OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

ORS 195.300 to ORS 195.336 (MEASURE 49) SUPPLEMENTAL REVIEW OF MEASURE 37 CLAIM
Final Order and Home Site Authorization

STATE ELECTION NUMBER:	E134021A[1]
CLAIMANT:	Derry Farms, Inc. 30180 Pickett Road Malin, OR 97632
MEASURE 37 PROPERTY IDENTIFICATION:	Township 40S, Range 12E Section 32, Tax lot 900 Section 33, Tax lots 600 and 800 Klamath County
AGENT CONTACT INFORMATION:	Justin Throne Attorney at Law 280 Main Street Klamath Falls, OR 97601

The claimant, Derry Farms, Inc., filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 4, 2006, for property located at 30180 Pickett Road, near Malin, in Klamath 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 its 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 and Home Site Authorization 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

[1] Claim E134201 has been split into two claims, E134201A and E134201B, because the Measure 37 claim sought relief for two non-contiguous parcels. Claim E134201A addresses the claimant's eligibility for Measure 49 relief on tax lots 900, 600 (section 33) and 800, and E134201B addresses its relief on tax lot 600 (section 7).

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 supplemental review under Section 6 in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes land division and development that could have resulted in more than three home sites.[2] 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, Derry Farms, Inc., filed a Measure 37 claim, M134021, with the state on December 4, 2006. The claimant filed a Measure 37 claim, M37-96-06, with Klamath County on December 4, 2006. The state claim was filed on December 4, 2006.

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

Klamath County has confirmed that the claimant is the current owner of the property.

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[2] The Measure 37 waiver described the property and provided relief for tax lots 900, 600 (section 33), 800 and 600 (section 7).

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 Klamath County, outside the urban growth boundary and outside the city limits of the nearest city, Malin.

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:

Tax lots 900 and 800 of the Measure 37 claim property are currently zoned Exclusive Farm Use-Cropland (EFU-C) by Klamath 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. Applicable provisions of ORS chapter 215 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, generally prohibit the establishment of a lot or parcel less than 80 acres in size in an EFU zone and regulate the establishment of dwellings on new or existing lots or parcels.

Tax lot 600 of the Measure 37 claim property is currently zoned Forestry Range (FR) by Klamath 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.

The claimant's property consists of 54.45 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

Klamath County deed records indicate that the claimant acquired the property on April 11, 1979.

The claimant acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Klamath County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On April 11, 1979, the Measure 37 claim property was zoned Agriculture/Forestry (AF) by Klamath County. Klamath County's AF zone included a fixed minimum acreage standard of 20 acres. However, the Commission had not acknowledged that zone for compliance with the goals when the claimant acquired the property on April 11, 1979. Accordingly, the statewide planning goals, and in particular Goals 3 and 4, and ORS chapter 215, applied directly to the Measure 37 claim property when the claimant acquired it.

On August 6, 1984, the Commission acknowledged the application of Klamath County's Exclusive Farm Use-Cropland (EFU-C) zone to tax lots 900 and 800 of the Measure 37 claim property, and the county's Forestry Range (FR) zone to tax lot 600 of the property. The

Commission's acknowledgement of Klamath County's EFU-C zone confirmed that zone's compliance with Goal 3 and ORS chapter 215, and the Commission's acknowledgement of Klamath County's FR zone confirmed that zone's compliance with Goals 3 and 4 and ORS chapter 215.

Although Klamath County's EFU-C zone was acknowledged to comply with the statewide planning goals, that zone did not establish a fixed minimum acreage standard for the creation of a lot or parcel on which a dwelling could be established. Rather, applications for division and development were evaluated on a case-by-case basis to ensure compliance with the county's applicable farm use policies, the Goals and the applicable requirements of ORS chapter 215. Therefore, on the claimant's acquisition date, it could not have established any home sites in the EFU-C zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations, absent compliance with the applicable review criteria.

Klamath County's acknowledged FR zone required 40 acres for the creation of a new lot or parcel on which a dwelling could be established. Tax lot 600 of the Measure 37 claim property consists of 0.85 acres. Therefore, on the claimant's acquisition date of tax lot 600, it could not have established any additional home sites in the FR zone that was ultimately acknowledged to comply with the statewide planning goals and implementing regulations.

However, because of uncertainty during the time period between adoption of the statewide planning goals in 1975 and each county's acknowledgment of its plan and land use regulations regarding the factual and legal requirements for establishing compliance with the statewide planning goals, the 2010 Legislative Assembly amended Measure 49. Senate Bill (SB) 1049 (2010) specifies the number of home sites considered lawfully permitted, for purposes of Measure 49, for property acquired during this period unless the record for the claim otherwise demonstrates the number of home sites that a claimant would have been lawfully permitted to establish. Those amendments provide, in relevant part, that eligibility for home site approval is subject to consistency with local land use regulations in effect when the claimant acquired the subject property.

The Measure 37 claim property was subject to Klamath County's AF zone on the claimant's date of acquisition. That zone included a fixed minimum acreage standard of 20 acres.

The Measure 37 claim property consists of 54.45 acres. Therefore, based on the analysis under Senate Bill 1049 (2010), the claimant was lawfully permitted to establish two home sites on the Measure 37 claim property on its date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on March 30, 2010. 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 and Home Site Authorization; however, the issues raised in the comments regarding water supply are more appropriately considered by Klamath County at the time the

claimant seeks land use approval based on the home site authorization and are therefore not specifically addressed in this final order.

III. CONCLUSION

Based on the analysis above, the claimant qualifies for up to two home sites. 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 Klamath County, the Measure 37 claim property currently includes three lots or parcels and one dwelling. There is no contiguous property in the same ownership. Therefore, the two home site approvals the claimant qualifies for under Section 6 of Measure 49 will authorize the claimant to establish no additional lots or parcels and one additional dwelling on the Measure 37 claim property.

IV. HOME SITE AUTHORIZATION

Based on the analysis set forth above, this claim is approved, and the claimant qualifies for two home site approvals. As explained in section III above, after taking into account the number of existing lots, parcels or dwellings, the claimant is authorized for no additional lots or parcels and one additional dwelling on the property on which the claimant is 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 claimant is eligible for Measure 49 relief. The establishment of a land division or dwelling based on this home site authorization must comply with all applicable standards governing the siting or development of the land division or dwelling. However, those standards must not be applied in a manner that prohibits the establishment of the land division or 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 land division or 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 claimant has developed the limit of twenty home sites under Measure 49, the claimant is no longer eligible for the home site approvals that are the subject of this order.

4. The number of lots, parcels or dwellings a claimant may establish under this home site authorization is reduced by the number of lots, parcels and 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 lots, parcels or dwellings to be either greater than or less than the number of lots, parcels or dwellings actually in existence on the Measure 37 claim property or contiguous property under the same ownership, then the number of additional lots, parcels or 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 claimant may choose to convert any temporary dwelling currently located on the property on which the claimant is 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 lot, parcel or dwelling on the property on which the claimant is eligible for Measure 49 relief. No additional development is authorized on contiguous property for which no Measure 37 claim was filed or on Measure 37 claim property on which the claimant is not eligible for Measure 49 relief. A lot or parcel established pursuant to a home site approval must either be the site of a dwelling that is currently in existence or be the site of a dwelling that may be established pursuant to the home site approval.

7. The claimant may use a home site approval to convert a lot, parcel or dwelling currently located on the property on which the claimant is eligible for Measure 49 relief to an authorized home site. If the number of lots, parcels or dwellings existing on the property on which the claimant is eligible for Measure 49 relief exceeds the number of home site approvals the claimant qualifies for under a home site authorization, the claimant may select which existing lots, parcels or dwellings to convert to authorized home sites; or may reconfigure existing lots, parcels or dwellings so that the number is equivalent to the number of home site approvals.

8. The claimant 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. The claimant may be required to alter the configuration of the lots or parcels currently in existence on the Measure 37 claim property and contiguous property so that each additional dwelling established on the property on which the claimant is eligible for Measure 49 relief, pursuant to this home site authorization, is sited on a separate lot or parcel.

10. Because the property is located in an exclusive farm use and a mixed farm and forest zone, the home site authorization does not authorize new lots or parcels that exceed five acres. However, existing or remnant lots or parcels may exceed five acres. Before beginning construction, the owner must comply with the requirements of ORS 215.293. Further, the home site authorization will not authorize new lots or parcels that exceed two acres if the new lots or parcels are located on high-value farmland, on high-value forestland or on land within a ground water restricted area. However, existing or remnant lots or parcels may exceed two acres.

11. Because the property is located in an exclusive farm use and a mixed farm and forest zone, Measure 49 requires new home sites to be clustered so as to maximize suitability of the remnant lot or parcel for farm or forest use. Further, 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 claimant 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 lots, parcels and dwellings within 10 years of the conveyance. A lot or parcel lawfully created based on this home site authorization will remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law. 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 claimant first obtains 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 Final Order and Home Site Authorization 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 15th day of June 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 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.