



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:** E124489

**CLAIMANTS:** Dick and Helyn C. Sellers<sup>1</sup>  
64061 N Highway 97  
Bend, Oregon 97701

**MEASURE 37 PROPERTY IDENTIFICATION:** Township 17S, Range 12E, Section 4  
Tax lot 800  
Deschutes County

**AGENT CONTACT INFORMATION** Michael H. McGean  
Francis Hansen & Martin LLP  
1148 NW Hill St.  
Bend, Oregon, 97701

The claimants, Dick and Helyn Sellers, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on March 20, 2006, for property located at 64061 N Highway 97, near Bend, in Deschutes 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 7 of Measure 49, which allows the Department of Land Conservation and Development (the department) to authorize up to ten 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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<sup>1</sup> Information included with the election material indicates that claimant Helyn C. Sellers died on April 21, 2007, and claimant Dick Sellers died on February 16, 2008. The claim was filed on March 20, 2006. Because the claim was filed before November 1, 2006 and claimant Helyn C. Sellers died before December 6, 2007, her heirs are not entitled to pursue her claim under Measure 49. However, claimant Dick Sellers died after December 6, 2007. 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.

## I. ANALYSIS OF CLAIM

### A. Maximum Number of Home Sites for Which the Claimants May Qualify

Under Section 7 of Measure 49, the number of home site approvals authorized by the department cannot exceed the lesser of the following: ten; the number stated by the claimants in the election materials; 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; or the number of home site approvals with a total value that represents just compensation for the reduction in fair market value caused by the enactment of one or more land use regulations that were the basis for the claim. The claimants have requested five home site approvals in the election material. The appraisal submitted by the claimants attempts to support the assertion that the value of five home site approvals is equal to or less than the loss of value caused by the enactment of land use regulations. The Measure 37 waiver issued for this claim describes five home sites. Therefore, the claimants may qualify for a maximum of five home site approvals under Section 7.

### B. Qualification Requirements

To qualify for a home site approval under Section 7 of Measure 49, the claimants must meet each of the following requirements:

#### **1. Property not high-value farm, forest or groundwater restricted**

The Measure 37 claim property must not be high-value farmland or high-value forestland, nor in a ground water restricted area, as defined in Section 2 of Measure 49.

#### **Findings of Fact and Conclusions**

The Measure 37 claim property is not high-value farmland or high-value forestland, nor in a ground water restricted area.

#### **2. 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, Dick and Helyn Sellers, filed a Measure 37 claim, M124489, with the state on March 20, 2006. The claimants filed a Measure 37 claim, M37-05-67, with Deschutes County on September 25, 2005. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Deschutes County.

### **3. 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, Dick and Helyn Sellers 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.

Deschutes County has confirmed that the claimants are the current owners of the property.

### **4. 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.

### **5. 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 Deschutes County, outside the urban growth boundary and outside the city limits of the nearest city, Bend.

### **6. 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 Multiple Use Agriculture (MUA-10) by Deschutes 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 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. Deschutes County's MUA-10 zone requires a minimum lot size of 10 acres.

Based on Deschutes County Assessor's data, the claimants' property consists of 9.51 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the five home sites the claimants are requesting under Section 7 of Measure 49.

**7. 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 five home sites that the claimants are requesting on the property is prohibited by land use regulations described in ORS 195.305(3).

**8. 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 7 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**

Deschutes County deed records indicate that the claimants acquired the property on March 2, 1965.

On March 2, 1965, the Measure 37 claim property was not subject to any local or state laws that would have prohibited the claimants from establishing at least five lots or parcels and at least

five dwellings. Therefore, the claimants lawfully could have established the five home sites the claimants have requested under Section 7 of Measure 49.

**9. The enactment of one or more land use regulations that are the basis for this claim, caused a reduction in the fair market value of the Measure 37 claim property that is equal to or greater than the fair market value of the home site approvals requested**

Sections 7 and 8 of Measure 49 require that the reduction in the fair market value of the property be demonstrated through an appraisal that meets the following requirements:

**a) The appraisal must be submitted within 180 days after the Measure 49 election is filed with the department.**

The claimants submitted an appraisal with their election on May 5, 2008. Therefore, the appraisal was submitted within 180 days of the election filing. However, the claimants have not submitted an appraisal that can be used by the Department to evaluate an asserted reduction in the fair market value of the Measure 37 claim property due to the enactment of one or more land use regulations under Measure 49. The appraisal, prepared by Gregory W. Moore, is a restricted-use appraisal prepared for the sole use of the appraiser and his client, Gregory Stuman. The appraiser states: "No third party shall have any rights to use or rely upon the appraisal for any purpose." "The only intended user of this appraisal report is the client, Gregory J. Stuman, Esq. of Francis Hansen & Martin, LLP. The client has agreed to contract this appraiser, for an additional fee, if it becomes necessary to share an appraisal report with a third party (i.e. Deschutes County)."

**a) The appraisal must be submitted within 180 days after the Measure 49 election is filed with the department.**

The claimants submitted their election on May 5, 2008, and their appraisal on August 13, 2008. Therefore, the appraisal was submitted within 180 days of the election filing.

**b) The appraisal must be prepared by a person certified under ORS chapter 674 or a person registered under ORS chapter 308.**

The appraiser signing the submitted appraisal, Gregory W. Moore, is a state-certified general appraiser. Therefore, this requirement has been met.

**c) The appraisal must comply with the Uniform Standards of Professional Appraisal Practice, as authorized by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.**

An appraisal review commissioned by DLCD has determined that the claimants' appraisal filed for the Measure 37 claim property meets the threshold requirements for Uniform Standards of Professional Appraisal Practice compliance for a "Restrictive Use Report" provided the appraiser has established with the client that the report is for client use only. The report fails to provide adequate analysis and support to allow consideration by a third

party and does not meet the minimum USPAP requirements for a Complete/Summary Appraisal. The appraisal determined the Highest and Best Use at the time the appraisal was conducted in 2005 to be "partition into four parcels ranging in size from 2.0 to 2.5 acres." However, the appraiser also notes that any use would be constrained "by typical safety (highway access) and environmental (septic system requirements), water supply (development of on-ground water permissible throughout the State of Oregon), and physical constraints of the site." The appraisal did not explain how these constraints could be overcome to establish a 4-lot subdivision. The appraisal does not contain evidence to adequately support the Highest and Best Use conclusion as required by USPAP.

In addition, the appraisal contains inconsistencies in the analysis of development costs. These inconsistencies affect the reliability of the conclusions of the residual raw land contribution and the difference from the "as is" condition of the property. The appraiser notes "I believe the market would anticipate approximately \$50,000 per parcel for establishing water and septic service, extending roads and power/telephone, surveying/engineering and permits." He also identified holding costs of \$2,500 per lot. The subsequent calculations for development/holding costs are inconsistent with these prior statements whereby the hard development costs were developed assuming \$15,000 per lot for a total of \$60,000 for the four lot development. Absent further support for his cost projections it is difficult to ascertain whether the hard development costs were intended to reflect \$15,000 per lot or \$50,000 per lot. The conclusions have been inadequately supported within the report to allow a determination as to their reasonableness. The report fails to provide sufficient analysis and support to meet the criteria of a Complete/Summary Appraisal which would be required for use by a third party. Thus the appraisal does not meet the criteria necessary for USPAP compliance relative to the scope of the Measure 49 appraisal report.

The claimants did not submit an appraisal that the department can use to evaluate the claimants' request for supplemental review under Measure 49. Therefore, this requirement has not been met.

**d) The appraisal must expressly determine the highest and best use of the property at the time the land use regulation was enacted and the highest and best use must be determined to be residential use.**

The appraisal did not determine the highest and best use of the property at the time the land use regulation was enacted. Therefore, this requirement has not been met.

**e) The appraisal must show the fair market value of the property one year before and one year after the enactment of the regulation(s) the claimants assert have resulted in a reduction of the fair market value of the Measure 37 claim property.**

In their Measure 37 claim, the claimants identified November 15, 1972 as a date on which an unspecified land use regulation may have been enacted. The date that Deschutes County's MUA zoning was acknowledged by the state to be in compliance with Goal 14 is May 11, 1981. The appraisal submitted by the claimants only shows the fair market value of the property with and without land use restrictions on June 30, 2005. Thus the appraisal does not

show the fair market value of the property one year before and one year after the enactment of any land use regulations. Therefore, this requirement has not been met.

**f) As required by Section 7 (6) and (7) the reduction in the fair market value of the Measure 37 property determined by the appraisal is equal to the decrease in the fair market value of the property from the date that is one year before the enactment of the land use regulation to the date that is one year after the enactment, plus interest. If the claim is based on the enactment of more than one land use regulation enacted on different dates, the reduction in the fair market value of the property caused by each regulation shall be determined separately and the values added together to calculate the total reduction in fair market value. Interest shall be computed using the average interest rate for a one-year United States Government Treasury Bill on December 31 of each year of the period between the date the land use regulation was enacted and the date the claim was filed, compounded annually on January 1 of each year of the period. The reduction in fair market value shall be adjusted by any ad valorem property taxes not paid, any severance taxes paid and any recapture of additional tax liability that the claimant has paid or will pay for the property if the property is disqualified from special assessment under ORS 308A.703.**

The appraisal did not determine the reduction in fair market value of the Measure 37 property as required by Section 7 (6) and (7). Instead, the reduction in fair market value included in the appraisal was determined as the difference between the value of the property with and without land use regulations on one date, June 30, 2005. The appraisal did not determine the decrease in the fair market value of the property from the date that is one year before the enactment of the land use regulation to the date that is one year after the enactment. The appraisal did not include any interest computations. The appraisal did not adjust any valuation by any ad valorem property taxes not paid. None of the required adjustments were made to any of the values included in the appraisal. Therefore, this requirement has not been met.

**g) The appraisal must show the present fair market value of each lot, parcel or dwelling that the claimant is seeking under section 7(2) of Measure 49.**

The appraisal determined the fair market value of the property as of June 30, 2005, three years before the appraisal was submitted for consideration under Section 7 of Measure 49. The appraisal appears to give a value of \$136,250 per lot, based on an aggregate value of \$545,000 for a 4-lot subdivision. However, a review commissioned by the department concluded that the value conclusions are inadequately supported within the report to allow the reviewer to make a determination as to their reasonableness. Therefore, this requirement has not been met.

The claimants have not submitted an appraisal that can be used by the department to evaluate an asserted reduction in the fair market value of the Measure 37 claim property due to the enactment of one or more land use regulations under Measure 49. Furthermore, the appraisal does not specify the highest and best use of the property at the time a land use regulation was enacted; does not show the fair market value of the property one year before and one year after a land use

regulation was enacted; does not determine the loss in fair market value due to the enactment of a land use regulation as required by Section 7 (6) and (7); and contains insufficient evidence to support the concluded present fair market value of the four home sites the claimants are seeking. Therefore, the appraisal submitted by the claimants does not meet the requirements of Section 7 under Measure 49.

## II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on January 11, 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 of Denial. Specifically, the claimants' attorney asserted that the appraisal submitted by the claimants, the resubmitted Measure 37 appraisal, should be adequate for the purposes of Measure 49. Section 7 (6) and (7) and Section 8 of Measure 49 list the requirements for a sufficient appraisal. The "Measure 49 Guide" included in the election packet sent to the claimants also explains these requirements. The documents submitted with the claimants' Measure 37 claim do not satisfy the requirements for an appraisal under Sections 7 and 8 of Measure 49.

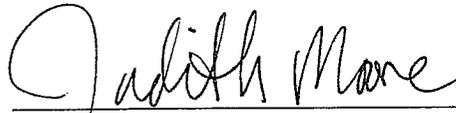
The claimants' attorney also asserts that the fact that the claimant submitted a restrictive use appraisal should be of no significance to the department. Section 7(7)(b) of Measure 49 requires that an appraisal must comply with the Uniform Standards of Professional Appraisal Practice (USPAP) as authorized by the Financial Institutions Reform, Recovery and Enforcement Act of 1989. USPAP Standard Rule 2-2(c) (i) comments: "The Restrictive Use Appraisal report is for client use only. Before entering into an agreement, the appraiser should establish with the client the situations where this type of report is to be used and should ensure that the client understands the restrictive utility of the restricted use appraisal report." Assuming that this notification was given to the client, the client should be aware that the submitted report is not to be used for the purposes other than appraiser/client consultation and is not for use by a third part such as the department. According to the appraisal review commissioned by the department, the minimal value analysis included in the report is consistent with that to be found within a Restricted Use Appraisal report but provides inadequate information to be relied upon by a third party. Therefore as submitted for reliance by a third party the appraisal was not completed in compliance with USPAP requirements and does not satisfy the requirements of Sections 7 and 8 of Measure 49.

## III. CONCLUSION

Based on the analysis above, the claimants do not qualify for Measure 49 home site approvals. The appraisal submitted by the claimants is a limited use appraisal and cannot be used by the department to evaluate an asserted reduction in the fair market value of the Measure 37 claim property due to the enactment of one or more land use regulations under Measure 49. Furthermore, the appraisal does not meet the requirements of Section 7 of Measure 49.

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, Division Manager  
Dept. of Land Conservation and Development  
Dated this 8<sup>th</sup> day of June 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.