



OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT

ORS 195.300 to ORS 195.336 (MEASURE 49) SUPPLEMENTAL REVIEW
OF MEASURE 37 CLAIM
Final Order of Denial

STATE ELECTION NUMBER: E131397¹

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

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 La Pine, 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.

This Final Order of Denial is the conclusion of the supplemental review of this claim.

I. ANALYSIS OF CLAIM

A. Maximum Number of Home Sites 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

¹ The claimants also have submitted a claim for property not contiguous to the subject property which is identified as E124843.

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.

B. Qualification Requirements

To qualify for a home site approval under Section 7 of Measure 49, the claimants must meet each of the following requirements:

1. Property not high-value farm, forest or groundwater restricted

The Measure 37 claim property must not be high-value farmland or high-value forestland, nor in a ground water restricted area, as defined in Section 2 of Measure 49.

Findings of Fact and Conclusions

The Measure 37 claim property is not high-value farmland or high-value forestland, nor in a ground water restricted area.

2. Timeliness of Claim

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.

Findings of Fact and Conclusions

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.

The claimants timely filed a Measure 37 claim with both the state and Klamath County.

3. 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.”

Findings of Fact and Conclusions:

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.

Klamath County has confirmed that the claimants are the current owners of the property.

4. All Owners of the Property Have Consented in Writing to the Claim

All owners of the property must consent to the claim in writing.

Findings of Fact and Conclusions:

All owners of the property have consented to the claim in writing.

5. The Property Is Located Entirely Outside Any Urban Growth Boundary and Entirely Outside the Boundaries of Any City

The Measure 37 claim property must be located entirely outside any urban growth boundary and entirely outside the boundaries of any city.

Findings of Fact and Conclusions:

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.

6. One or More Land Use Regulations Prohibit Establishing the Lot, Parcel or Dwelling

One or more land use regulations must prohibit establishing the requested lot, parcel or dwelling.

Findings of Fact and Conclusions:

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.

7. 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.

Findings of Fact and Conclusions

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 is prohibited by land use regulations described in ORS 195.305(3).

8. 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."

Findings of Fact and Conclusions

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.

9. 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:

- a) **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.

b) 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 and appraisal addendum, C. Spencer Powell, is a state-certified general appraiser; therefore this requirement has been met.

c) 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 stated that when combined with the appraisal addendum filed by the claimants' appraiser on May 13, 2010, the claimants' appraisal filed for the Measure 37 claim property meets the threshold requirements for Uniform Standards of Professional Appraisal Practice compliance; therefore, this requirement has been met.

d) 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 has been met.

e) 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. 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 response to the determination in the preliminary evaluation that this criteria had not been met the claimants' appraiser stated:

“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 a forest zone, and regulate the establishment of dwellings on new or existing lots or parcels.

Thus while Goal 4 did not set a minimum parcel size 80 acres, it did set limitations on land use in order to conserve and protect forest lands.”

However, the claimants were required to analyze the fair market value of the property one year after the enactment of the regulation the claimants assert has resulted in a reduction of the fair market value of the property. In order to do this, the claimants must point to the enactment of a specific regulation that reduced the value of the property. Because Klamath County did not have a minimum lot size requirement for forest zones in 1976 or even after acknowledgement, it is not clear that the claimants would not have been able to create more than one or two home sites in 1976 had the claimants established that such home sites were compatible with forest use. Therefore, this requirement has not been met.

f) 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. Therefore, this requirement has been met.

g) 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-acre home site at \$26,690. Therefore, this requirement has been met.

h) 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 addendum submitted by the appraiser determined the reduction in the present fair market value of the property to be \$57,160, and the fair market value of ten home site approvals to be \$196,000. The appraisal determined that the value of the remnant home site is \$26,690 and the value of the 5-acre home sites is \$18,812 each. Therefore, the claimants could qualify for a maximum of two home sites on the Measure 37 claim property had the other requirements of Section 7 been met.

II. COMMENTS ON THE PRELIMINARY EVALUATION

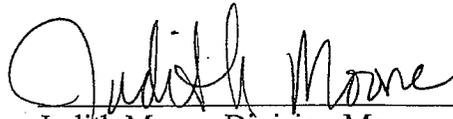
The department issued its Preliminary Evaluation for this claim on March 30, 2010. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. Comments received have been taken into account by the department in the issuance of this Final Order of Denial.

III. CONCLUSION

Based on the analysis above, the claimants do 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.

IT IS HEREBY ORDERED that this Final Order of Denial is entered by the Director of the Department of Land Conservation and Development as a final order of the department and the Land Conservation and Development Commission under ORS 197.300 to ORS 195.336 and OAR 660-041-0000 to 660-041-0160.

FOR THE DEPARTMENT AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:



Judith Moore, Division Manager
Dept. of Land Conservation and Development
Dated this 28th day of June 2010

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to judicial remedies including the following:

1. Judicial review is available to anyone who is an owner of the property as defined in Measure 49 that is the subject of this final determination, or a person who timely submitted written evidence or comments to the department concerning this final determination.
2. Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 must be filed in the Circuit Court in the county in which the affected property is located. Upon motion of any party to the proceedings, the proceedings may be transferred to any other county with jurisdiction under ORS 183.484 in the manner provided by law for change of venue.
3. Judicial review of this final determination is limited to the evidence in the record of the department at the time of its final determination. Copies of the documents that comprise the record are available for review at the department's office at 635 Capitol St. NE, Suite 150, Salem, OR 97301-2540. Judicial review is only available for issues that were raised before the department with sufficient specificity to afford the department an opportunity to respond.