



**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 17, 2010

**STATE ELECTION NUMBER:** E130761

**CLAIMANT:** Katherine R. Clark  
18809 Hill Road  
Klamath Falls, Oregon 97603

**MEASURE 37 PROPERTY  
IDENTIFICATION:** Township 40S, Range 10E, Section 25  
Tax lots 300 and 400  
Klamath County

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

**I. ELECTION**

The claimant, Katherine Clark, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 15, 2006, for property located at 18809 Hill Road and 15925 Taylor Road, near Merrill, 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 claimant has elected supplemental review of her 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 not eligible for any relief under Measure 49 because the property appears to be entirely within the Klamath Falls Irrigation District boundary and is, therefore, high-value farmland; and 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. The Measure 37 waiver issued for this claim describes seven home sites. A letter submitted by the claimant's 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. Therefore, the claimant may qualify for a maximum of seven 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. ORS 195.300(10)(c)(B) defines land that is in a mixed farm and forest zone and that on June 28, 2007, is within the boundaries of a district, as defined in ORS 540.505, as high-value farmland.

The claimant's property is zoned mixed farm and forest. A map of the Klamath Irrigation District obtained from the Oregon Department of Water Resources, available on the Department of Land Conservation's Measure 49 on-line Map Viewer, indicates that the Measure 37 claim property is located entirely within the boundaries of the Klamath Irrigation District. The Klamath Irrigation District is a district as defined in ORS 540.505. Therefore, the Measure 37 claim property is high-value farmland.

The claimant's attorney submitted a letter from the Klamath Irrigation District indicating that only six acres of the property are within the Klamath Irrigation District and six acres are within the Klamath Basin Improvement District. Research using the Department of Water Resources WRIS system indicates that these acreages represent "point of use" water rights assigned to specific locations within the property. These acreages do not represent the boundaries of a district. The claimant has not submitted evidence showing that the property is not located entirely within the boundaries of any "district," as defined in ORS 540.505.

Based on information in the record, it appears that the Measure 37 property is high-value farmland and therefore is not eligible for relief under Section 7 of Measure 49. Unless the claimant submits additional evidence sufficient to establish that the property is not high value farmland as defined by Measure 49, this claim will be denied. It appears that the property is not high-value forestland and is not in a ground water restricted area.

The Department concludes that the claimant has failed to establish that the property is not high-value farmland, which is a threshold requirement for relief under Section 7. However, this evaluation analyzes the claim for compliance with the balance of the Section 7 criteria because the claimant may be able to provide additional evidence sufficient to establish that the property is not high value farmland as defined by Measure 49.

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.

The claimant, Katherine Clark, filed a Measure 37 claim, M130761, with the state on November 15, 2006. The claimant filed a Measure 37 claim, 16-06, with Klamath County on June 3, 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 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 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 deed submitted by the claimant, Katherine Clark is the settlor of a revocable trust into which the property was conveyed as shown in the Klamath 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 Klamath County, outside the urban growth boundary and outside the city limits of the nearest city, Merrill.

**(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 seven 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.

The claimant's property consists of 55.11 acres and is developed with one dwelling. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the seven 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 seven 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."

Klamath County deed records indicate that the claimant acquired the property on December 15, 1965.

On December 15, 1965, the Measure 37 claim property was not subject to any local or state laws that would have prohibited the claimant from establishing at least seven lots or parcels and at least seven dwellings. Therefore, the claimant lawfully could have established the seven home sites the claimant qualifies 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 7, 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.**

An appraisal review commissioned by the department determined that the claimant's appraisal filed for the Measure 37 claim property generally met the threshold requirements for Uniform Standards of Professional Appraisal Practice compliance with the exception of Rule 1-2(d), which requires that the appraiser "identify the effective date of the appraiser's opinions and conclusions." For the retrospective property value opinions, the appraiser identified only the years 1971 and 1973. 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 does not determine that the highest and best use of the Measure 37 claim property at the time the land use regulation was enacted was residential use. The appraisal does

not expressly 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 claimant asserts 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 55.11-acre Measure 37 claim property at any point in 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 one hypothetical 20-acre parcel and one hypothetical 34.27-acre parcel 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 development 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 55.11-acre 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 55.11-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 55.11-acre Measure 37 property. Therefore, this requirement has not been met.

## **2. Preliminary Conclusion**

Based on the preliminary analysis, the claimant, Katherine Clark, does not qualify for Measure 49 home site approvals because the property appears to be entirely within the Klamath Falls Irrigation District boundary and is, therefore, high-value farmland and 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.**