



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:

E129701<sup>1</sup>

CLAIMANTS:

Thomas Ankeny<sup>2</sup>  
2175 NW Davis St, 4th Floor  
Portland, OR 97210

Lewis H. Ankeny  
1000 SW Vista #21  
Portland, OR 97210

MEASURE 37 PROPERTY  
IDENTIFICATION:

Township 38S, Range 9E, Section 21  
Tax lot 600  
Klamath County

AGENT CONTACT INFORMATION

Michael L. Spencer  
439 Pine Street  
Klamath Falls, OR 97601

The claimants, Thomas Ankeny and Lewis Ankeny, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on May 1, 2006, for property located adjacent to the eastern boundary of the city of Klamath Falls, 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.

---

<sup>1</sup> Claimants also filed claim M122221 for the same property. Measure 49 Section 6(5) provides:

“If multiple claims were filed for the same property, the number of lots, parcels or dwellings that may be established for purposes of subsection (2)(a) of this section is the number of lots, parcels or dwellings in the most recent waiver issued by the state before the effective date of this 2007 Act or, if a waiver was not issued, the most recent claim filed with the state, but not more than three in any case.”

This final order addresses M129701 because the most recent waiver was issued under that claim.

<sup>2</sup> Daniel Ankeny is listed as a claimant on the election form, but he was not a claimant under Measure 37 and, therefore, is not eligible for relief under Measure 49.

## 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; 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. A letter submitted by the claimants' attorney 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. The Measure 37 waiver issued for this claim describes three hundred (300) home sites. Therefore, the claimants may qualify for a maximum of ten home site approvals under Section 7.

### 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**

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.

#### **Findings of Fact and Conclusions:**

The claimants, Thomas Ankeny and Lewis Ankeny, filed a Measure 37 claim, M129701, with the state on May 1, 2006. The claimants filed a Measure 37 claim, 48-05, with Klamath County on September 6, 2005. 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 recorded distribution of trust agreement submitted by the claimants and the Klamath County deed records, Thomas Ankeny and Lewis Ankeny are the owners of fee title to the Measure 37 claim property.

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 the urban growth boundary and outside the city limits of the nearest city, Klamath Falls.

### **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 Forestry Range (FR) by Klamath County, in accordance with Goals 3 and 4, as implemented by OAR 660-006-0050. State land use regulations, including

applicable provisions of ORS chapter 215 and OAR 660, divisions 6 and 33, generally prohibit the establishment of a lot or parcel less than 80 acres in size in a mixed farm/forest zone and regulate the establishment of dwellings on new or existing lots or parcels.

The claimants' property consists of 80.00 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the ten home sites the claimants are requesting 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 that the claimants are requesting 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 January 16, 1961.

On January 16, 1961, 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 are requesting 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 May 12, 2008, and their appraisal on November 3, 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 claimants submitted two sets of documents in an attempt to satisfy the appraisal requirements of Sections 7 and 8 of Measure 49. One set of documents was a residential appraisal authored by Charles R. Dehlinger. The Dehlinger appraisal provided values for single, hypothetical lots of 1-2 acres, 20 acres, and 5 acres that could be developed at the relevant time periods, but provided no value of the Measure 37 property itself. Charles R. Dehlinger is a state-certified general appraiser; therefore, with respect to the tasks performed by Dehlinger, this requirement has been met. The second set of documents submitted were authored by the claimants' attorney, Michael Spencer. Those documents purported to comply with the requirements of Sections 7 and 8 of Measure 49 by using the individual lot values obtained from the Dehlinger appraisal to determine a value for the 80-acre Measure 37 property at the relevant time periods. Under Section 7(7) of Measure 49 these activities must be part of the "appraisal" and must be performed by a person certified under ORS chapter 674 or a person registered under ORS chapter 308. Michael Spencer is not a state-certified general appraiser; therefore, with respect to the tasks performed by Michael Spencer, this requirement has not been met.<sup>3</sup>

---

<sup>3</sup> ORS 674.100(2)(c) does not require an attorney to comply with the licensing requirements of the statute when the attorney engages in what otherwise would be deemed real estate appraisal activity when the activity is undertaken "in the performance of duties as an attorney at law." The fact that an attorney is exempt from the licensing requirements of ORS 674 in certain circumstances is not the same as being "certified" under ORS 674.

**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 appraisal performed by Charles Dehlinger meets the threshold requirements for Uniform Standards of Professional Appraisal Practice (USPAP) compliance for the scope of work outlined by the appraiser, with the exception of Rule 1-2(d), which requires that the appraiser “identify the effective date of the appraiser’s opinions and conclusions.” For the retrospective property value opinions, the appraiser identified only the years 1971 and 1973.

As noted above, claimants’ attorney Michael Spencer completed significant portions of the analysis required to be included in the appraisal under Section 7(7) of Measure 49. Michael Spencer used the individual lot values identified in the Dehlinger appraisal to determine a value for the entire property at the relevant time periods. For example, the Dehlinger appraisal determined that in 1971, one year before the land use regulation went into effect, an individual 1-to-2-acre parcel had a fair market value of \$3,900. Mr. Spencer multiplied this figure by 80 to determine a value for the 80-acre Measure 37 property of \$312,000. Likewise, Mr. Spencer took Dehlinger’s determination that in 1973 a 20-acre parcel had a fair market value of \$21,000 and multiplied that figure by 4 to support his conclusion that the Measure 37 Property had a value of \$84,000 after the land use regulation went into effect. Finally, Mr. Spencer took Dehlinger’s determination that in 2008 a 5-acre parcel had a fair market value of \$158,000 to \$210,000 and multiplied the lower figure by 10 to determine the current value of the lots, parcels or dwellings to which claimants were otherwise entitled under Measure 49. An appraisal review commissioned by DLCD has determined that those portions of the Measure 49 appraisal performed by Mr. Spencer did not meet the threshold requirements for Uniform Standards of Professional Appraisal Practice compliance. The value conclusions for the Measure 37 property reached by Mr. Spencer are a summation of the hypothetical retail lot values determined by Dehlinger and made no allowance for development costs, holding costs, marketing costs, or developer’s profit. As such, the valuations lack any meaningful analysis and fail to meet the criteria outlined in Standards 1 and 2 of USPAP. As a result, Mr. Spencer’s analysis is not compliant with USPAP.

Based on the above analysis, 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.**

Neither the appraisal submitted by Dehlinger nor the analysis submitted by Mr. Spencer identified what the highest and best use of the property was at the time the land use regulation was enacted. In response to the preliminary evaluation, both Mr. Dehlinger and Mr. Spencer attempted to clarify the highest and best use of the property at the time the land use regulation was enacted. The appraiser stated that “the Highest & Best Use of this property during the early 1970’s and through 1977 would have been as a building sites [sic]” and “In fact, Highest & best Use would have been with a residence constructed on the

property.” The attorney stated that “this property’s highest and best use is in residential parcels. That continued to be the highest and best use after land use regulations were enacted [sic].” Between these statements, the highest and best use at the time the land use regulation was enacted was determined to be residential use. 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 Klamath County’s FR zone reduced the fair market value of the Measure 37 claim property. The claimants submitted two sets of documents in an attempt to satisfy this requirement, the Dehlinger appraisal and Mr. Spencer’s analysis.

The Dehlinger appraisal does not purport to determine the fair market value of the 80-acre Measure 37 claim property for any relevant date. Instead, the appraisal shows a fair market value of one hypothetical 2-acre parcel in 1971 “as if within a sub-division or partition had the property been so divided” and of two hypothetical 20-acre parcels in 1973 “had the property been so divided.” Therefore, with respect to the tasks performed by Dehlinger, this requirement has not been met.

The analysis submitted by Mr. Spencer as part of the Measure 49 appraisal attempts to establish the value of the entire Measure 37 property one year before and one year after the land use regulation went into effect. However, the values determined by Mr. Spencer lack any meaningful analysis and fail to meet the criteria outlined in Standards 1 and 2 of USPAP. There are two reasons for this conclusion. First, the value established by Mr. Spencer for 1971 (one year before the enactment of the regulation) was accomplished by merely multiplying the value of a single 1-to-2-acre parcel as determined by the Dehlinger appraisal by 80. Likewise, the value established by Mr. Spencer for 1973 (one year after the enactment of the regulation) was accomplished by merely multiplying the value of a 20-acre parcel as determined by the Dehlinger appraisal by 4. In both instances, the analysis made no allowance for costs of development, holding, marketing or profit. It is clear from the Dehlinger appraisal that the values for the individual lots did not make any allowance for costs of development, holding, marketing or profit. Second, although the narrative of the Dehlinger appraisal asserts that the fair market value of \$3,900 was for a 1-to-2-acre parcel in 1971, it is clear that the data relied on by Mr. Dehlinger to determine that value was based solely on a 2-acre parcel. Mr. Dehlinger’s report states “Four comparable Sales have been included in this report. Based on the analysis the value estimate for the 2-acre building sites is \$3900 or \$1950 per acre in 1971.” The size of the four comparables utilized by Mr. Dehlinger ranged from 1.29 to 5.35 acres, and the sale prices of the same were adjusted in comparison to a 2-acre parcel. Thus, when Mr. Spencer multiplied the \$3,900 value of a 1-to-2-acre parcel as determined by Dr. Dehlinger by 80, Mr. Spencer in effect doubled the value of the Measure 37 property in 1971. Therefore, with respect to the tasks performed by Mr. Spencer, 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 Dehlinger appraisal does not purport to determine whether the reduction in the fair market value of the Measure 37 property 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. Therefore, with respect to the tasks performed by Mr. Dehlinger, this requirement has not been met.

The analysis submitted by Mr. Spencer as part of the Measure 49 appraisal attempts to determine whether the reduction in the fair market value of the Measure 37 property 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. Mr. Spencer's analysis of this requirement is not credible for several reasons. First, as noted above, Mr. Spencer's analysis of the value of the Measure 37 property prior to the enactment of the land use regulation is not credible and fails to meet the criteria outlined in Standards 1 and 2 of USPAP because it (1) made no allowance for costs of development, holding, marketing or developer profit; and (2) multiplied the fair market value of a 2-acre parcel by 80 to determine the fair market value of the whole. Second, Mr. Spencer's analysis of the value of the Measure 37 property after the enactment of the land use regulation is not credible and fails to meet the criteria outlined in Standards 1 and 2 of USPAP because it made no allowance for costs of development, holding, marketing or developer profit. Third, because of the errors noted above, Mr. Spencer's analysis grossly exaggerates the reduction in value caused by the land use regulation. Finally, although Mr. Spencer correctly adjusted the alleged loss in value by calculating interest thereon 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, Mr. Spencer failed to adjust the reduction in fair market value by any ad valorem property taxes not paid, any severance taxes paid and any recapture of additional tax liability that the claimants have paid or will pay for the property if the property is disqualified from special assessment under ORS 308A.703. Therefore, with respect to the tasks performed by Mr. Spencer, 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 Dehlinger appraisal does not purport to show the present fair market value of each lot, parcel or dwelling that the claimants are seeking under section 7(2) of Measure 49. Instead, the Dehlinger appraisal merely determines the present fair market value of one, 5-acre building site “as if the subject property was divided into 5 acre parcels as if within a subdivision.” The appraisal concluded that the value of a 5-acre building site would be between \$158,000 and \$210,000 “depending on the amenities such as view available to the lot, access roads, power, availability of domestic water, and potential cost of the septic system.” The appraisal does not show the present fair market value of each of the requested ten, buildable home sites as they would exist on the 80-acre Measure 37 property. In response to the preliminary evaluation, the appraiser further clarifies by stating “I have no idea how many 5 acre parcels would be developed on this property” and “As noted in the original acceptance of this analysis, this was not intended as a subdivision analysis and no subdivision plat was presented from which to evaluate each lot separately.” Thus, it is clear that the Dehlinger appraisal makes no attempt to show the present fair market value of each lot, parcel or dwelling that the claimants are seeking under section 7(2) of Measure 49. Therefore, with respect to the tasks performed by Mr. Dehlinger, this requirement has not been met.

The analysis submitted by Mr. Spencer as part of the Measure 49 appraisal attempts to determine the present fair market value of each lot, parcel or dwelling that the claimants are seeking under section 7(2) of Measure 49. In completing this analysis, Mr. Spencer utilized the low end of the value of a 5-acre building site as determined in the Dehlinger appraisal of \$158,000 and multiplied that number by ten, the number of home site approvals sought by the claimants. Mr. Spencer’s analysis of this requirement is not credible for several reasons. First, Mr. Spencer’s analysis fails to account for the value of the 30-acre parcel that would remain from the 80-acre Measure 37 property following the establishment of ten 5-acre home sites. Second, Mr. Spencer’s analysis made no allowance for costs of development, holding, marketing or profit. Finally, Mr. Spencer’s analysis contained no evidence of any ad valorem property taxes not paid, any severance taxes paid and any recapture of additional tax liability that the claimants have paid or will pay for the property if the property is disqualified from special assessment under ORS 308A.703. Therefore, with respect to the tasks performed by Mr. Spencer, this requirement has not 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.***

As discussed in subsections (e), (f), and (g) above, the Dehlinger appraisal and the analysis submitted by Mr. Spencer taken together fail to establish the prerequisites necessary to demonstrate that 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. Therefore, this requirement has not been met.

## **II. COMMENTS ON THE PRELIMINARY EVALUATION**

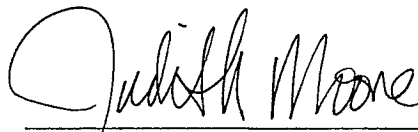
The department issued its Preliminary Evaluation for this claim on February 4, 2010. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. Comments received have been taken into account and have been addressed by the department in the issuance of 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 claimants does not meet all of the qualification standards described in Sections 7 and 8 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 22<sup>nd</sup> 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.