant may qualify for one home site under Section 6(3) only if the claimant otherwise qualifies for relief under Section 6 of Measure 49.

Among other criteria set forth in Section 6(6) of Measure 49, in order to "otherwise qualify" for one home site approval under Section 6(3), the claimants must have been "lawfully permitted" on their acquisition date to establish the one home site they may qualify for in addition to the existing seven lots or parcels. The claimants assert that their acquisition date was November 4, 1977. On that date, the property was not zoned by Lane County, but the statewide land use planning goals were in effect, and because the Land Conservation and Development Commission had not acknowledged Lane County's comprehensive plan and land use regulations, the statewide planning goals applied directly to the property. The Legislative Assembly in February of 2010 passed Senate Bill 1049 clarifying the Measure 49 "lawfully permitted" analysis for properties acquired during the time period "...after January 25, 1975, and before the date the comprehensive plan for the county in which the property is located was first acknowledged by the Land Conservation and Development Commission to comply with the statewide land use planning goals..." (Section 2, Senate Bill 1049 (2010)).

Section 2(3) of Senate Bill 1049 addressing properties that were "subsequently designated in the first acknowledged comprehensive plan as land for rural residential development" would control the lawfully permitted analysis for the claimants' property. That section provides in relevant part:

- (a) If the property was not zoned or was zoned to allow residential development at a density equal to or greater than one dwelling per two acres, the claimant is deemed to have been lawfully permitted to establish up to three home sites with a minimum acreage standard of two acres.

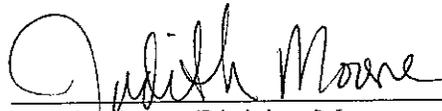
The claimants assert that they qualify for one home site in addition to the seven lots or parcels existing on the property. However, under the analysis mandated by Senate Bill 1049, the claimants would not have been lawfully permitted to establish an eighth lot or parcel on the 14.29-acre property because that lot or parcel could not meet the minimum acreage standard of two acres. The claimants would therefore not "otherwise qualify" for one home site even if the department conducted the Measure 49 home site approval analysis under Section 6(3) of Measure 49 rather than under Section 6(2).

III. CONCLUSION

Based on the analysis above, the claimants do not qualify for Measure 49 home site approvals because no land use regulation prohibits the claimants from establishing the lots, parcels or dwellings.

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 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.