



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:

E130865

CLAIMANTS:

Joseph H. and Geraldine L. Bitz  
26805 S. Bitz Road  
Mulino, Oregon 97042

MEASURE 37 PROPERTY  
IDENTIFICATION:

Township 4S, Range 2E, Section 16  
Tax lot 4700  
Clackamas County

The claimants, Joseph and Geraldine Bitz, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on November 17, 2006, for property located at 26805 S Bitz Road, near Mulino, in Clackamas 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; 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 six home site approvals in the election material. The appraisal submitted by the claimants attempts to support the assertion that the value of six 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 six home sites. Therefore, the claimants may qualify for a maximum of six 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**

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, Joseph and Geraldine Bitz, filed a Measure 37 claim, M130865, with the state on November 17, 2006. The claimants filed a Measure 37 claim, ZC297-06, with Clackamas County on November 14, 2006. The state claim was filed prior to December 4, 2006.

The claimants timely filed a Measure 37 claim with both the state and Clackamas 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 and land sale contract submitted by the claimants, Joseph and Geraldine Bitz are the owners of fee title to the property as shown in the Clackamas County deed records and, therefore, are owners of the property under Measure 49.

Clackamas 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 Clackamas County, outside any urban growth boundary and any city limits, near the community of Mulino.

**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 Timber District (TBR) by Clackamas 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.

Based on Clackamas County Assessor’s data, the claimants’ property consists of 30.0 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the six 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 six 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**

Clackamas County deed records indicate that the claimants acquired the property on September 16, 1967.

On September 16, 1967, the Measure 37 claim property was not subject to any local or state laws that would have prohibited the claimants from establishing at least six lots or parcels and at least five dwellings. Therefore, the claimants lawfully could have established the six home sites the claimants have requested 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 5, 2008, and their appraisal on August 13, 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 appraisal submitted by the claimants was prepared by Kenneth Weiner, a State-Certified Residential Appraiser under ORS Chapter 674. The Appraiser Certification and Licensure Board has adopted administrative rules to implement ORS Chapter 674. The administrative rules are found at Oregon Administrative Rules, Chapter 161 and describe the scope of the authority of a State-Certified Residential Appraiser. OAR 161-025-0005(1)(a) provides that “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.” OAR 161-025-0005(1)(b) authorizes a State-Certified Residential Appraiser to appraise “all other types of real property having a transaction value of less than \$250,000”. However, OAR 161-025-0005(2) prohibits a State-Certified Residential Appraiser from appraising subdivisions. OAR 161-002-0000 defines a “subdivision” as “either an act of subdividing land or an area or a tract of land subdivided to create four or more lots within a calendar year”. In the submitted appraisal, the appraiser identified the highest and best use of the property as that of a six-lot subdivision and appraised the property as a “hypothetical” six-lot subdivision. As a result, the appraisal was in violation of OAR 161-025-0005(2) as it was beyond the scope of authority of a State-Certified Residential Appraiser. Likewise, the transaction value for the “hypothetical” six-lot subdivision as determined by the appraisal was \$1,285,000. As noted, OAR 161-025-0005(1)(b) limits the transaction value for all other types of real property to less than \$250,000. As a result, the appraisal was in violation of OAR 161-025-0005(1)(b) as it was beyond the scope of authority of a State-Certified Residential Appraiser. The appraisal cannot be used for the purpose of appraising the value of six 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 claimants’ appraisal filed for the Measure 37 claim property does not meet the threshold requirements for Uniform Standards of Professional Appraisal Practice (USPAP) compliance. The appraisal failed to identify the purpose and function of the report relative to the Measure 49 claim and failed to address the majority of the requirements for an appraisal specified by Section 7 of Measure 49, as detailed in subsections (d)-(g), below. The portion of the appraisal in which the appraiser assigned a value of \$190,000 to each of four, undeveloped, five-acre home sites in the hypothetical six-lot subdivision, contained insufficient information and analysis to support the land value conclusions. Due to the lack of support for the land value conclusions, the appraisal fails to comply with USPAP Standards Rules 1 and 2. Finally, as determined above, the appraiser conducted work outside of the scope of his license which is a violation of USPAP. 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 did not determine the highest and best use of the property at the time the land use regulation was enacted. 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 does not show the fair market value of the property one year before or one year after the enactment of any land use regulations. 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 in (e). 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 each of six lots or parcels that the claimants are seeking. However, the value attributed to the four, undeveloped five-acre parcels was inadequately supported. In addition, as determined in 9(b) above, the appraiser was not qualified to appraise the value of the property as segregated into the requested six parcels. Therefore, this requirement has not been met.

The appraiser was not qualified to appraise the value of the property as segregated into six parcels, a violation of USPAP. Furthermore, the appraisal does not specify the highest and best use at the time the land use regulation was enacted; does not show the fair market value of the property one year before and one year after the land use regulation was enacted; does not determine the loss in fair market value due to the enactment of a land use regulation as required by Section 7 (6) and (7) of Measure 49. The appraisal also contains insufficient evidence to support the concluded present fair market value of the six home sites the claimants are seeking. Therefore, the appraisal submitted by the claimants does not meet the requirements of Sections 7 and 8 under Measure 49.

## II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on January 8, 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.

Specifically, the Oregonians in Action Legal Center submitted comments regarding the department's determination that the appraisal submitted by the claimants could not be used to satisfy the requirements of Section 7 of Measure 49. In this comment it is asserted that the following are the relevant requirements for an appraisal to be prepared in accordance with the requirements of Measure 49:

- a. "[A] claimant must provide an appraisal showing the fair market value of the property ..." Section 7(7).
- b. The appraisal must be "prepared by a person certified under ORS chapter 674 or a person registered under ORS chapter 308;" Section 7(7)(a)
- c. The appraiser must "[e]xpressly determine the highest and best use of the property at the time the land use regulation was enacted." Section 7(7)(c)

The comment states that these requirements have been met and, therefore, the appraisal meets the requirements of Measure 49. However, an appraisal must be prepared in accordance with all of the relevant requirements of Measure 49. These requirements are stipulated in ORS 195.305, Section 7(6)-(7) and Section 8(5) and OAR 660-041-0160.

In addition, the Oregonians in Action Legal Center asserts that the appraiser did not appraise a six-lot subdivision. The attorney draws a distinction between appraising the value of an existing subdivision and a "hypothetical subdivision." This assertion is without merit as all subdivisions are "hypothetical" until actually subdivided.

The Oregonians in Action Legal Center also asserts that the appraiser did not appraise a subdivision because the division of the property could occur as serial partitions over a period of years or not at all. However, the appraisal in fact appraised the fair market value of six home site approvals "as of July 28, 2008." The appraiser states: "...this appraisal is to represent the estimate market value of a 'hypothetical' division of the property to create a final result of six (6)

five (5) acre parcels....” The appraiser provided individual values for each of the six parcels to be segregated from the 30-acre property.

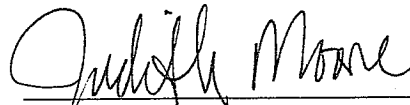
### **III. CONCLUSION**

Based on the analysis above, the claimants do not qualify for Measure 49 home site approvals. The appraisal submitted by the claimants cannot be used for the purpose of appraising the value of six home sites, a six-lot subdivision, under Section 7 of Measure 49, because the appraiser’s Certified Residential Appraiser License does not allow the appraisal of subdivisions. Furthermore, the appraisal submitted does not follow 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:



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Judith Moore, Division Manager  
Dept. of Land Conservation and Development  
Dated this 21<sup>st</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.