



**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: E131609

CLAIMANT: Barry J. Butcher
11040 SW Barbur Boulevard
Portland, OR 97062

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 2S, Range 1W, Section 36A
Tax lot 2800
Washington County

AGENT CONTACT INFORMATION: Kevin V. Harker
Vial Fotheringham LLP
7000 SW Varns Street
Portland, OR 97223

The claimant, Barry Butcher, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 29, 2006, for property located at 6880 SW Norse Hall Road, near Tualatin, in Washington 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. No waiver was issued for this claim. The Measure 37 claim filed with the state describes residential use. Therefore, the

claimant 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 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, Barry Butcher, filed a Measure 37 claim, M131609, with the state on November 29, 2006. The claimant filed a Measure 37 claim, 37CL0671, with Washington County on November 29, 2006. The state claim was filed prior to December 4, 2006.

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

Washington 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:

The deed and assessment information submitted by the claimant indicated that there are non-claimant owners who had not consented to the claim: Christine M. Butcher and Jill Louise Butcher. Subsequent information and documents submitted by the claimant confirms that those individuals no longer have any ownership interest in the subject property. 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 Washington County, outside the urban growth boundary and outside the city limits of the nearest city, Tualatin.

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 Agriculture and Forest – 5 (AF-5) by Washington 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. Washington County’s AF-5 requires a minimum lot size of five acres.

The claimant’s property consists of 6.3 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property 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

Washington County deed records indicate that the claimant acquired the property on July 16, 1990.

On July 16, 1990, the Measure 37 claim property was subject to Washington County's acknowledged Agriculture and Forest - 5 (AF-5) zone. Washington County's AF-5 zone required five acres for the creation of a new lot or parcel on which a dwelling could be established. The claimant's property consists of 6.3 acres, and is developed with a dwelling. Therefore, the claimant lawfully could not have established the requested home sites on his date of acquisition.

The claimant's representative submitted comments to the preliminary evaluation, disputing this conclusion. The representative argues that based on historical facts asserted to be existant in 1990, the claimant could have satisfied highly discretionary criteria then in effect and could have obtained approval of a residential planned development (RPD), which would have allowed the claimant to divide the property and develop one additional dwelling.

In general, the RPD process, in effect in 1990 when the claimant acquired the property, allowed for clustering of individual lots in the AF-5 zone, and some minor reduction in the minimum lot size, based on a calculation determined by the number of acres of the site divided by an established divisor. Under the provisions of Washington Code Section 404-5.4 (1989 edition), the claimant would not have been entitled under that process to further divide the subject 6.3 acres. As the claimant explains, there was an additional, fact-based process available that

potentially could have been used to justify a deviation from the density requirements.¹ The claimant argues that “[i]t is reasonable to believe that had an application for an RPD been submitted it would have been approved.” However, it is not clear on its face that this provision would have allowed additional reductions in the base density and, in any event, no such application was in fact submitted or approved. Even assuming these provisions could have allowed reductions below the base density beyond those permitted under Section 404-5.4, the claimant would not have been allowed to divide the AF-5 zoned property to parcels as small as 3 acres absent a rigorous and fact-dependent, discretionary review process. Measure 49 allows a claimant to establish the number of lots, parcels and dwellings that lawfully would have been permitted at the time the claimant acquired the property. The claimant would not lawfully have been permitted a use that could have potentially been approved, and only following a fact-specific, discretionary evaluation that, in fact, did not occur.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on June 26, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. As discussed above, the claimant submitted comments, which have been considered and taken into account by the department in the issuance of this Final Order of Denial.

III. CONCLUSION

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

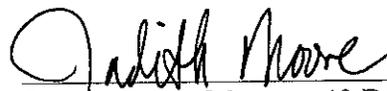
¹ Washington County Section 404-5.8 (1989 edition) provided:

“If the RPD results in an increase in density of the basic district, the applicant shall demonstrate how the PRD complies with the purpose of the underlying District by varying the lot sizes to preserve the farm or forest uses on the site. If the RPD is contiguous to an EFU, EFC or AF-20 or commercial farm or forest use, demonstrate that the configuration of those lots does not seriously interfere with those uses.

It is not clear from the language of this section whether the intent of Section 404-5.8 was to allow further reductions in the density in addition to the reduction in the density of the base district that would be allowed under Section 404-5.4 or whether the intent of 404.5.8 was to require reductions in density allowed under 404-5.4 to an acreage less than the base zone to satisfy the requirements of 404-5.8 in addition to the requirements of 404-5.4.

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 6th day of October 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.