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:	E133854
CLAIMANTS:	Alan E. and Barbara J. Russell 7837 NW Lone Pine Lane Terrebonne, OR 97760
MEASURE 37 PROPERTY IDENTIFICATION:	Township 14S, Range 14E, Section 7 Tax lots 101, 102 and 200[1] Crook County

The claimants, Alan and Barbara Russell, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 4, 2006, for property located at 7535, 7831, 7837 and 7839 NW Lone Pine Lane, near Terrebonne, in Crook 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 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 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

[1] The Measure 37 claim property consists of tax lots 100, 101, 102 and 200. The claimants did not elect supplemental review for tax lot 100. While a claim cannot be amended to remove claim property, analysis of a claimant's eligibility for relief on a portion of claim property may, in some cases, be immaterial. In this case, whether the claimants are eligible for relief on tax lot 100 is not relevant to the analysis of whether the claimants are eligible for relief on tax lots 101, 102 and 200. Therefore, although tax lot 100 is part of the Measure 37 claim property, review of the claimants' eligibility for relief on tax lot 100 is omitted. Tax lot 100 will be taken into account in determining the total amount of development existing on the Measure 37 claim property.

issued for this claim. The Measure 37 claim filed with the state describes seven 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, Alan and Barbara Russell, filed a Measure 37 claim, M133854, with the state on December 4, 2006. The claimants filed a Measure 37 claim with Crook County on November 30, 2006. The state claim was filed on December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Crook 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, Alan and Barbara Russell are the settlors of a revocable trust into which they conveyed the Measure 37 claim property and, therefore, are owners of the property under Measure 49.

Crook 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 Crook County, outside the urban growth boundary and outside the city limits of the nearest city, Terrebonne.

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-2) by Crook 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. Those provisions also regulate the establishment of dwellings on new or existing lots or parcels and include restrictions on establishing more than one dwelling on a single tract.

The claimants' property consists of 244.71 acres that make up a single tract. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the three home sites the claimants 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 three 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

Crook County deed records indicate that the claimants acquired tax lot 101 (149.07 acres) on December 11, 1969, tax lot 200 (69.64 acres) on June 28, 1972, the northern portion of tax lot 102 (approximately 10 acres) on March 30, 1978, and the southern portion of tax lot 102 (approximately 16 acres) on January 6, 1981.

On December 11, 1969, the Measure 37 claim property consisted of tax lot 101 and on June 28, 1972 the Measure 37 claim property consisted of tax lots 101 and 200. On those dates, tax lots 101 and 200 were not subject to any local or state laws that would have prohibited the claimants from establishing at least three lots or parcels and at least three dwellings. The claimants were lawfully permitted to establish more than one dwelling on a tract on their dates of acquisition of tax lots 101 and 200. Therefore, the claimants lawfully could have established the three home sites the claimants may qualify for under Section 6 of Measure 49 on tax lots 101 and 200.

The claimants acquired the northern approximately 10-acre portion of tax lot 102 of the Measure 37 claim property after adoption of the statewide planning goals, but before the Land Conservation and Development Commission (the Commission) acknowledged Crook County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. On March 30, 1978, tax lots 101, 200 and the northern approximately 10-acre portion of tax lot 102 of the Measure 37 claim property were zoned Exclusive Agriculture (A-10) by Crook County. Crook County's A-10 zone included a fixed minimum acreage standard of 10 acres. However, the Commission had not acknowledged that zone for compliance with the goals when the claimants acquired the northern approximately 10-acre portion of tax lot 102 of the Measure 37 claim property on March 30, 1978. Accordingly, the statewide planning goals, and in particular Goal 3, and ORS chapter 215 applied directly to tax lots 101, 200 and the northern approximately 10-acre portion of tax lot 102 of the Measure 37 claim property.

On February 16, 1979, the Commission acknowledged the application of Crook County's Exclusive Farm Use (EFU-2) zone to the Measure 37 claim property. The Commission's

acknowledgement of Crook County's EFU-2 zone confirmed that zone's compliance with Goal 3 and ORS chapter 215. Crook County's acknowledged EFU-2 zone required 160 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants were lawfully permitted to establish more than one dwelling on a tract on their date of acquisition of the northern approximately 10-acre portion of tax lot 102. Tax lots 101, 200 and the northern approximately 10-acre portion of tax lot 102 of the Measure 37 claim property consist of 228.71 acres, and are developed with three dwellings. Therefore, on the claimants' acquisition date, they could not have established on the northern approximately 10-acre portion of tax lot 102 of the Measure 37 claim property any additional home sites in the 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 subject to consistency with local land use regulations in effect when they acquired the Measure 37 claim property, claimants whose property consists of at least 40 acres were lawfully permitted to establish three home sites.

Tax lots 101, 200 and the northern approximately 10-acre portion of tax lot 102 of the Measure 37 claim property consist of 228.71acres. Therefore, based on the analysis under SB 1049 (2010), the claimants were lawfully permitted to establish three home sites on tax lots 101, 200 and the northern approximately 10-acre portion of tax lot 102 of the Measure 37 claim property on their date of acquisition of the northern approximately 10-acre portion of tax lot 102 of the Measure 37 claim property.

On January 6, 1981, the Measure 37 claim property consisted of tax lots 101, 200 and 102 and was subject to Crook County's acknowledged Exclusive Farm Use (EFU-2) zone. Crook County's EFU-2 zone required 160 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consists of 244.71 acres, and is developed with three dwellings. Therefore, the claimants lawfully could not have established on the southern approximately 16-acre portion of tax lot 102 of the Measure 37 claim property any additional home sites on their date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on March 26, 2010. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. No written comments were received in response to the 28-day notice.

III. CONCLUSION

Based on the analysis above, the claimants do not qualify on the southern approximately 16-acre portion of tax lot 102 of the Measure 37 claim property for Measure 49 home site approvals because the claimants were not lawfully permitted to establish the lots, parcels or dwellings on the claimants' date of acquisition of that portion.

Based on the analysis above, the claimants qualify for up to three home sites on tax lots 101, 200 and the northern approximately 10-acre portion of tax lot 102. 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 Crook County, the Measure 37 claim property currently includes four lots or parcels and three dwellings, two of which are located on tax lot 102. There is no contiguous property under the same ownership. Therefore, the three home site approvals the claimants qualify for under Section 6 of Measure 49 will authorize the claimants to authorize or replace the three existing dwellings and to alter the configuration of the existing lots or parcels so that each existing dwelling is sited on a separate authorized lot or parcel on tax lots 101, 200 and the northern approximately 10-acre portion of tax lot 102 of the Measure 37 claim property. The claimant is not authorized to establish any additional dwellings, lots or parcels.

IV. HOME SITE AUTHORIZATION

Based on the analysis set forth above, this claim is approved, and the claimants qualify for three home site approvals. As explained in section III above, after taking into account the number of existing lots, parcels or dwellings, the claimants are authorized to authorize or replace the three existing dwellings and to alter the configuration of the existing lots or parcels so that each existing dwelling is sited on a separate authorized lot or parcel on tax lots 101, 200 and the northern approximately 10-acre portion of tax lot 102 of the Measure 37 claim property. The claimant is not authorized to establish any additional dwellings, lots or parcels 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 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 claimants have developed the limit of twenty home sites under Measure 49, the claimants are 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 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 lot, parcel or 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 or on Measure 37 claim property on which the claimants are 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 claimants may use a home site approval to convert a lot, parcel or 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 lots, parcels or 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 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 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. The claimants 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 claimants are 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 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 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 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 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 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 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 17th day of May 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.