



**OREGON DEPARTMENT OF LAND CONSERVATION AND  
DEVELOPMENT**

**ORS 195.300 to ORS 195.336 (MEASURE 49) SUPPLEMENTAL REVIEW  
OF MEASURE 37 CLAIM**

**Amended Final Order and Home Site Authorization on Reconsideration**

**STATE ELECTION NUMBER:** E133803

**CLAIMANTS:** Thomas A. and Vickie A. Duyck<sup>1</sup>  
43775 NW Greenville Road  
Forest Grove, Oregon 97116

**MEASURE 37 PROPERTY  
IDENTIFICATION:** Township 1N, Range 3W, Section 6  
Tax lot 1800  
Washington County

**AGENT CONTACT INFORMATION:** Jim L. Lucas  
1911 Mountain View Lane, Suite 400  
Forest Grove, Oregon 97116

The claimants, Thomas and Vickie Duyck, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 4, 2006, for property located on NW Greenville Road, near Forest Grove, 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 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 Amended Final Order and Home Site Authorization on Reconsideration 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 one home site approval in the election material. No waiver was issued

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<sup>1</sup> Claimant Thomas Duyck also has a claim E133801 for property that is not contiguous to tax lot 1800.

for this claim. The Measure 37 claim filed with the state describes one home site. Therefore, the claimants may qualify for a maximum of one home site approval 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, Thomas and Vickie Duyck, filed a Measure 37 claim, M133803, with the state on December 4, 2006. The claimants filed a Measure 37 claim, 37CL0826, with Washington County on December 4, 2006. The state claim was filed on December 4, 2006.

The claimants 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 claimants, Thomas and Vickie Duyck are the owners of fee title to the property as shown in the Washington County deed records and, therefore, are owners of the property under Measure 49.

Washington 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 Washington County, outside the urban growth boundary and outside the city limits of the nearest city, Forest Grove.

**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 (EFU) by Washington County, in accordance with ORS chapter 215 and OAR 660, division 33, because the property is “agricultural land” as defined by Goal 3. Goal 3 requires agricultural land to be zoned exclusive farm use (EFU). Applicable provisions of ORS chapter 215 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, provide standards for the establishment of a dwelling in an EFU zone. In general and subject to some exceptions, those standards currently require that the property be a minimum of 80 acres in size in an EFU zone and generate a minimum annual income from the sale of farm products.

The combined effect of the standards for the establishment of a dwelling in an EFU zone is to prohibit the claimants from establishing a dwelling on the Measure 37 claim property.

**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 one home site 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**

Washington County deed records indicate that claimant Thomas Duyck acquired the property on September 17, 1984, and claimant Vickie Duyck acquired the property on December 30, 1994. Therefore, for purposes of Measure 49, the claimants' acquisition date is September 17, 1984.

On September 17, 1984, the Measure 37 claim property was subject to Washington County's acknowledged Exclusive Farm Use (EFU) zone. In general, Washington County's EFU zone required 76 acres for the establishment of a dwelling on a vacant lot or parcel. The Measure 37 claim property consists of 19.90 acres. Therefore, the claimants lawfully could not have established a home site on the Measure 37 claim property on their date of acquisition, under the 76-acre standard.

As the claimants' agent correctly clarifies, the 76-acre standard in effect in 1984 was not the exclusive means through which a dwelling could be established on EFU zoned land. In fact, although the department has determined generally that a dwelling could be established on a lot or parcel of at least 76 acres, under the county's code, 76 acres would not necessarily have been sufficient to satisfy the county standard. As relevant here, the acknowledged county code that applied when the claimants acquired the property provided in section 430-37.2.A(1)(b) for dwellings in conjunction with farm use if the lot or parcel:

"(b) has produced at least \$10,000 in annual gross farm income in two (2) consecutive calendar years out of the three (3) calendar years before the year in which the application for the dwelling was made, or is planted in perennials capable of producing, upon harvest, an average of at least \$10,000 in gross annual income; \* \* \*."

The claimants' agent commented that these provisions would have allowed dwellings on lots or parcels less than 76 acres. The claimants' agent is correct that the standards in effect in 1984 when the claimants acquired the property provided different alternatives for applicants to seek approval to establish a dwelling in conjunction with farm use.

In response to the previous Final Order of Denial, the claimants' attorney submitted copies of Thomas Duyck's federal tax returns for the years 1985, 1986, 1987, 1988, 1991, 1993 and 1994, establishing that, between the time the claimants acquired the property in 1984 and the time the more restrictive regulations became effective in 1993, the property "produced at least \$10,000 in gross annual income in two consecutive calendar years out of three calendar years \* \* \*" indicating that the claimants could have made an application for a dwelling in that time period.

Therefore, based on the evidence submitted by the claimants' attorney in response to the Final Order of Denial, the claimants were lawfully permitted to establish one home site on the Measure 37 claim property on their date of acquisition.

## **II. COMMENTS ON THE PRELIMINARY EVALUATION AND FINAL ORDER**

The department issued its Preliminary Evaluation for this claim on October 22, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. As discussed above, the claimants' agent originally submitted comments but did not provide documentation to establish that the property produced at least \$10,000 in gross annual income in two consecutive calendar years out of three calendar years between the time they acquired the property and the restrictive land use regulations were enacted. The department issued its Final Order for this claim on December 31, 2009. The claimants requested reconsideration of that Final Order and ultimately have now provided sufficient documentation to support a finding that the property was capable of producing at least \$10,000 in gross annual income in two consecutive calendar years out of three calendar years between the time they acquired the property and the restrictive land use regulations were enacted. This Amended Final Order and Home Site Authorization on Reconsideration includes the department's revised determination and supersedes the previously issued final order.

## **III. CONCLUSION**

Based on the analysis above, the claimants qualify for one home site. However, the number of lots, parcels or dwellings that a claimant may establish pursuant to a home site authorization is reduced by the number of lots, parcels or dwellings currently in existence on the Measure 37 claim property and any contiguous property under the same ownership according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49.

Based on the documentation provided by the claimants and information from Washington County, the Measure 37 claim property includes one lot or parcel and no dwellings. There is no contiguous property under the same ownership. Therefore, the one home site approval the claimants qualify for under Section 6 of Measure 49 will authorize the claimants to establish no additional lots or parcels and one dwelling on the Measure 37 claim property.

## **IV. HOME SITE AUTHORIZATION**

Based on the analysis set forth above, this claim is approved, and the claimants qualify for one home site approval. As explained in section III above, after taking into account the number of

existing lots, parcels or dwellings, the claimants are authorized for one dwelling on the property on which the claimants are eligible for Measure 49 relief, subject to the following terms:

1. Each dwelling must be on a separate lot or parcel, and must be contained within the property on which the claimants are eligible for Measure 49 relief. The establishment of a dwelling based on this home site authorization must comply with all applicable standards governing the siting or development of the dwelling. However, those standards must not be applied in a manner that prohibits the establishment of the dwelling, unless the standards are reasonably necessary to avoid or abate a nuisance, to protect public health or safety, or to carry out federal law.
2. This home site authorization will not authorize the establishment of a dwelling in violation of a land use regulation described in ORS 195.305(3) or in violation of any other law that is not a land use regulation as defined by ORS 195.300(14).
3. A claimant is not eligible for more than 20 home site approvals under Sections 5 to 11 of Measure 49 regardless of how many properties a claimant owns or how many claims a claimant filed. If the claimants have developed the limit of twenty home sites under Measure 49, the claimants are no longer eligible for the home site approval that is the subject of this order.
4. The number of dwellings a claimant may establish under this home site authorization is reduced by the number of dwellings currently in existence on the Measure 37 claim property and contiguous property in the same ownership, regardless of whether evidence of their existence has been provided to the department. If, based on the information available to the department, the department has calculated the number of currently existing dwellings to be either greater than or less than the number of dwellings actually in existence on the Measure 37 claim property or contiguous property under the same ownership, then the number of additional dwellings a claimant may establish pursuant to this home site authorization must be adjusted according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49. Statements in this final order regarding the number of lots, parcels or dwellings currently existing on the Measure 37 claim property and contiguous property are not a determination on the current legal status of those lots, parcels or dwellings.
5. Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimants may choose to convert any temporary dwelling currently located on the property on which the claimants are eligible for Measure 49 relief to an authorized home site pursuant to a home site approval. Otherwise, any temporary dwelling is subject to the terms of the local permit requirements under which it was approved, and is subject to removal at the end of the term for which it is allowed.
6. A home site approval only authorizes the establishment of a new dwelling on the property on which the claimants are eligible for Measure 49 relief. No additional development is authorized on contiguous property for which no Measure 37 claim was filed.

7. The claimants may use a home site approval to convert a dwelling currently located on the property on which the claimants are eligible for Measure 49 relief to an authorized home site. If the number of dwellings existing on the property on which the claimants are eligible for Measure 49 relief exceeds the number of home site approvals the claimants qualify for under a home site authorization, the claimants may select which existing dwellings to convert to authorized home sites.
8. The claimants may not implement the relief described in this Measure 49 home site authorization if a claimant has been determined to have a common law vested right to a use described in a Measure 37 waiver for the property. Therefore, if a claimant has been determined in a final judgment or final order that is not subject to further appeal to have a common law vested right as described in Section 5(3) of Measure 49 to any use on the Measure 37 claim property, then this Measure 49 Home Site Authorization is void. However, so long as no claimant has been determined in such a final judgment or final order to have a common law vested right to a use described in a Measure 37 waiver for the property, a use that has been completed on the property pursuant to a Measure 37 waiver may be converted to an authorized home site.
9. A home site approval does not authorize the establishment of a new dwelling on a lot or parcel that already contains one or more dwellings.
10. Because the property is located in an exclusive farm use zone, the owner must comply with the requirements of ORS 215.293 before beginning construction.
11. If an owner of the property is authorized by other home site authorizations to subdivide, partition, or establish dwellings on other Measure 37 claim properties, Measure 49 authorizes the owner to cluster some or all of the authorized lots, parcels or dwellings that would otherwise be located on land in an exclusive farm use zone, a forest zone or a mixed farm and forest zone on a single Measure 37 claim property that is zoned residential use or is located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone but is less suitable for farm or forest use than the other Measure 37 claim properties.
12. If the claimants transferred ownership interest in the Measure 37 claim property prior to the date of this order, this order is rendered invalid and authorizes no home site approvals. Provided this order is valid when issued, a home site approval authorized under this order runs with the property and transfers with the property. A home site approval will not expire, except that if a claimant who received this home site authorization later conveys the property to a party other than the claimant's spouse or the trustee of a revocable trust in which the claimant is the settlor, the subsequent owner of the property must establish the authorized dwellings within 10 years of the conveyance. A dwelling lawfully created based on a home site approval is a permitted use.
13. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, this home site authorization will not authorize the use of the property unless the claimants first obtain that permit, license or other

form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the subject property imposed by private parties.

IT IS HEREBY ORDERED that this Amended Final Order and Home Site Authorization on Reconsideration 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:



Jerry Ldz, Acting Director  
Dept. of Land Conservation and Development  
Dated this 14<sup>th</sup> day of March 2011

#### **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.