



**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:

E130536

CLAIMANT:

Brett W. Johanson
2157 West Burnside #25
Portland, OR 97210

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 2S, Range 7E, Section 23D
Tax lot 1902¹
Clackamas County

The claimant, Brett Johanson, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 2, 2006, for property located at 20491 East Lolo Pass Road, near Brightwood, 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 claimant has elected supplemental review of his 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 Claimant 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 claimant has requested three home site approvals in the election material. The Measure 37 waiver issued for this claim describes five home sites. Therefore, the claimant may qualify for a maximum of three home site approvals under Section 6 of Measure 49.

¹ The Measure 37 claim was originally for tax lots 1902 (Township 2S, Range 7E, Section 23D) and 800 (Township 2S, Range 7E, Section 26AA). The claimant did not indicate that he would like the department to review his eligibility for relief on tax lot 800. Tax lot 800 is not under the same ownership as tax lot 1902. Therefore, while a claimant cannot amend claim property, this Final Order of Denial addresses only the claimant's eligibility for relief on tax lot 1902, and all references to the Measure 37 claim property refer only to tax lot 1902.

B. Qualification Requirements

To qualify for a home site approval under Section 6 of Measure 49, the claimant 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 claimant, Brett Johanson, filed a Measure 37 claim, M130536, with the state on November 2, 2006. The claimant filed a Measure 37 claim, ZC189-06, with Clackamas County on September 13, 2006. The state claim was filed prior to December 4, 2006.

The claimant timely filed a Measure 37 claim with both the state and Clackamas 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 claimant, Brett Johanson is the owner of fee title to the property as shown in the Clackamas County deed records and, therefore, is an owner of the property under Measure 49.

Clackamas County has confirmed that the claimant is the current owner 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 Clackamas County, outside any urban growth boundary and outside of any city limits, near the unincorporated community of Brightwood.

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 Farm/Forest (RRFF-5) by Clackamas 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 the size established in the County rural residential zone in existence on October 4, 2000, if the zone in existence on that date had a minimum lot size of two or more acres. Clackamas County's RRFF-5 zone requires a minimum lot size of five acres and allows establishment of one dwelling on a pre-existing vacant lot or parcel of record less than five acres.

The claimant's property consists of 2.8 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property two of the three home sites the claimant 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 claimant, it does not appear that the establishment of the three home sites for which the claimant 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 claimant acquired the property on April 8, 1977.

The claimant acquired the Measure 37 claim property after adoption of the statewide planning goals, but before 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. At that time, the Measure 37 claim property was zoned Recreational Residential (RR) by Clackamas County, which required a minimum parcel size of one acre for the creation of a new lot or parcel. However, the Commission had not acknowledged Clackamas County's comprehensive plan and land use regulations for compliance with the goals when the claimant acquired the property on April 8, 1977. Accordingly, the statewide planning goals, and in particular Goal 14, applied directly to the property when the claimant acquired it.

On April 8, 1977, Goal 14 required counties "to provide for an orderly and efficient transition from rural to urban land use." The Goal required the creation of urban growth boundaries to "identify and separate urbanizable land from rural land," and prohibited the location of "urban uses" outside urban growth boundaries without the approval of a Goal 2 exception to Goal 14. In general, and consistent with subsequent judicial interpretation and LCDC rules implementing Goal 14, urban uses included residential lots or parcels less than two acres in size. Ultimately, the County's acknowledged plan zoned the subject property to require a minimum of five acres for the creation of a new lot or parcel. Therefore, the establishment of a new lot or parcel of five acres on the subject property would have complied with Goal 14 on the claimant's date of acquisition. However, based on evidence in the record and consistent with judicial and regulatory authority, under a direct application of the goals, prior to acknowledgment, a lot or parcel of two acres or more could also have complied with the requirements of Goal 14.

The claimant's property consists of 2.8 acres. Therefore, the claimant's request to create three home sites would result in parcels smaller than two acres. Without additional evidence to establish that, as applied to the subject property, the requested smaller parcels would have

satisfied the requirements of Goal 14, the claimant lawfully could have established no more than one home site when he acquired the property. The claimant, therefore, qualifies for one home site under Section 6 of Measure 49, because no additional evidence has established that, in this instance, a direct application of Goal 14 would have allowed the claimant to establish smaller lots or parcels. However, state land use regulations do not currently prohibit the claimant from establishing one home site on the Measure 37 claim property.

II. COMMENTS ON THE PRELIMINARY EVALUATION

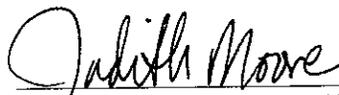
The department issued its Preliminary Evaluation for this claim on June 11, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. Comments received have been taken into account by the department in the issuance of this Final Order of Denial. Specifically, the claimant asserts that he could have established home sites smaller than two acres on his acquisition date. However, as discussed in section B.7. above, it is the department's position that as applied to this property home sites smaller than two acres would not have been consistent with Goal 14 when the claimant acquired it.

III. CONCLUSION

Based on the analysis above, the claimant does not qualify for Measure 49 home site approvals because the claimant is not currently prohibited from establishing the one home site the claimant may otherwise qualify for under Measure 49.

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 17th day of November 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.