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:	H134405
CLAIMANTS:	Mildred L. Hoodenpyl[1] 50700 NW South Road Gaston, OR 97119 Barbara E. Hancox Co-Trustee of the Hoodenpyl Family Trust 50700 NW South Road Gaston, OR 97119 Leroy G. Hoodenpyl Co-Trustee of the Hoodenpyl Family Trust 4319 NE 62nd Avenue Portland, OR 97218
MEASURE 37 PROPERTY IDENTIFICATION:	Township 2S, Range 4W, Section 4 Tax lot 1100[2] Yamhill County
AGENT CONTACT INFORMATION:	Samuel R. Justice Haugeberg, Rueter, Gowell, Fredericks, Higgins & McKeegan, P.C. PO Box 480 McMinnville, OR 97128

The claimants, Mildred Hoodenpyl, Barbara Hancox and Leroy Hoodenpyl, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on June 27, 2007, for property located at 50460 NW South Road, near Gaston, in Yamhill County. ORS 195.300 to ORS 195.336 (Measure 49) entitles claimants who filed Measure 37 claims to elect supplemental review of

[1] Information included with the election material indicates that claimant Mildred Hoodenpyl passed away on February 27, 2008. Under Measure 49, if a claimant dies on or after December 6, 2007, entitlement to prosecute the claim passes to the person who acquires the claim property by devise or by operation of law.
[2] The Measure 37 claim property consisted of 54.64 acres of tax lot 1100 located to the southeast of the county road. After the Measure 37 claim was filed, Yamhill County approved a property line adjustment for tax lot 1100 that remapped and reconfigured the land area of tax lot 1100. All references to the Measure 37 claim property refer to the 54.64 acres southeast of the county road that was the subject of the claimants' Measure 37 claim.

their claims. The claimants 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. However, as initially enacted in 2007, a claimant was not eligible for relief under Measure 49 if the claimant filed a Measure 37 claim with the state after December 4, 2006, but did not comply with the provisions of OAR 660-041-0020, then in effect. Mildred Hoodenpyl, Barbara Hancox and Leroy Hoodenpyl were not entitled to Measure 49 relief on that basis.

However, the Oregon State Legislative Assembly subsequently amended this Measure 49 requirement through the passage of House Bill 3225 (Chapter 855 (2009 Laws)) (HB 3225). As a result, this requirement no longer prevents the claimants, Mildred Hoodenpyl, Barbara Hancox and Leroy Hoodenpyl, from obtaining Measure 49 relief. The claimants elected to seek relief under Measure 49, as amended by HB 3225, and submitted the $175 fee required by Section 18 of HB 3225 in order to have the claim reviewed.

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 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 land division and development that could have resulted in more than three 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, as amended by HB 3225, 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 the state before Measure 49 became effective on December 6, 2007. If the claimant filed their state Measure 37 claim after December 4, 2006, the claimant must also have either (a) filed the claim in compliance with the provisions of OAR 660-041-0020 then in effect; (b) submitted a land use application as described in OAR 660-041-0020 then in effect prior to June 28, 2007; or (c) filed a Measure 37 claim with the county on or before December 4, 2006.

Findings of Fact and Conclusions

The claimants, Mildred Hoodenpyl, Barbara Hancox and Leroy Hoodenpyl, filed a Measure 37 claim, M134405, with the state on June 27, 2007. The claimants filed a Measure 37 claim, M37-01-07, with Yamhill County on June 27, 2007. The state claim was filed after December 4, 2006, and the claimants also submitted a land use application as described in OAR 660-041-0020 then in effect prior to June 28, 2007.

The claimants filed a timely Measure 37 claim with the state along with any additional claims or applications that the claimants had to have filed in order to be eligible for review under Measure 49, as amended by HB 3225.

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, Mildred Hoodenpyl is the settlor of a revocable trust into which she conveyed the Measure 37 claim property and, therefore, is an owner of the property under Measure 49.

Yamhill County has confirmed that the claimant Mildred Hoodenpyl was the owner of the property as of the date of her death.

According to the information submitted by the claimants, Barbara Hancox and Leroy Hoodenpyl, as Co-Trustees of the of the Hoodenpyl Family Trust, the revocable trust into which the property was transferred, were not owners of the property for the purposes of Measure 49 during the period prior to the death of Mildred Hoodenpyl because under Measure 49 the only owner of property in a revocable trust is the settlor of the revocable trust. Although Barbara Hancox and Leroy Hoodenpyl did become owners of the property as trustees of an irrevocable trust on February 8, 2008 upon the death of Mildred Hoodenpyl, they are not entitled to any relief under Measure 49. There are a couple reasons for this conclusion. First, as noted above, claimants Barbara Hancox and Leroy Hoodenpyl were not "owners" of the property under Measure 49 on the date the claim was filed. Second, on their acquisition date of February 8, 2008 the current zoning of the property was already in place and would prohibit the establishment of the three home sites claimants Barbara Hancox and Leroy Hoodenpyl may qualify for under Section 6 of Measure 49.

However, the date of acquisition of and ownership of the claim property by Barbara Hancox and Leroy Hoodenpyl does not prohibit affirmative relief on this claim. Section 11(10) of Measure 49 provides:

> If a claimant is an individual, the entitlement to prosecute the claim under section 6, 7 or 9, chapter 424, Oregon Laws 2007, and an authorization to use the property provided by a waiver under section 6, 7 or 9, chapter 424, Oregon Laws 2007:
>
> (a) Is not affected by the death of the claimant if the death occurs on or after December 6, 2007; and
>
> (b) Passes to the person that acquires the property by devise or by operation of law.

This provision allows the department to consider Mildred Hoodenpyl's interest in the property prior to her death and to grant relief on that basis. Further, this provision authorizes Barbara Hancox and Leroy Hoodenpyl, as the individuals who acquired the property "by devise or by operation of law" following claimant Mildred Hoodenpyl's death, to prosecute the claim and implement any authorization issued with respect to Mildred Hoodenpyl's interest in the property. So, while Barbara Hancox and Leroy Hoodenpyl, as Trustees of the Hoodenpyl Family Trust, are not considered owners of the property for purposes of Measure 49, they get the benefit of the relief granted to claimant Mildred Hoodenpyl. Based on the foregoing, the remaining approval criteria will not be evaluated for claimants Barbara Hancox and Leroy Hoodenpyl, but will be evaluated for claimant Mildred Hoodenpyl.

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 Majority of the Measure 37 Claim Property Is Located Outside Any Urban Growth Boundary and Outside the Boundaries of Any City or the Measure 37 Claim Property is Located within the Boundaries of A City and Entirely Outside Any Urban Growth Boundary

Either the majority of the Measure 37 claim property must be located outside any urban growth boundary and outside the boundaries of any city or the Measure 37 Claim Property must be located within the boundaries of a city and entirely outside any urban growth boundary.

Findings of Fact and Conclusions:

The Measure 37 claim property is located in Yamhill County and the property is located outside any urban growth boundary and outside the city boundary of the nearest city, Gaston.

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-80) 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.

The Measure 37 claim property consists of 54.64 acres. Therefore, state land use regulations prohibit claimant Mildred Hoodenpyl from establishing on the Measure 37 claim property the three home sites 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 claimants, it does not appear that the establishment of the three home sites for which claimant Mildred Hoodenpyl 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 claimant Mildred Hoodenpyl acquired the property on April 19, 1958.

On April 19, 1958, the 54.64-acre Measure 37 claim property was not subject to any local or state laws that would have prohibited the claimant from establishing at least three lots or parcels and at least three dwellings. Therefore, claimant Mildred Hoodenpyl lawfully could have established the three home sites the claimant qualifies for under Section 6 of Measure 49.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on June 8, 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. The claimants' agent submitted a comment regarding the interests of claimants Barbara Hancox and Leroy Hoodenpyl, as Trustees of the Hoodenpyl Family Trust, the revocable trust into which the property was transferred. The comment states that Barbara Hancox and Leroy Hoodenpyl should be considered owners of the property for purposes of Measure 49. The comments are adequately addressed in Section 2 above.

III. CONCLUSION

Based on the analysis above, claimant Mildred Hoodenpyl qualifies for up to three 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 analysis above, claimants Barbara Hancox and LeRoy Hoodenpyl are not eligible for any relief under Measure 49 because they are not owners of the property for the purposes of Measure 49.

Based on the documentation provided by the claimants and information from Yamhill County, the Measure 37 claim property includes one lot or parcel and one dwelling. There is no contiguous property under the same ownership. Therefore, the three home site approvals claimant Mildred Hoodenpyl qualifies for under Section 6 of Measure 49 will authorize the claimant to establish up to two additional lots or parcels and two additional dwellings on the 54.64-acre Measure 37 claim property located southeast of the county road.

IV. HOME SITE AUTHORIZATION

Based on the analysis set forth above, this claim is approved, and claimant Mildred Hoodenpyl qualifies for three 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 two additional lots or parcels and two additional dwellings on the 54.64-acre Measure 37 claim property located southeast of the county road 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. If the property described in a claim is divided by an urban growth boundary, any new dwelling, lot or parcel established on the property pursuant to a home site approval must be located on the portion of the property outside the urban growth boundary.

11. 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.

12. 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.

13. 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.

14. 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:

Kristin May, Division Manager
Dept. of Land Conservation and Development
Dated this 17th day of August 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.