



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

**ORS 195.300 to ORS 195.336 (MEASURE 49) SUPPLEMENTAL REVIEW
OF MEASURE 37 CLAIM
Preliminary Evaluation**

December 17, 2009

STATE ELECTION NUMBER:

E129625

CLAIMANTS:

Wildish Land Co.

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 18S, Range 2W¹
Section 7, Tax lots 100, 200 and 1000
Section 8, Tax lots 601, 700, 801 and 900
Section 9, Tax lots 400, 900, 1401 and 1404
Section 10, Tax lots 502 and 503 and
Section 16, Tax lot 101

Township 18S, Range 3W
Section 1, Tax lot 3500
Section 11, Tax lot 500 and
Section 12, Tax lots 300, 400, 900 and 1000

Lane County

AGENT CONTACT INFORMATION:

Randall Hledik, Wildish Land Co.
PO Box 7428
Eugene, Oregon 97401

I. ELECTION

The claimant, Wildish Land Co., filed a claim with the state under ORS 197.352 (2005) (Measure 37) on July 6, 2006, for property located south of Eugene and Springfield, near Mt.

¹ The Measure 37 claim property consists of tax lots 100, 200, 1000 (Section 7), 601, 700, 801, 900 (Section 8), 400, 900 (Section 9), 1401, 1404, 502, 503, 101, 3500, 500, 300, 400 (Section 12), 900 (Section 12) and 1000 (Section 12). The claimant did not elect supplemental review for tax lots 601, 700, 801, 900 (Section 8), 400, 900 (Section 9), 1401, 1404, 502, 503, 101, 3500, 500, 300, 400 (Section 12), 900 (Section 12) and 1000 (Section 12). While a claim cannot be amended to remove claim property, analysis of a claimant's eligibility for relief on a portion of claim property may, in some cases, be immaterial. In this case whether the claimant is eligible for relief on the tax lots they did not elect relief on is not relevant to the analysis of whether the claimants are eligible for relief on tax lots 100, 200 and 1000 (Section 7). Therefore, although tax lots 601, 700, 801, 900 (Section 8), 400, 900 (Section 9), 1401, 1404, 502, 503, 101, 3500, 500, 300, 400 (Section 12), 900 (Section 12) and 1000 (Section 12) are part of the Measure 37 claim property, review of the claimant's eligibility for relief on these tax lots is omitted.

Pisgah, along the Middle and Coast Forks of the Willamette River, in Lane 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 its 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.

II. SUMMARY OF PRELIMINARY EVALUATION

Based on the department's preliminary analysis, it appears that the claimant is qualified for up to ten home site approvals on tax lots 100, 200 and 1000 (Section 7) of the Measure 37 claim property provided that the claimant submits an appraisal of its tenth home site meeting the qualification standard described in Section 7(5)(g) of Measure 49.² The claimant's property, including both the Measure 37 claim property and all contiguous property in the same ownership, currently appears to consist of 26 lots or parcels, which are undeveloped. After taking into account the number of lots, parcels and dwellings currently located on the Measure 37 claim property, including one parcel that the claimant sold, and the contiguous property under the same ownership, it appears that the home site approvals will allow the claimant to establish no additional lots or parcels and nine additional dwellings on the Measure 37 claim property.

III. THE MAXIMUM NUMBER OF HOME SITE APPROVALS FOR WHICH THE CLAIMANT 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 claimant 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 claimant has requested ten home site approvals in the election material. The Measure 37 waiver issued for this claim describes 300 home sites. The appraisal submitted by the claimant attempts to support the assertion that the value of ten home site approvals is equal to or less than the loss of value caused by the enactment of land use regulations. Therefore, the claimant may qualify for a maximum of ten home site approvals under Section 7.

² The claimant has requested no dwelling for the tenth home site, referred to by the claimant as "the remainder property." Measure 49 only authorizes home sites, whether or not the intended use is to place a dwelling on the home site. The claimant is requesting nine home sites for dwellings, therefore any "remainder property" necessarily results in a tenth parcel or home site.

IV. PRELIMINARY ANALYSIS OF QUALIFICATION FOR HOME SITE APPROVAL

1. Preliminary Analysis

In order to be eligible for relief under Section 7 of Measure 49, the Measure 37 claim property must not be high-value farmland or high-value forestland, nor in a ground water restricted area.

It appears that the property is not high-value farmland or high-value forestland, and is not in a ground water restricted area.

To qualify for a home site approval under Section 7 of Measure 49, 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 December 4, 2006, 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.

The claimant, Wildish Land Co., filed a Measure 37 claim, M129625, with the state on July 6, 2006. The claimant filed a Measure 37 claim, PA06-6144, with Lane County before December 6, 2006. The state claim was filed prior to December 4, 2006.

It appears that the claimant timely filed a Measure 37 claim with both the state and Lane County.

In addition to filing a claim with both the state and the county in which the property is located, to qualify for a home site approval under Section 7 of Measure 49 the claimant must establish each of the following:

(a) 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."

According to the deeds submitted by the claimant, Wildish Land Co. 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.

(b) All Owners of the Property Have Consented in Writing to the Claim

It appears that the claimant is the sole owner of the property. Therefore, no additional consent is required.

(c) The Measure 37 Claim Property Is Located Entirely Outside Any Urban Growth Boundary and Entirely Outside the Boundaries of Any City

The Measure 37 claim property is located in Lane County, outside the urban growth boundary and outside the city limits of the nearest cities, Eugene and Springfield.

(d) One or More Land Use Regulations Prohibit Establishing the Lot, Parcel or Dwelling

As stated in Section III above, the claimant may qualify for up to ten home site approvals.

Tax lot 100 (136.5 acres) of the Measure 37 property is currently zoned Non-impacted Forest Lands District (F1) and Impacted Forest Lands District (F2) by Lane County in accordance with ORS chapter 215 and OAR 660, division 6, because the property is “forest land” under Goal 4. Applicable provisions of ORS chapter 215 and OAR 660 division 6, enacted or adopted pursuant to Goal 4, generally prohibit the establishment of a lot or parcel less than 80 acres in size in a forest zone. Those provisions also regulate the establishment of dwellings on new or existing lots or parcels and include restrictions on establishing more than one dwelling on a single tract.

Tax lots 200 (13.9 acres) and 1000 (9.7 acres) of the Measure 37 property are currently zoned Exclusive Farm Use (E-30) 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. Those provisions also regulate the establishment of dwellings on new or existing lots or parcels and include restrictions on establishing more than one dwelling on a single tract. 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 Lane County’s E-30 zone, which requires a minimum lot size of 30 acres.

Tax lots 100, 200 and 1000 of the Measure 37 property consist of 160.1 acres and are part of a single tract consisting of 1,368 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the ten home sites the claimant may qualify for under Section 7 of Measure 49.

(e) 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.

Based on the documentation submitted by the claimant, it does not appear that the establishment of the ten home sites that the claimant is requesting on tax lots 100, 200 and 1000 of the property would be prohibited by land use regulations described in ORS 195.305(3).

(f) 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."

Lane County deed records indicate that the claimant acquired tax lots 100 and 200 of the Measure 37 claim property on December 31, 1966, and tax lot 1000 on November 24, 1971.

On December 31, 1966, and November 24, 1971, tax lots 100, 200 and 1000 of the Measure 37 claim property were subject to Lane County's Agriculture/Grazing/Timber (AGT) zone. Lane County's AGT zone required at least one acre for the creation of a new lot or parcel on which a dwelling could be established. The claimant was lawfully permitted to establish more than one dwelling on a tract on its date of acquisition. Tax lots 100, 200 and 1000 consist of 160.1 acres. Therefore, the claimant lawfully could have established the requested maximum limit of ten home sites on its date of acquisition.

(g) 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:

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

The claimant submitted its election on April 25, 2008, and its appraisal on October 22, 2008. Therefore, the appraisal was submitted within 180 days of the election filing.

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

The appraisers signing the submitted appraisal, Bradford J. Thompson and Charles P. Thompson, are state-certified general appraisers; therefore this requirement appears to have been met.

3) The 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.

An appraisal review commissioned by DLCD has determined that the claimant's appraisal filed for tax lots 100, 200 and 1000 of the Measure 37 claim property meets the threshold requirements for Uniform Standards of Professional Appraisal Practice compliance; therefore this requirement appears to have been met.

4) 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 submitted determines that the highest and best use of the Measure 37 claim property at the time the land use regulations were enacted was a 71-lot, residential subdivision; therefore this requirement appears to have been met.

5) 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 claimant asserts have resulted in a reduction of the fair market value of the Measure 37 claim property.

The claimant asserts that the enactment of State Land Use Planning Goal 4 reduced the fair market value of tax lots 100, 200 and 1000 of the Measure 37 claim property. The department notes that tax lots 200 and 1000 of the Measure 37 claim property are subject to State Land Use Planning Goal 3, not Goal 4 as the claimant asserts. Goals 3 and 4 were enacted on the same date. The appraisal submitted by the claimant values the property on December 28, 1973, and on December 28, 1975; therefore this requirement appears to have been met.

6) The reduction in fair market value of the Measure 37 property determined by the appraisal 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 as required by Section 7(6) and (7).

In the appraisal submitted by the claimant, the reduction in fair market value based on the difference between the value of tax lots 100, 200 and 1000 of the Measure 37 claim property on December 28, 1975, and December 28, 1973, has been adjusted for interest and reduced by tax savings adjusted for interest; therefore this requirement appears to have been met.

7) 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 submitted by the claimant values the claimant's loss in property value due to the enactment of Goals 3 and 4 at approximately \$2,609,262. The appraisal values the market value of nine additional home sites at approximately \$1,371,000. However, the claimants have

requested a total of ten home site approvals in the form of nine, 5-acre home sites and one remainder 110-acre home site. Therefore it appears that if the claimant submits an appraisal showing that the value of its tenth home site is worth an amount less than approximately \$1,238,262 it will qualify for the maximum of ten home site approvals under Section 7 of Measure 49.

Provided that the claimant submits an appraisal valuing its tenth home site at an amount equal to or less than approximately \$1,238,262.00, based on the analysis above, the appraisal submitted by the claimant meets the requirements of Sections 7 and 8 of Measure 49.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimant, Wildish Land Co., qualifies for up to ten home site approvals under Section 7 of Measure 49, provided that it submits an appraisal of its tenth home site that meets the qualification standard described in Section 7(5)(g) of Measure 49.

Because the Measure 37 claim property includes one lot or parcel that has been transferred to a different owner, the number of home site approvals that the claimant qualifies for on the portion of the Measure 37 property that it currently owns is reduced to nine.

V. NUMBER OF LOTS, PARCELS OR DWELLINGS ON OR CONTAINED WITHIN THE PROPERTY

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 7(2)(b) of Measure 49.

Based on the documentation provided by the claimant and information from Lane County, the Measure 37 claim property appears to currently include nineteen lots or parcels in the ownership of the claimant that are undeveloped and one lot or parcel, tax lot 3500 (Township 18S, Range 3W, Section 1), that is not in the ownership of the claimant that is undeveloped. As demonstrated by the supplemental information submitted by the claimant and information available from Lane County, the claimant also owns tax lots: 1605 and 4502 (Township 18S, Range 2W, Section 6); 800 (Township 18S, Range 2W, Section 7); 201 and 401 (Township 18S, Range 2W, Section 8); and 3001 (Township 18S, Range 3W, Section 1), which are contiguous to the Measure 37 claim property. The contiguous property under the same ownership appears to include six lots or parcels and no dwellings. Together, it appears that the Measure 37 claim property and the contiguous property in the same ownership include twenty-six (26) lots or parcels and no dwellings. Therefore, provided that the claimants submit a sufficient appraisal of their tenth home site, the nine home site approvals the claimant appears to qualify for under Section 7 of Measure 49 will allow the claimant to establish no additional lots or parcels and nine additional dwellings on tax lots 100, 200 and 1000 of the Measure 37 claim property. Each dwelling must be on a separate lot or parcel, and must be contained within tax lots 100, 200 and 1000 of the Measure 37 claim property. The claimant will be required to alter the configuration of the lots or parcels currently in existence on the Measure 37 claim property and contiguous

property if it intends to develop nine additional dwellings, so that each additional dwelling established on the Measure 37 claim property, pursuant to these home site approvals, is sited on a separate lot or parcel and that the total number of lots or parcels located on the Measure 37 claim property, including Measure 37 property transferred to a different owner, and contiguous property does not exceed twenty-six.

VI. PRELIMINARY STATEMENT OF PROPOSED LIMITATIONS AND CONDITIONS ON THE NUMBER AND SCOPE OF HOME SITE APPROVALS

The department has identified the following limitations and conditions that may affect the number or scope of the home site approvals that the claimant would otherwise be entitled to under Section 7 of Measure 49. This list may not be comprehensive and does not preclude the possibility that other considerations, not yet identified by the department, may affect the establishment of a land division or dwelling authorized by a home site approval.

1. 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. The number of lots, parcels or dwellings a claimant may establish under a Measure 49 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 7(2)(b) of Measure 49. Statements in this preliminary evaluation 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. 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 a 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 any Measure 49 Home Site Authorization for the property will be 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 a home site approval, is sited on a separate lot or parcel.
10. Because the property is located in an exclusive farm use zone and a forest zone, the home site authorization will not authorize new lots or parcels that exceed five acres. However, existing or remnant lots or parcels may exceed five acres. Before beginning construction in one of these zones, 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.

11. Because the property is located in an exclusive farm use zone and a forest 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 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. Once the department issues a final home site authorization, a home site approval granted under that authorization will run with the property and will transfer with the property. A home site approval will not expire, except that if a claimant who received a 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 the 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.

V. ORVII. NOTICE OF OPPORTUNITY TO COMMENT

A claimant or a claimant's authorized agent, a county and any third party may submit written comments, evidence and information in response to the preliminary evaluation. The comments, evidence and information must be filed with the department no more than twenty-eight (28) calendar days after the date this evaluation is mailed to the claimant and the claimant's agent and notice of this evaluation is mailed to third parties.

The department will mail a copy of all materials timely filed by a county or a third party with the department to the claimant and the claimant's agent. A claimant or a claimant's authorized agent may then file written comments, evidence or information in response to the materials filed by the third party or county. That response must be filed no more than twenty-one (21) calendar days after the date the department mails the materials to the claimant and the claimant's authorized agent.

All comments, evidence and information in response to the preliminary evaluation and all responses to materials filed by a third party or a county shall be delivered to Supplemental Measure 49 Claim Review, 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540 and will be deemed timely filed either (1) if actually delivered to the department before the close of business on the final eligible calendar day, or (2) if mailed on or before the final eligible calendar day.

Note: Please reference the claim number and claimant name and clearly mark your comments as "Preliminary Evaluation Comments." Comments must be submitted in original written form only. Comments submitted electronically or by facsimile will not be accepted.