



**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:**

E129797

**CLAIMANTS:**

Kenneth M. Jenck<sup>1</sup>  
3515 Gienger Road  
Tillamook, OR 97141

Timothy M. Jenck  
3555 Gienger Road  
Tillamook, OR 97141

**MEASURE 37 PROPERTY  
IDENTIFICATION:**

Township 2S, Range 9W  
Section 6, Tax lot 800  
Section 6AB, Tax lots 500, 502 and 503  
Tillamook County

The claimants, Kenneth and Timothy Jenck, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on August 2, 2006, for property located at 3555 Gienger Road, near Tillamook, in Tillamook 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 three home site approvals in the election material. The Measure 37

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<sup>1</sup> Sharon Jenck was also a Measure 37 claimant; however, she passed away since the filing of the Measure 37 claim.

waiver issued for this claim describes 100 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, Kenneth and Timothy Jenck, filed a Measure 37 claim, M129797, with the state on August 2, 2006. The claimants filed a Measure 37 claim, M-06-04, with Tillamook County on July 31, 2006. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Tillamook 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 land sale contract submitted by the claimants, Timothy Jenck is the purchaser under a recorded land sale contract in force for the property and, therefore, is an owner of the property under Measure 49. Tillamook County has confirmed that the claimant is the current owner of the property.

According to the information submitted by the claimants, Kenneth Jenck has not established his ownership of the property for the purposes of Measure 49.<sup>2</sup>

### **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 Tillamook County, outside the urban growth boundary and outside the city limits of the nearest city, Tillamook.

### **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 by Tillamook County. State land use regulations, including applicable provisions of ORS chapter 215 and OAR 660, division 33, 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 60.82 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.

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<sup>2</sup> Claimant Kenneth M. Jenck asserts in comments submitted to the department that he is an owner of the property because (1) he retained the right to use and develop the property when he sold it to Timothy Jencks on a land sale contract, and (2) the Final Staff Report and Recommendation and Final Order under Ballot Measure 37 issued January 26, 2007, determined that Kenneth M. Jencks was an owner of the property as that term was defined in ORS 197.352(11)(C). ORS 197.352(11)(C) was repealed by the enactment of Measure 49. For purposes of M49, "owner" is defined in ORS 195.300(16) 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." Therefore, notwithstanding his retention of certain use and development rights in the property during the life of the land sale contract, Kenneth M. Jencks is not an "owner" of the property as that term is defined in ORS 195.300(16).

**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**

Tillamook County deed records indicate that claimant Timothy Jenck acquired the property on January 23, 1997.

On January 23, 1997, the Measure 37 claim property was subject to Tillamook County's Farm (F-1) zone. Tillamook County's F-1 zone required 40 acres for the creation of a new lot or parcel on which a dwelling could be established. However, state law in effect on January 23, 1997, specifically ORS 215.780 (1995 edition), required that the property be a minimum of 80 acres. The claimant's property consists of 60.82 acres and is developed with a dwelling. Therefore, claimant Timothy Jenck lawfully could not have established any home sites on his date of acquisition.

## **II. COMMENTS ON THE PRELIMINARY EVALUATION**

The department issued its Preliminary Evaluation for this claim on September 28, 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.

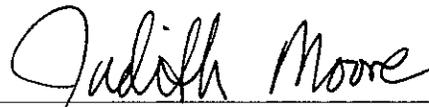
## **III. CONCLUSION**

Based on the analysis above, claimant Kenneth Jenck does not qualify for Measure 49 home site approvals because he no longer owns the Measure 37 claim property.

Based on the analysis above, claimant Timothy Jenck does not qualify for Measure 49 home site approvals because he was not lawfully permitted to establish the lots, parcels or dwellings on his 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:



Judith Moore, Measure 49 Division Manager  
Dept. of Land Conservation and Development  
Dated this 31<sup>st</sup> day of December 2009.

#### 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 it 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.