



**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 4, 2010

STATE ELECTION NUMBER: E133537A¹

CLAIMANT: Buford D. Wingerd
4306 Braeburn Drive
Fairfax, VA 22032

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 35S, Range 6W, Section 4
Tax lot 201
Josephine County

I. ELECTION

The claimant, Buford Wingerd, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 2, 2006, for property located on Russell Road, near Merlin, in Josephine 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 appraisal submitted by the claimant cannot be used for the purpose of appraising the value of nine home sites, a nine-lot subdivision, under Section 7 of Measure 49, because the appraiser's Certified Residential Appraiser License does not allow the appraisal of subdivisions.

¹ Claim E133537 has been split into two claims, E133537A and E133537B, because the Measure 37 claim sought relief for two non-contiguous parcels. Claim E133537A addresses the claimant's eligibility for Measure 49 relief on tax lot 201 and claim E133537B addresses his relief on tax lot 200.

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 nine home site approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes ten home sites. The appraisal submitted by the claimant attempts to support the assertion that the value of nine 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 nine 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 claimant, Buford Wingerd, filed a Measure 37 claim, M133537, with the state on December 2, 2006. The claimant filed a Measure 37 claim, 2006-068, with Josephine County on November 2, 2005. 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 Josephine 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, Buford Wingerd is the owner of fee title to the property as shown in the Josephine 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 Josephine County, outside any urban growth boundary and outside any city limits, near the community of Merlin.

(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 nine home site approvals.

The property is currently zoned Rural Residential (RR-2.5) by Josephine County, in accordance with Goal 14, which prohibits the urban use of rural land and requires local comprehensive plans to identify and separate urbanizable from rural land in order to provide for the orderly and efficient transition from rural to urban use. State laws, namely Goal 14 and OAR 660-004-0040, prohibit the establishment of a lot or parcel less than the size established in the County rural residential zone in existence on October 4, 2000, if the zone in existence on that date had a minimum lot size of two or more acres. Josephine County's RR-2.5 zone requires a minimum lot size of 2.5 acres.

The claimant's property consists of 9.55 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the nine 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 nine 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."

Josephine County deed records indicate that the claimant acquired the property on June 24, 1970.

On June 24, 1970, the Measure 37 claim property was not subject to any local or state laws that would have prohibited the claimant from establishing at least nine lots or parcels and at least nine dwellings. Therefore, the claimant lawfully could have established the nine 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 his election on May 16, 2008, and his appraisal on October 22, 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 appraisal submitted by the claimant was prepared by Garrett Pottmeyer, a Certified Residential Appraiser. ORS Chapter 674 is governed by Chapter 161 of the Appraiser Certification and Licensure Board Administrative Rules. Per Section 161-025-0005, "a State-Certified Residential Appraiser (SCRA) is authorized to appraise: all types of one- to four-family residential real property without regard to complexity or transaction value, which includes the appraisal of vacant or unimproved land that is utilized for one- to four-family residential purposes, and where the Highest and Best Use is for one- to four-family residential purposes." The State-Certified Residential Appraiser is also authorized to appraise all types of real property having a transaction value of less than \$250,000. Specifically, however, the Certified Residential Appraiser classification does not allow the appraisal of subdivisions which would involve any segregation of four or more parcels. In the submitted appraisal, the Highest and Best Use involved a nine-lot subdivision and a transaction value in excess of \$250,000. The submitted appraisal is beyond the scope of the state-certified residential appraisal license. The appraisal cannot be used for the purpose of appraising the value of nine home sites under Section 7 of Measure 49, and, therefore, this requirement has not been met.

Because this requirement has not been met, the claimant is not entitled to any relief under Measure 49, and, therefore, the remaining approval criteria will not be evaluated.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimant, Buford Wingerd, does not qualify for Measure 49 home site approvals. The appraisal submitted by the claimant cannot be used for the purpose of appraising the value of nine home sites, a nine-lot subdivision, under Section 7 of Measure 49, because the appraiser's Certified Residential Appraiser License does not allow the appraisal of subdivisions.

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.