



**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 30, 2010

**STATE ELECTION NUMBER:** E131397<sup>1</sup>

**CLAIMANTS:** Larry A. and Mable I. Smith  
23105 S Unger Road  
Colton, OR 97017

**MEASURE 37 PROPERTY  
IDENTIFICATION:** Township 23S, Range 10E, Section 00  
Tax lot 1400  
Klamath County

**AGENT CONTACT INFORMATION:** Donald M. Kelley  
Kelley and Kelley  
110 N Second Street  
Silverton, OR 97381

**I. ELECTION**

The claimants, Larry and Mable Smith, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 28, 2006, for property located south of LaPine, 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.

**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 does not appear to meet the requirements of USPAP, or correspondingly, Section 7 of Measure 49.

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<sup>1</sup> The claimant also has submitted a claim for property not contiguous to the subject property which is identified as E124843.

### **III. THE MAXIMUM NUMBER OF HOME SITE APPROVALS FOR WHICH THE CLAIMANTS 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 claimants have requested ten home site approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes 24 home sites. The appraisal submitted by the claimants 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 claimants 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.

The claimants, Larry and Mable Smith, filed a Measure 37 claim, M131397, with the state on November 28, 2006. The claimants filed a Measure 37 claim, 119-06, with Klamath County on December 3, 2006. 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.

#### **(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 claimants, Larry and Mable Smith are the settlors of a revocable trust into which they conveyed the Measure 37 claim property and, therefore, are owners of the property under Measure 49.

**(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 any urban growth boundary and outside any city limits, near the community of Gilchrist.

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

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

The property is currently zoned Forest (F) by Klamath 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.

The claimants’ property consists of 160.00 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the ten home sites the claimants 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 claimants, it does not appear that the establishment of the ten home sites for which the claimants 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 claimants acquired the property on July 30, 1957.

On July 30, 1957, 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 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 claimants submitted their election on June 6, 2008, and their appraisal on June 25, 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, C. Spencer Powell, 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 claimants' appraisal filed for the Measure 37 claim property did not meet the threshold requirements for Uniform

Standards of Professional Appraisal Practice compliance. There are two primary reasons for this conclusion. First, the Subdivision Development approach was not adequately supported relative to the June 11, 2008 value date. Second, the January 25, 1976 value conclusion does not support a two-lot, residential subdivision as the highest and best use of the property. Both are explained below.

The Subdivision Development approach was not adequately supported relative to the June 11, 2008 value date in two material respects. First, the sales comparisons used to derive the value of the nine 5-acre home sites as of June 11, 2008, occurred between 1994 and 2004. While these values were adjusted using an undisclosed Consumer Price Index (CPI), the CPI index is not comparable to trends in the real estate market. The appraisal does not attempt to provide more accurate sales data by developing a time trend from Central Oregon data or including sales more comparable to the date of value. The appraisal review determined that comparable sales were available and identified four sales in 2005 for approximately 5-acre parcels ranging from \$17,000 to \$29,000 per acre, significantly higher retail values than the \$8000 per acre concluded in the appraisal.

Second, the sales comparisons used to derive the value of the tenth home site, a 113.50-acre rural parcel, as of June 11, 2008, was based on four sales between 1990 and 1994 and one sale in 2002. Again using an undisclosed CPI index, the appraiser concludes that the 113.50-acre parcel would have a value of \$500 per acre in 2008. This value appears to be excessively low. The appraisal review determined that more reliable comparable sales were available and identified a 2005 sale in the region providing a value of almost \$4000 per acre. While a single sale may not be directly comparable to the subject property, it appears to be more relevant than the sales upon which the appraisal was based and calls into doubt the value conclusions for the 2008 home sites.

The January 25, 1976, value conclusion does not support a two-lot, residential subdivision as the highest and best use of the property. The appraisal valued the 160-acre property at \$29,000, assuming a two-lot subdivision with each lot containing 80 acres. This value is inadequately supported using the discounted cash flow analysis which yields a value below that which a direct sales comparison could logically support. According to values used in the appraisal, the value of a two-lot subdivision was less than the value of the property if it remained undivided or was valued as forest land. Keeping the 160-acre parcel intact, the subject property value would have been between \$32,000 and \$64,000, based on the value attributed by the appraisal to an individual 80-acre parcel. Using the \$400 per acre value the appraisal attributes to the 1976 purchase of neighboring forest land to gain access to the property, the value of the 160-acre parcel would have been \$64,000 as forest land. Therefore, the appraisal does not justify a two-lot subdivision as the highest and best use of the property in 1976 and the conclusion regarding loss in fair market value following the enactment of land use regulations is not credible.

For the reasons set forth above, the department concludes that the appraisal does not meet the threshold requirements for USPAP compliance; 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 determined that the highest and best use of the Measure 37 claim property at the time the land use regulation was enacted was a 27-lot 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 claimants assert that the enactment of State Land Use Planning Goal 4 on January 25, 1975, reduced the fair market value of the Measure 37 claim property. The appraisal submitted by the claimants valued the property on January 25, 1974, one year before Goal 4 was enacted, and on January 25, 1976, one year after Goal 4 was enacted. The appraisal valued the 160-acre property on January 25, 1976, as two, 80-acre residential lots. However, Goal 4 did not impose a minimum lot size of 80 acres. No minimum lot size was established for a parcel in the forest zone in 1976. In addition, as discussed in g(3), above, the method of determining the fair market value of the property on January 25, 1976, 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 the appraisal submitted by the claimants the reduction in fair market value based on the difference between the value of the Measure 37 claim property on January 25, 1974, and January 25, 1976, 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 appraisal values the market value of each, 5-acre home site at \$18,812 and a 113.5-ac home site at \$26,690. 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.

**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 claimants determined the reduction in the present fair market value of the property to be \$280,000, and the fair market value of ten home site approvals to be \$196,000. However, as discussed in g(3) it appears that the value conclusion of \$29,000 for January 25, 1976, is inadequately supported using the discounted cash flow analysis which yields a value below that which a direct sales comparison could logically support. In addition, the June 11, 2008, value estimate of \$196,000 is inadequately supported in terms of sales that are reasonably current or adjusted with market-supported trends. Therefore, this requirement has not been met.

## **2. Preliminary Conclusion**

Based on the preliminary analysis, the claimants, Larry and Mable Smith, do not qualify for Measure 49 home site approvals because the appraisal does not appear to meet the requirements of USPAP, or correspondingly, 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.**