



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: E133343

CLAIMANT: Johnnie W. Baker
C/O James Tiger
582 E. Washington Street
Stayton, OR 97383

MEASURE 37 PROPERTY IDENTIFICATION: Township 1S, Range 10W, Section 30BB
Tax lots 204 and 205
Tillamook County

AGENT CONTACT INFORMATION: Michael J. Lilly
Attorney at Law
4800 SW Griffith Drive Suite 325
Beaverton, OR 97005

The claimant, Johnnie Baker, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located on Cedar Street, in Oceanside, in Tillamook 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.

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 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. No waiver was issued for this claim. The Measure 37 claim filed with the state describes 12 home sites. 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 of Measure 49.

B. Qualification Requirements

To qualify for a home site approval under Section 7 of Measure 49, the claimant 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 claimant, Johnnie Baker, filed a Measure 37 claim, M133343, with the state on December 1, 2006. The claimant filed a Measure 37 claim, M-06-49, with Tillamook County on December 1, 2006. The state claim was filed prior to December 4, 2006.

The claimant timely filed a Measure 37 claim with both the state and Tillamook 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 decree of distribution submitted by the claimant, Johnnie Baker is the owner of fee title to the property as shown in the Tillamook County deed records and, therefore, is an owner of the property under Measure 49.

Tillamook County has confirmed that the claimant is the current owner 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 Tillamook County, outside any urban growth boundary and outside any city limits, in the community of Oceanside.

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 Residential Oceanside Zone (ORS) by Tillamook County, in accordance with Goal 14, which prohibits urban use of rural lands and establishes standards for planning and development within unincorporated communities. State laws, namely Goal 14 and OAR 660 division 22, require counties to adopt individual plan and zone designations reflecting the projected uses of properties within unincorporated communities. Tillamook County's ORS zone requires a minimum of 20,000 square feet per dwelling unit within the urban unincorporated community of Oceanside, where average slopes are greater than twenty-nine percent.

The claimant's property consists of 1.44 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the ten home sites the claimant 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 claimant, it does not appear that the establishment of the ten home sites for which the claimant qualifies on the property is necessarily prohibited by land use regulations described in ORS 195.305(3). However, to the extent the establishment of home sites would violate restrictions or prohibitions on activities for the protection of public health and safety, this claim would be exempt from relief under 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

Tillamook County deed records indicate that the claimant acquired the property on October 4, 1989.

On October 4, 1989, the Measure 37 claim property was subject to Tillamook County's acknowledged Medium Density Urban Residential (R-2) zone. Tillamook County's R-2 zone required 5000 square feet for the creation of a new lot or parcel on which a dwelling could be established. On the claimant's acquisition date, the claimant lawfully could not have established a dwelling on a lot or parcel less than 5000 square feet. The claimant's property consists of 1.44 acres. Therefore, the claimant lawfully could have established the maximum limit of ten home sites on his date of acquisition.

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 claimant submitted his election on June 16, 2008. The appraisal was due on or before December 13, 2008. The claimant submitted portions of the appraisal on December 12, 2008, January 12, 2009, and September 9, 2009. Appraised values critical to the determination of the loss in fair market value were not submitted until September 9, 2009, well beyond 180 days of the election filing. Therefore, this requirement has not been met.

b) The appraisal must be prepared by a person certified under ORS chapter 674 or a person registered under ORS chapter 308.

The appraisal reports submitted by the claimant were prepared by Laura M. Adkins, 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 property. In the submitted appraisal reports, the Highest and Best Use involved multiple, twelve-lot subdivisions and transaction values in excess of \$250,000. The submitted appraisal reports are beyond the scope of the state-certified residential appraisal license. The appraisal cannot be used for the purpose of appraising the value of ten home sites under Section 7 of Measure 49, and, therefore, this requirement has not been met.

c) The appraisal must comply with the Uniform Standards of Professional Appraisal Practice, 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 various reports fail to comply with the reporting standards outlined in USPAP Standard Rules 1 and 2. The methodology used in all five reports involved the summation of the

retail value of separate lots which reportedly could have been developed. No attempt was made to analyze the costs associated with segregating the various lots; holding costs; marketing costs; and profit. As such the concluded values do not accurately reflect the raw value contribution of the lots, and do not accurately represent the value of the property in its entirety as of the various value dates. Therefore this requirement has not 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 suggested two time periods as possibly having land use regulations enacted, some time in 1981 or 1982, and in 1998. The claimant acquired the property in 1989, thus only the 1998 land use regulation is relevant. The appraisal determined that the highest and best use of the property in 1997 was "more than 3 residential dwelling." The appraisal also states: "There looks to be enough build-able ground to place at least 12 homesites, 9 of which would be 6,000 square feet and the others slightly under that square footage, which would have been legal under the old R-1 Residential zoning." However, the appraiser was not licensed to evaluate property for which the highest and best use involved any segregation of land. Therefore, this requirement has not 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 claimants assert have resulted in a reduction of the fair market value of the Measure 37 claim property.

The appraisal identifies a value of \$974,000 for 12 lots at some time in 1997 and a value of \$908,000 for three lots at some time in 1999. However, the appraiser was not licensed to appraise the value of any segregation of the property. Therefore, this requirement has not been met.

f) As required by Section 7 (6) and (7) the reduction in the fair market value of the Measure 37 property determined by the appraisal is equal to the decrease in the fair market value of the property from the date that is one year before the enactment of the land use regulation to the date that is one year after the enactment, plus interest. If the claim is based on the enactment of more than one land use regulation enacted on different dates, the reduction in the fair market value of the property caused by each regulation shall be determined separately and the values added together to calculate the total reduction in fair market value. Interest shall be computed using the average interest rate for a one-year United States Government Treasury Bill on December 31 of each year of the period between the date the land use regulation was enacted and the date the claim was filed, compounded annually on January 1 of each year of the period. The reduction in fair market value 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.

The appraisal did not determine the reduction in fair market value as required. The appraisal did not determine the decrease in the fair market value of the property from the date that is one year before the enactment of the land use regulation to the date that is one year after the enactment. The appraisal did not include any interest computations. The appraisal did not adjust any valuation by any ad valorem property taxes not paid. None of the required adjustments were made to any of the values included in the appraisal. Therefore, this requirement has not 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 showed the present fair market value of 12 lots; however, as discussed in subsection (c) above, these values were determined to be unsupported. In addition, the Certified Residential Appraiser classification does not allow the appraisal of subdivisions which would involve any segregation of property. The appraisal cannot be used for the purpose of appraising the value of ten home sites under Section 7 of Measure 49, and, therefore, this requirement has not been met.

Because these requirements have not been met, the claimant is not entitled to any relief under Measure 49.

II. COMMENTS ON THE PRELIMINARY EVALUATION

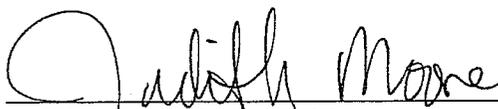
The department issued its Preliminary Evaluation for this claim on April 1, 2010. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. No written comments were received in response to the 28-day notice.

III. CONCLUSION

Based on the analysis above, the claimant does not qualify for Measure 49 home site approvals. The appraisal necessary to establish loss in fair market value due to a land use regulation enacted after the claimant acquired the property was submitted on September 9, 2009, more than 180 days after the Measure 49 election was filed with the department. In addition, the appraisals submitted by the claimant do not meet the additional requirements of Sections 7 and 8 of Measure 49 and also cannot be used for the purpose of appraising the value of ten home sites, a ten-lot subdivision, under Section 7 of Measure 49 because the appraiser's Certified Residential Appraiser License does not allow the appraisal of subdivisions which would involve any segregation of the property.

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 8th 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.