



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

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

March 26, 2010

STATE ELECTION NUMBER: E130440¹

CLAIMANT: Rose M. Hurliman
9360 Fawcett Creek Road
Tillamook, Oregon 97141

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 2S, Range 9W, Section 21
Tax lot 105
Township 2S, Range 9W, Section 22²
Tax lots 300, 600, 800³ and 1004
Tillamook County

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I. ELECTION

The claimant, Rose Hurliman, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on October 26, 2006, for property located near 9360 Fawcett Creek Road, near Tillamook, in Tillamook 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 her Measure 37 claim under Section 7 of Measure 49, which

¹ The claimant's attorney asserts in the election materials that the road crossing the Measure 37 claim property, Fawcett Creek Road, divides the property into three distinct non-contiguous portions, each entitled to a Measure 49 election. However, information obtained from Tillamook County indicates that Fawcett Creek Road is not an intervening ownership that divides the subject property. In the claimant's partition of tax lot 800, Partition plat 2008-42, shows that resulting tax lots 802 and 803 share a boundary along the south Fawcett Creek Road right-of-way. Parcel 2 (tax lot 802) of Partition Plat 2008-42 includes Fawcett Creek Road. Fawcett Creek Road does not create an intervening ownership between Parcel 1 and 2 of PP 2008-42.

² The Measure 37 claim property consisted of tax lots 105, 300, 600, 800 and 1004. Tax lot 800 has since been partitioned into tax lots 800, 802 and 803.

³ The Measure 37 waiver did not include the approximately 5 acre portion of tax lots 300 and 800 currently zoned Rural Residential 2-acre. For this reason that portion of those tax lots are not included in this supplemental review under Measure 49.

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 not eligible for any relief under Measure 49 because the appraisal submitted by the claimant 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; 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; 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.⁴ The Measure 37 waiver issued for this claim describes 48 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 of Measure 49.

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 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.

⁴ The claimant requested a total of 16 home sites by splitting the claim into three separate claims. Because the Department has determined this claim is not split under OAR 660-041-0150, this supplemental review will consider the maximum of ten home sites requested for the conditional portion of the election.

The claimant, Rose Hurliman, filed a Measure 37 claim, M130440, with the state on October 26, 2006. The claimant filed a Measure 37 claim, M-06-13, with Tillamook County on October 25, 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 Tillamook 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, Rose Hurliman is the owner of fee title to the property as shown in the Tillamook 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 Tillamook County, outside the urban growth boundary and outside the city limits of the nearest city, Tillamook.

(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.

The property is currently zoned Farm (F-1) by Tillamook 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 91.33 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 for which the claimant may qualify 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."

Tillamook County deed records indicate that the claimant acquired tax lot 300 (45.47 acres) on August 11, 1961, and tax lots 600 (13.6 acres), 800 (18.5 acres), 1004 (15.0 acres) and 105 (3.76 acres) on May 1, 1966.

On August 11, 1961, and May 1, 1966, the Measure 37 claim property was not subject to any local or state laws that would have prohibited the claimant from establishing at least ten lots or parcels and at least ten dwellings on the 36.46-acre "conditional election" portion of the property. Therefore, the claimant lawfully could have established the ten home sites the claimant may qualify for 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 claimant submitted her election on May 12, 2008, and her appraisal on November 4, 2008. Therefore, the appraisal was submitted within 180 days of the election filing.⁵

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, Matthew Larrabee, 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.

An appraisal review commissioned by DLCD has determined that the claimant's appraisal filed for the Measure 37 claim property does not meet the threshold requirements for Uniform Standards of Professional Appraisal Practice compliance. The value attributed to the property before the implementation of land use regulations was based solely on the Subdivision Development Approach. Although sole reliance on the Subdivision Development Approach is not in and of itself non-compliant with the Uniform Standards of Professional Appraisal Practice when no adequate historical sales data exists, the Subdivision Development Approach must be supported by detailed market-based input. Typically, detailed development and engineering plans are required to determine the market-based inputs. No such detailed development and engineering plans are referenced in the appraisal. While the value attributed to the potential retail lot sales appears to be based on market-derived input, the absorption rates, holding costs, marketing costs, developer's profit and discount rates used in the appraisal are not substantiated. In addition, the appraisal includes a 3% annual appreciation rate in the discounted cash flow parameters for each of the five reported value dates without providing a source for that rate. The appraisal review concludes that the reliance on the Subdivision Development Approach without sufficient market-based inputs reduces the credibility of the result to an extent that this appraisal would not meet USPAP Standards Rule 1-4. Therefore this requirement has not 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 regulation was enacted was an 18-lot subdivision. The appraisal review determined that the support for such a conclusion is limited, however the requirement appears to have been met.

⁵ The appraisal only appraises a 36.46-acre portion of the Measure 37 property south of Fawcett Creek Road.

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 3 on December 27, 1974, and of Tillamook County's Farm Zone (F-1) on December 30, 1981, reduced the fair market value of the Measure 37 claim property. Section 7(6) of Measure 49 states: "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." However, the appraisal submitted by the claimant provides two alternative time periods for which loss in fair market values were determined. Since the appraiser did not combine the values, DLCD's reviewer selected the appraisal period that demonstrated the greatest potential loss in fair market value to review, the application of Tillamook County's F-1 zone on the Measure 37 property. For this purpose, the appraisal submitted by the claimant values the property on December 30, 1980, and on December 30, 1982. The appraisal determined the value of the 36.46-acre portion of the property on December 30, 1982, as an undeveloped farm parcel. The Measure 37 claim property is 96 acres and the minimum lot size for a dwelling parcel in the farm zone in 1982 was 40 acres and would have allowed at least two parcels and two dwellings. Therefore, the value in the appraisal is inaccurate.

In addition, as discussed in g(3), above, the method of determining the fair market values used by the appraiser does not appear to meet the requirements of USPAP, or correspondingly, Section 7 of Measure 49. 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).

In addition, Section 7(6) of Measure 49 states: "Interest shall be computed under this subsection 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 submitted appraisal erroneously uses a single average interest rate multiplier for the entire loss period.

In the appraisal submitted by the claimant the reduction in fair market value based on the difference between the value of the Measure 37 claim property on December 30, 1980, and December 30, 1982, has been adjusted for interest and reduced by tax savings adjusted for interest. However, as discussed in g(3), above, the method of determining the fair market values used by the appraiser does not appear to meet the requirements of USPAP, or correspondingly, Section 7 of Measure 49. Therefore, this requirement has not 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 number of lots, parcels or dwellings the claimant is seeking under Section 7(2) of Measure 49 is ten. However, the appraisal assessed the fair market value of each lot, parcel or dwelling as if the claimant was seeking eighteen home sites. Therefore, the value attributed to each home site the claimant is seeking under Section 7(2) of Measure 49 cannot be determined from the appraisal.

In addition, the claimant's attorney asserts that home site approvals under Section 7 of Measure 49 must be considered for appraisal purposes as "a zone change" and that the appraisal need only compare "potential densities" of development under different zoning scenarios. However, Measure 49 explicitly states that the appraisal must consider the value of each "home site" the claimant is seeking. As the attorney notes, the definition of a "home site" includes the actual approval of development. This requirement is not equivalent to "potential densities" or zone changes.

In addition, as discussed in g(3), above, the method of determining the fair market values used by the appraiser does not appear to meet the requirements of USPAP, or correspondingly, Section 7 of Measure 49. 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.

The appraisal submitted by the claimant did not determine the fair market value of the home site approvals that may be established on the property under Section 7(2) of Measure 49. Instead, the appraisal determined the fair market value of an 18-lot subdivision and adjusted that value downward by subtracting the fair market value of an undeveloped agricultural lot. The maximum number of home site approvals that may be established on the property under section 7(2) of Measure 49 is ten. The current fair market value of the property as agricultural land has no bearing on the fair market value of the requested home site approvals and should not be subtracted from that value.

The appraisal did not supply a fair market value of the home site approvals that may be established on the property under Section 7(2) of Measure 49, therefore, this requirement has not been met.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimant, Rose Hurliman, does not qualify for Measure 49 home site approvals, because the appraisal submitted by the claimant failed to comply with the requirements of 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 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.