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:	E131684B[1]
CLAIMANTS:	Robert G. and Elaine M. Durrer 20295 E. Beaver Creek Road Cloverdale, OR 97112 Kevin G. Durrer 2890 McCormick Loop Tillamook, OR 97141
MEASURE 37 PROPERTY IDENTIFICATION:	Township 1S, Range 9W, Section 32 Tax lots 1600 Tillamook County
AGENT CONTACT INFORMATION:	Lois A. Albright Albright & Kittell PO Box 939 Tillamook, OR 97141

The claimants, Robert and Elaine Durrer, and Kevin Durrer, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 29, 2006, for property located at 2635 McCormick Loop 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.

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[1] Claim E131684 has been split into two claims, E131684A and E131684B, because the Measure 37 claim sought relief for two non-contiguous parcels. Claim E131684A addresses the claimants' eligibility for Measure 49 relief on tax lots 1200, 1300, and 1500, and E131684B addresses their relief on tax lot 1600.

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. No waiver was issued for this claim. The Measure 37 claim filed with the state describes 180 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, Robert and Elaine Durrer, and Kevin Durrer, filed a Measure 37 claim, M131684, with the state on November 29, 2006. The claimants filed a Measure 37 claim, M06-27, with Tillamook County on November 28, 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 deeds submitted by the claimants, Kevin Durrer is of fee title to the property as shown in the Tillamook County deed records 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, Robert and Elaine Durrer have not established their ownership of the property for the purposes of Measure 49. Robert and Elaine Durrer conveyed their ownership interest in the Measure 37 claim property to claimant Kevin Durrer on November 21, 2006.

Because this requirement has not been met, the claimants Robert and Elaine Durrer are not entitled to any relief under Measure 49, and, therefore, the remaining approval criteria will not be evaluated for those claimants.

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 exclusive farm use zone and regulate the establishment of dwellings on new or existing lots or parcels.

The claimant's property consists of 39.10 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

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."

Tillamook County deed records indicate that the claimant acquired the property on November 21, 2006.

On November 21, 2006, the Measure 37 claim property was subject state statutes. State law in effect when the claimant acquired the property, specifically ORS 215.780 (1993 edition), required a minimum lot size of 80 acres for land zoned for exclusive farm use and not designated

rangeland. The state law in effect on November 21, 2006, would have prohibited the claimant from lawfully partitioning the Measure 37 claim property into lots smaller than 80 acres. The claimant's property consists of 39.10 acres. Therefore, the claimant lawfully could not have established any additional home sites on his date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on November 30, 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 claimants' attorney submitted a comment disputing the department's determination regarding the current ownership of the property. Section 2(16) of 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." Claimants Robert and Elaine Durrer are not owners of the property because a seller under a land sale contract in force for the property does not fall within the definition of "owner" under Measure 49. Claimant Kevin Durrer is a purchaser under a recorded land sale contract in force for the property and, therefore, is the owner of the property under Measure 49.

III. CONCLUSION

Based on the analysis above, claimants Robert and Elaine Durrer do not qualify for Measure 49 home site approvals because the claimants no longer own the Measure 37 claim property.

Based on the analysis above, claimant Kevin Durrer is not eligible for any relief under Measure 49 because the zoning and lawfully permitted uses of the claimant's property have not changed since he acquired it. The claimant was not lawfully permitted to establish the requested three home sites when he acquired the property.

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

Judith Moore, Division Manager
Dept. of Land Conservation and Development
Dated this 22ND day of February 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.