



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

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

July 27, 2009

STATE ELECTION NUMBER:

E131020

CLAIMANTS:

Bryce H. Johnston
3732 North Clarey Street
Eugene, Oregon 97402-8744

**MEASURE 37 PROPERTY
IDENTIFICATION:**

Township 17S, Range 12W:
Section 22, Tax lot 400
Section 23, Tax lot 800
Lane County

I. ELECTION

The claimant, Bryce Johnston, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 21, 2006, for property located at 90000 and 90019 Highway 101, near Florence, 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 his 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. The claimant's property appears to be high-value forestland and the appraisal submitted failed to comply with the Uniform Standards of Professional Appraisal Practices as authorized by the Financial Institutions Reform, Recovery and Enforcement Act of 1989.

**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 Measure 37 waiver issued for this claim describes sixty-one (61) home sites. The claimant has requested ten home site approvals in the election material. 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.

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.

Measure 49 defines “High-value forestland” in western Oregon as “land that is in a forest zone or a mixed farm and forest zone and composed predominantly of soils capable of producing more than 120 cubic feet per acre per year of *wood fiber* and that is capable of producing more than 5,000 cubic feet per year of commercial tree species.” (ORS 195.300(11)) Provisions of OAR 660-041-0130 direct DLCD to “use soil survey information from the U.S. Department of Agriculture’s Natural Resources Conservation Service (NRCS), unless other information or data are made a part of the record for the Supplemental Review, in which case DLCD will consider such information or data along with any pertinent NRCS information.” The claimant’s property is in a forest zone. The NRCS Websoil Survey indicates that the property is composed predominantly of soils capable of producing greater than 120 cubic feet per acre of wood fiber from Sitka spruce and Douglas fir species.¹ In addition, the property is capable of producing more than 5,000 cubic feet per year of commercial tree species. Documentation submitted by the claimant with his election suggests that the property may be composed predominantly of soils that produce less than 120 cubic feet per acre of Douglas fir wood fiber. However, the documentation failed to take into account any other types of wood fiber. Based on information in the record, it appears that the Measure 37 property is high-value forestland 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 forestland, this claim will be denied. It appears that the property is not high-value farmland 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 forestland, 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 forestland.

¹ Source of data: Natural Resources Conservation Service; URL: <http://websoilsurvey.nrcs.usda.gov>. Generated from USDA-NRCS certified data for Lane County Area, Oregon, as of Version 6, December 22, 2006.

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, Bryce Johnston, filed a Measure 37 claim, M131020, with the state on November 21, 2006. The claimant filed a Measure 37 claim, PA06-6213, with Lane County on or prior to July 7, 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 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 deeds submitted by the claimant, Bryce Johnston is the settlor of a revocable trust into which he conveyed the Measure 37 claim property 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 city, Florence.

(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 Impacted Forest (F-2) 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 and regulate the establishment of dwellings on new or existing lots or parcels.

Based on Lane County Assessor’s data, the claimant’s property consists of 115.7 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the ten home sites the claimant is 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 claimant, it does not appear that the establishment of the ten home sites that the claimant is 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 6 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 the property on October 19, 1943.

On October 19, 1943, 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. Therefore, the claimant lawfully could have established the ten home sites the claimant is 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 claimant submitted his election on February 27, 2008, and his appraisal on August 12, 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.

Both the appraisers signing the submitted appraisal, Paul H. Schaffner and Bradford J. 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 the Measure 37 claim property does not meet the threshold requirements for Uniform Standards of Professional Appraisal Practice compliance. The value concluded in the appraisal submitted was based solely on the Subdivision Development Approach. The appraisal did not use the direct Sales Comparison Approach and did not explain why that approach was omitted. The appraisal review concludes that this reliance on the Subdivision Development Approach alone 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 a 117-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 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 the Measure 37 claim property. The appraisal submitted by the claimant values the property on December 28, 1973, one year before Goal 4 was enacted, and on December 28, 1975, one year after Goal 4 was enacted. However, as discussed in G(3), above, the method of determining the fair market values used by the appraisers 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 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 28, 1975, and December 28, 1973, 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 appraisers 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 the 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 the enactment of Goal 4 at approximately \$2,299,786. The appraisal values the market value of ten additional home sites at approximately \$976,000. However, as discussed in G(3), above, the method of determining the fair market values used by the appraisers does not appear to meet the requirements of USPAP, or correspondingly, Section 7 of Measure 49. Therefore, this requirement has not been met.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimant, Bryce Johnston, does not qualify for Measure 49 home site approvals, because the property appears to be high-value forestland according to the definition in ORS 195.300(11) and the appraisal submitted by the claimant 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 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.