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:	E134388[1]
CLAIMANTS:	Richard L. and Shirley V. Gingerich Gingerich Family Limited Partnership PO Box 910 Canby, OR 97013
MEASURE 37 PROPERTY IDENTIFICATION:	Township 4S, Range 1E, Section 25 Tax lots 1501 and 1600 Clackamas County
AGENT CONTACT INFORMATION:	Kristen S. David Bowerman & David PC PO Box 100 Oregon City, OR 97045

The claimants, Richard and Shirley Gingerich and Gingerich Family Limited Partnership, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 28, 2006, for property located near Canby, in Clackamas 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 of Denial 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

[1] The claimants, Richard and Shirley Gingerich, also have claim E134386 for property that is not contiguous to tax lots 1501 and 1600; and claimants Richard and Shirley Gingerich and Gingerich Limited Family Partnership also have claims E134387 and E134389 for property that is not contiguous to tax lots 700 and 1600.

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 residential and nonresidential uses. 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, Richard and Shirley Gingerich and Gingerich Family Limited Partnership, filed a Measure 37 claim, M134388, with the state on November 28, 2006. The claimants filed a Measure 37 claim, ZC558-06, with Clackamas County on November 29, 2006. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Clackamas 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 claimants, Gingerich Family Limited Partnership is the owner of fee title to the property as shown in the Clackamas County deed records and, therefore, is an owner of the property under Measure 49. Clackamas County has confirmed that the claimant is the current owner of the property.

According to the information submitted by the claimants, Richard and Shirley Gingerich have not established their ownership of the property for the purposes of Measure 49. Richard and Shirley Gingerich acquired an ownership interest in tax lots 1501 and 1600 on April 30, 1985, as

reflected by a recorded warranty deed and recorded memorandum of land sale contract included with the claim. On August 28, 1998, they transferred all their ownership interest in both tax lots to claimant Gingerich Family Limited Partnership.

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 Clackamas County, outside the urban growth boundary and outside the city limits of the nearest city, Canby.

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) by Clackamas 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 claimant's property consists of 58.19 acres. Therefore, state land use regulations prohibit claimant Gingerich Family Limited Partnership 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 claimants, it does not appear that the establishment of the three home sites for which claimant Gingerich Family Limited Partnership 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

Clackamas County deed records indicate that claimant Gingerich Family Limited Partnership acquired the property on August 28, 1998.

On August 28, 1998, the Measure 37 claim property was subject to Clackamas County's acknowledged Exclusive Farm Use (EFU) zone. Clackamas County's EFU zone required 80 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimant's property consists of 58.19 acres. Therefore, the claimant lawfully could not have established any home sites on its date of acquisition.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on October 6, 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. The claimants' attorney submitted a comment asserting that the claimants, Richard and Shirley Gingerich, as individuals, are current owners of the property. While Richard and Shirley Gingerich did own the property at an earlier date, they transferred the property to Gingerich Family Limited Partnership in 1998. Even if Richard and Shirley Gingerich are partners in the Gingerich Family Limited Partnership, the partnership is a separate and distinct legal entity from Richard and Shirley Gingerich. Therefore, claimants Richard and Shirley Gingerich are no longer owners of the property for purposes of Measure 49.

III. CONCLUSION

Based on the analysis above, claimants Richard and Shirley Gingerich are not eligible for any relief under Measure 49 because they are no longer owners of the Measure 37 claim property, and claimant Gingerich Family Limited Partnership is not eligible for any relief under Measure 49 because the claimant lawfully could not have established any home sites on its 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 January 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 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.