



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:

E130587A¹

CLAIMANTS:

Richard and Judy Kindwall
14550 Orchard Knob Road
Dallas, OR 97338

MEASURE 37 PROPERTY
IDENTIFICATION:

Township 7S, Range 5W, Section 17
Tax lot 603
Polk County

The claimants, Richard and Judy Kindwall, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 6, 2006, for property located on James Howe Road, near Dallas, in Polk 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. The Measure 37 waiver issued for this claim describes two home sites. Therefore, the claimants may qualify for a maximum of two home site approvals under Section 6 of Measure 49.

¹ Claim E130587 has been divided into two claims because the claim includes multiple tax lots or parcels that are not in the same ownership. E130587A refers to tax lot 603 and claimant Judy Kindwall. E130587B refers to tax lot 702 and claimants Richard and Judy Kindwall.

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, Richard and Judy Kindwall, filed a Measure 37 claim, M130587, with the state on November 6, 2006. The claimants filed a Measure 37 claim, M06-90, with Polk County on November 3, 2006. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Polk 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 and trust documents submitted by the claimants, Judy Kindwall is the settlor of a revocable trust into which she conveyed the Measure 37 claim and, therefore, is an owner of the property under Measure 49. Polk County has confirmed that claimant Judy Kindwall is the current owner of the property.

According to deeds submitted by the claimants, Richard Kindwall is not an owner of the property under Measure 49.

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 Polk County, outside the urban growth boundary and outside the city limits of the nearest city, Dallas.

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 Farm/Forest (FF) by Polk County, in accordance with Goals 3 and 4, as implemented by OAR 660-006-0050. State land use regulations, including applicable provisions of ORS chapter 215 and OAR 660, divisions 6 and 33, generally prohibit the establishment of a lot or parcel less than 80 acres in size in a mixed farm/forest zone, and regulate the establishment of dwellings on new or existing lots or parcels. Under ORS 215.780(2)(a), counties may adopt minimum lot sizes smaller than 80 acres, subject to approval by the Land Conservation and Development Commission (the Commission). The Commission has approved Polk County's FF zone, which requires a minimum lot size of 40 acres.

The claimant's property consists of 11.39 acres. Therefore, state land use regulations prohibit claimant Judy Kindwall from establishing on the Measure 37 claim property the two home sites she 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

Polk County deed records indicate that claimant Judy Kindwall acquired the property on April 7, 1997.

On April 7, 1997, the Measure 37 claim property was subject to Polk County's acknowledged Farm/Forest (FF) zone. Polk County's FF zone required 40 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimant's property consists of 11.39 acres. Therefore, claimant Judy Kindwall lawfully could not have established any home sites on her date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on September 10, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. The department has considered the comments of the claimants' attorney dated October 7, 2009. The claimants' attorney asserts that Judy D. Kindwall acquired the claim property on an earlier date due to her marriage to Richard C. Kindwall. However, Measure 49 states that 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" ORS 195.328(1). According to the Polk County deed records, Judy D. Kindwall acquired the property on April 7, 1997.

Additionally, the claimant's attorney asserts that a dwelling may have been allowed on a pre-existing lot or parcel less than 40 acres as a conditional use. Specifically, the claimants' attorney asserts that a non-farm dwelling may have been lawfully permitted on the subject property based on a decision of approval the claimants received for a non-farm dwelling on a 29.05-acre parcel in 1994. Measure 49 allows a claimant to establish the number of lots, parcels and dwellings that would have been lawfully permitted at the time a claimant acquired the property. A use is not lawfully permitted when approval of the use on a claimant's acquisition date would have required a highly discretionary review process and the record for the claim do not include

evidence that the claimant could have met the standards under such a review process. The submitted non-farm dwelling approval is for a 29.05-acre property, not the 11.39-acre property that is the subject of this claim. It is unclear what the result would be if the review criteria were applied to the property that is the subject of this claim. Additionally, if the claimants could have qualified for a non-farm dwelling on this property on their acquisition date, it is unclear that they would be prohibited from qualifying for a non-farm dwelling under current standards. ORS 215.284 and OAR 660-033-0130 provide the criteria for the establishment of a non-farm related dwelling in an EFU zone. Non-farm dwellings are subject to criteria that have not substantively changed since the claimant acquired the Measure 37 claim property. The question of whether the claimant could have qualified for or could currently qualify for a non-farm dwelling is independent of the issue relevant to the Measure 49 inquiry, which is statutorily limited to whether a claimant was lawfully permitted to establish one or more home sites on the claimant's acquisition date and, due to regulations established subsequent to that acquisition, is currently prohibited from establishing that use.

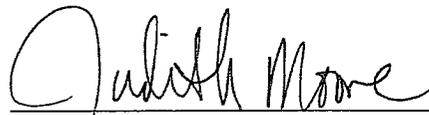
III. CONCLUSION

Based on the analysis above, claimant, Judy Kindwall does not qualify for Measure 49 home site approvals because she was not lawfully permitted to establish the lots, parcels or dwellings on her date of acquisition.

Based on the analysis above, claimant Richard Kindwall is not eligible for any relief under Measure 49 because he is not an owner of the Measure 37 claim property for purposes of 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, Division Manager
Dept. of Land Conservation and Development
Dated this 12th day of January 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 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.