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:	E133923B[1, 2]
CLAIMANT:	Gayle S. Wilhoit 17275 Kings Grade Road Newberg, OR 97132
MEASURE 37 PROPERTY IDENTIFICATION:	Township 3S, Range 3W, Section 3 Tax lot 101 Yamhill County
AGENT CONTACT INFORMATION:	John C. Pinkstaff Lane Powell Attorneys & Counselors 601 SW 2nd Avenue, Suite 2100 Portland, OR 97204

The claimant, Gayle Wilhoit, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 4, 2006, for property located at 17705 Kings Grade Road, near Newberg, in Yamhill 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 her 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 E133923 has been split into two claims, E133923A and E133923B, because the Measure 37 claim sought relief for two non-contiguous parcels. Claim E133923A addresses the claimant's eligibility for Measure 49 relief on tax lots 300, 301 and 600 and E133923B addresses her relief on tax lot 101.

[2] On July 9, 2008, the department sent the claimant a letter stating that no further action would be taken regarding this claim. That letter was sent in error. This final order supersedes the letter dated July 9, 2008, and this claim will continue to be processed under Measure 49.

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 material; 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 one home site approval in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes one home site. Therefore, the claimant 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 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, Gayle Wilhoit, filed a Measure 37 claim, M133923, with the state on December 4, 2006. The claimant filed a Measure 37 claim, M37-270-06, with Yamhill 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 Yamhill 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, Gayle Wilhoit is the owner of fee title to the property as shown in the Yamhill County deed records and, therefore, is an owner of the property under Measure 49.

Yamhill 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:

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 Yamhill County, outside the urban growth boundary and outside the city limits of the nearest city, Newberg.

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 (EF-40) by Yamhill 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. Under ORS 215.780(2)(a), counties may adopt minimum lot sizes smaller than 80 acres, subject to approval by the Land Conservation and Development Commission (the Commission). The Commission has approved Yamhill County's EF-40 zone, which requires a minimum lot size of 40 acres.

The combined effect of the standards for the establishment of a dwelling in an EFU zone is to prohibit the claimant 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 claimant, it does not appear that the establishment of the one home site 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

Yamhill County deed records indicate that the claimant acquired the property on June 28, 1993.

On June 28, 1993, the Measure 37 claim property was subject to Yamhill County's acknowledged Exclusive Farm Use (EF-40) zone. Yamhill County's EF-40 zone required 40 acres for the establishment of a dwelling on a vacant lot or parcel. The Measure 37 claim property consists of 13 acres. Therefore, the claimant lawfully could not have established one home site on the Measure 37 claim property on her date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on December 22, 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. An agent for the claimant and the claimant's son submitted comments asserting that the claimant was lawfully permitted to establish a farm dwelling on the property on her date of acquisition based on either of two provisions in the Yamhill County zoning ordinance then in effect. The specified provisions provided for approval of a farm

dwelling on a lot or parcel of less than 40 acres if either (a) "farm crops or livestock valued at a minimum of $40,000 have been raised on the property, and sold, in each of the two previous years, or in three of the last five years" or (b) "the farm is of a commercial scale" as demonstrated by meeting specific criteria in a Type III review process.

The agent indicates that the claimant is "prepared to make application to Yamhill County" under these criteria. The claimant's son asserts that based on evidence of hazelnut production on the property on the claimant's acquisition date the property was a farm of a commercial scale and in the alternative that the claimant could plant the property in wine grapes to meet the historic income standard.

Measure 49 allows a claimant to establish the number of lots, parcels and dwellings that would *have been* lawfully permitted at the time a claimant acquired the property. A use was not "lawfully permitted" when approval of the use on a claimant's acquisition date would have required a highly discretionary review process and the record for the claim does not include sufficient evidence that the claimant could have met the standards under such a review process. Further, a use was not lawfully permitted in cases where a claimant suggests that the property could in the future be made to meet the standards for a farm dwelling that existed on the claimant's acquisition date.

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 a dwelling on the claimant's date of acquisition.

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 21st day of April 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.