



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

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

February 4, 2010

STATE ELECTION NUMBER: E129701¹

CLAIMANTS: Thomas Ankeny²
2175 NW Davis St, 4th Floor
Portland, OR 97210

Lewis H. Ankeny
1000 SW Vista #21
Portland, OR 97210

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 38S, Range 9E, Section 21
Tax lot 600
Klamath County

AGENT CONTACT INFORMATION Michael L. Spencer
439 Pine Street
Klamath Falls, OR 97601

I. ELECTION

The claimants, Thomas Ankeny and Lewis Ankeny, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on May 1, 2006, for property located adjacent to the eastern boundary of the city of Klamath Falls, in Klamath 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.

¹ Claimants also filed claim M122221 for the same property. Measure 49 Section 6(5) provides:

“If multiple claims were filed for the same property, the number of lots, parcels or dwellings that may be established for purposes of subsection (2)(a) of this section is the number of lots, parcels or dwellings in the most recent waiver issued by the state before the effective date of this 2007 Act or, if a waiver was not issued, the most recent claim filed with the state, but not more than three in any case.”

This preliminary evaluation addresses M129701 because the most recent waiver was issued under that claim.

² Daniel Ankeny is listed as a claimant on the election form, but he was not a claimant under Measure 37 and, therefore, is not eligible for relief under Measure 49.

II. SUMMARY OF PRELIMINARY EVALUATION

Based on the department's preliminary analysis, it appears that the claimants are not eligible for any relief under Measure 49 because the appraisal submitted by the claimants failed to comply with the requirements of Section 7 of Measure 49.

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 claimants have requested ten home site approvals in the election material. A letter submitted by the claimants' attorney 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. The Measure 37 waiver issued for this claim describes three hundred (300) home sites. Therefore, the claimants may qualify for a maximum of ten home site approvals under Section 7.

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 claimants, Thomas Ankeny and Lewis Ankeny, filed a Measure 37 claim, M129701, with the state on May 1, 2006. The claimants filed a Measure 37 claim, 48-05, with Klamath County on September 6, 2005. The state claim was filed prior to December 4, 2006.

It appears that the claimants timely filed a Measure 37 claim with both the state and Klamath 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 claimants 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 recorded distribution of trust agreement submitted by the claimants and the Klamath County deed records, Thomas Ankeny and Lewis Ankeny are the owners of fee title to the Measure 37 claim property.

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

It appears that the claimants are the sole owners 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 Klamath County, outside the urban growth boundary and outside the city limits of the nearest city, Klamath Falls.

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

As stated in Section III above, the claimants have requested up to ten home site approvals.

The property is currently zoned Forestry Range (FR) by Klamath County, in accordance with Goals 3 and 4, as implemented by OAR 660-006-0050. State land use regulations, including applicable provisions of ORS chapter 215 and OAR 660, divisions 6 and 33, generally prohibit the establishment of a lot or parcel less than 80 acres in size in a mixed farm/forest zone and regulate the establishment of dwellings on new or existing lots or parcels.

Based on Klamath County Assessor’s data, the claimants’ property consists of 80.00 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the ten home sites the claimants are requesting 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 claimants, it does not appear that the establishment of the ten home sites that the claimants are requesting on 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."

Klamath County deed records indicate that the claimants acquired the property on January 16, 1961.

On January 16, 1961, the Measure 37 claim property was not subject to any local or state laws that would have prohibited the claimants from establishing at least ten lots or parcels and at least ten dwellings. Therefore, the claimants lawfully could have established the ten home sites the claimants are requesting under Section 7 of Measure 49.

(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 claimants submitted their election on May 12, 2008, and their appraisal on November 3, 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 appraiser signing the submitted appraisal, Charles R. Dehlinger, is a state-certified general appraiser; 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.

The appraisal review commissioned by the department did not assess whether the claimants' appraisal filed for the Measure 37 claim property met the threshold requirements for Uniform Standards of Professional Appraisal Practice compliance, due to the deficiencies cited below.

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 does not determine that the highest and best use of the Measure 37 claim property at the time the land use regulations was residential use. The appraisal does not state what the highest and best use of the property was at the time the land use regulation was enacted. Therefore, this requirement has not 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 claimants assert that the enactment of Klamath County's FR zone reduced the fair market value of the Measure 37 claim property. However, the appraisal does not show the fair market value of the 80-acre Measure 37 claim property at any time. The appraisal shows a fair market value of one hypothetical, 1- to 2-acre parcel in 1971 "as if within a sub-division or partition had the property been so divided." The appraisal also shows a fair market value of two, hypothetical, 20-acre parcels in 1973 "had the property been so divided." The appraiser specifically states that the appraisal is not intended to appraise the value of a subdivision and stipulates that further valuation of subdivision costs would be necessary to complete the appraisal. Therefore, this requirement has not 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).

Because the appraisal did not determine a reduction in fair market value of the Measure 37 claim property, this requirement cannot be evaluated.

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 shows the present fair market value of one, 5-acre building site “as if the subject property was divided into 5 acre parcels as if within a subdivision.” The appraisal does not show the present fair market value of each of the requested ten, buildable home sites as they would exist on the 80-acre Measure 37 property. Therefore, this requirement has not been met.

8) The enactment of one or more land use regulations, other than land use regulations described in ORS 197.352 (3), that are the basis for the claim *caused a reduction in the fair market value of the property that is equal to or greater than the fair market value of the home site approvals that may be established on the property under subsection (2) of this section, with the reduction in fair market value measured as set forth in subsection (6) of this section.*

As discussed in Section 5, above, the appraisal did not show a reduction in fair market value of the 80-acre Measure 37 property. Therefore, this requirement has not been met.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimants, Thomas Ankeny and Lewis Ankeny, do not qualify for Measure 49 home site approvals because the appraisal submitted by the claimants does not meet all of the qualification standards described in Section 7 of Measure 49.

V. 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 claimants and the claimants' 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 claimants and the claimants' 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 claimants and the claimants' 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.