



**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:**

E130781

**CLAIMANT:**

Darrell Z. Hunker  
PO Box 622  
Toledo, OR 97391

**MEASURE 37 PROPERTY  
IDENTIFICATION:**

Township 11S, Range 10W, Section 4  
Tax lot 300  
Lincoln County

The claimant, Darrell Hunker, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 15, 2006, for property located at 221 Happy Valley Road, near Toledo, in Lincoln 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 his 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 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. However, if the number of lots, parcels and dwellings currently in existence on the Measure 37 claim property and the contiguous property under the same ownership is equal to or greater than the maximum number of home sites a claimant could otherwise qualify for under Section 6 of Measure 49, a claimant may qualify for only one home site approval.

The claimant has requested three home site approvals in the election material. The Measure 37 waiver issued for this claim describes five home sites. However, because it appears that the

Measure 37 claim property and contiguous property in the same ownership contain three or more lots or parcels that are developed with dwellings, the claimants may qualify for a maximum of one home site approval.

## **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, Darrell Hunker, filed a Measure 37 claim, M130781, with the state on November 15, 2006. The claimant filed a Measure 37 claim, 17-LURCC-06, with Lincoln County on November 15, 2006. The state claim was filed prior to December 4, 2006.

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

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

### **3. All Owners 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 Lincoln County, outside the urban growth boundary and outside the city limits of the nearest city, Toledo.

**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:**

As stated in Section I.A. above, the claimant may qualify for one home site.

The property is currently zoned Rural Residential (RR5), by Lincoln County, in accordance with Goal 14, which prohibits the urban use of rural land and requires local comprehensive plans to identify and separate urbanizable from rural land in order to provide for the orderly and efficient transition from rural to urban use. State laws, namely Goal 14 and OAR 660-004-0040, prohibit the establishment of a lot or parcel less than the size established in the County's rural residential zone in existence on October 4, 2000, if the zone in existence on that date had a minimum lot size of two or more acres. Lincoln County's RR5 zone requires a minimum lot size of five acres.

The claimant's property consists of 5.8 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the one home site 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 one home site for which the claimant may qualify on the property would be 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**

Lincoln County deed records indicate that the claimant acquired the property on November 1, 1978.

The claimant acquired the Measure 37 claim property after adoption of the statewide planning goals, but before the Commission acknowledged Lincoln County's comprehensive plan and land use regulations to be in compliance with those goals pursuant to ORS 197.250 and 197.251. At that time, the Measure 37 claim property was zoned Rural Residential (A-2) by Lincoln County which required a minimum parcel size of one acre for the creation of a new lot or parcel. On January 18, 1983, the Commission acknowledged the application of Lincoln County's Rural Residential (RR5) zone to the Measure 37 claim property. Because the Commission had not acknowledged Lincoln County's comprehensive plan and land use regulations for compliance with the goals when the claimant acquired the property on November 1, 1978, the statewide planning goals, and in particular Goal 14, applied directly to the Measure 37 claim property.

On November 1, 1978, Goal 14 required counties "to provide for an orderly and efficient transition from rural to urban land use." The Goal required the creation of urban growth boundaries to "identify and separate urbanizable land from rural land," and prohibited the location of "urban uses" outside urban growth boundaries without the approval of a Goal 2 exception to Goal 14. In general, and consistent with subsequent judicial interpretation and LCDC rules implementing Goal 14, urban uses included residential lots or parcels less than two acres in size. Ultimately, the County's acknowledged plan zoned the subject property to require a minimum of five acres for the creation of a new lot or parcel. Therefore, the establishment of a new lot or parcel of five acres on the subject property would have complied with Goal 14 on the claimant's date of acquisition. However, based on evidence in the record and consistent with judicial and regulatory authority, under a direct application of the goals, prior to

acknowledgement, a lot or parcel of two acres or more could also have complied with the requirements of Goal 14.

The claimant's property consists of 5.8 acres. Therefore, under a direct application of Goal 14, the claimant lawfully could have created at least one additional residential lot or parcel had he sought that division when he acquired the property. The claimant, therefore, qualifies for up to one home site under Section 6 of Measure 49.

## **II. COMMENTS ON THE PRELIMINARY EVALUATION**

The department issued its Preliminary Evaluation for this claim on June 19, 2009. 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 claimant qualifies for the one home site approval.

The number of lots, parcels or dwellings that a claimant is authorized to 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. If a claimant otherwise qualifies for relief under Section 6 of Measure 49, the claimant will be able to establish at least one additional lot, parcel or dwelling, regardless of the number of dwellings currently in existence.

Based on the documentation provided by the claimant and information from Lincoln County, the Measure 37 claim property includes one lot or parcel and one dwelling. As demonstrated by Lincoln County records, the claimant also owns tax lots 200 and 204, which are contiguous to the Measure 37 claim property. The contiguous property under the same ownership includes two parcels and two dwellings. Together the Measure 37 claim property and the contiguous property in the same ownership include three lots or parcels and three dwellings. The number of lots, parcels and dwellings currently in existence on the Measure 37 claim property and the contiguous property under the same ownership is equal to or exceeds the maximum number of home sites the claimant could qualify for under Section 6 of Measure 49. However, because the claimant otherwise qualifies for relief under Section 6, the claimant qualifies for one home site approval on the Measure 37 claim property. Therefore the one home site approval the claimant qualifies for will allow the claimant to establish one additional lot or parcel and establish 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 one home site approval. As explained in section III above, after taking into account the number of existing lots, parcels or dwellings, the claimant is authorized for one additional lot or parcel and to establish one additional dwelling on the property on which the claimant is eligible for Measure 49 relief, subject to the following terms:

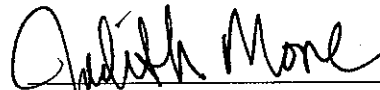
1. Each dwelling must be on a separate lot or parcel, and must be contained within the property on which the claimant is eligible for Measure 49 relief. The establishment of a land division or dwelling based on a Measure 49 home site authorization must comply with all applicable standards governing the 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. A 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.
4. 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 Measure 49 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 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 a 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 future 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.
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.
10. If the claimant transferred his 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 lot, parcel or dwelling 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.
11. If an owner of the property is authorized by other home site approvals 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. 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, Measure 49 Division Manager  
Dept. of Land Conservation and Development  
Dated this 5<sup>th</sup> day of August 2009.

#### **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.