



OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT

ORS 195.300 to ORS 195.336 (MEASURE 49) SUPPLEMENTAL REVIEW
OF MEASURE 37 CLAIM
Preliminary Evaluation

September 29, 2009

STATE ELECTION NUMBER: E130501

CLAIMANT: Betty Fisher¹
4510 Cooper Hollow Road
Dallas, OR 97338

MEASURE 37 PROPERTY IDENTIFICATION: Township 8S, Range 5W, Section 20
Tax lot 100²
Polk County

PRIMARY CONTACT INFORMATION: Paula Warkentin
400 N Polk Street
Eugene, OR 97402

I. ELECTION

The claimant, Betty Fisher, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on October 31, 2006, for property located at 4540 Cooper Hollow Road, near Dallas, in Polk 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 her Measure 37 claim under Section 6 of Measure 49, which allows the Department of Land Conservation and Development (the department) to authorize up to three 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 for tax lot 119 because she no longer owns tax lot 119 of the Measure 37 claim property.

¹ Paula Warkentin was a claimant under Measure 37, however, she did not elect under Measure 49.

² The Measure 37 claim property consisted of tax lot 100. Tax lot 100 has since been partitioned into tax lots 100 and 119.

Based on the department's preliminary analysis, it appears that the claimant is not eligible for any relief under Measure 49 for tax lot 100 because the zoning and lawfully permitted uses have not changed since the claimant acquired the property and the claimant would not have been lawfully permitted to establish any additional home sites when she acquired the property.

III. THE MAXIMUM NUMBER OF HOME SITE APPROVALS FOR WHICH THE CLAIMANT MAY QUALIFY

Under Section 6 of Measure 49, the number of home site approvals authorized by the department cannot exceed the lesser of the following: three; 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. The claimant has requested two home site approvals in the election material. The Measure 37 waiver issued for this claim describes two home sites. Therefore, the claimant may qualify for a maximum of two home site approvals under Section 6 of Measure 49.

IV. PRELIMINARY ANALYSIS OF QUALIFICATION FOR HOME SITE APPROVAL

1. Preliminary Analysis

To qualify for a home site approval under Section 6 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, Betty Fisher, filed a Measure 37 claim, M130501, with the state on October 31, 2006. The claimant filed a Measure 37 claim, M06-78, with Polk County on October 19, 2006. 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 Polk 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 6 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 deeds submitted by the claimant, Betty Fisher is the owner of fee title to the property as shown in the Polk County deed records and, therefore, is an owner of tax lot 100 of the property under Measure 49.

According to the information submitted by the claimant, Betty Fisher has not established her ownership of tax lot 119 of the property for the purposes of Measure 49. Claimant Betty Fisher acquired the property on June 6, 1957, as reflected by a recorded deed included with the claim. However, Betty Fisher conveyed fee title to Paula Warkentin on September 4, 1997, retaining for herself a life estate. Under Measure 49, a life estate holder is not an owner of property; thus for purposes of Measure 49 relief, Betty Fisher was no longer an owner of tax lot 119 after September 4, 1997.

(b) All Owners of the Property Have Consented in Writing to the Claim

Polk County deed records indicate that there are non-claimant owners who have not consented to the claim: Jolene Moskal and Paula Warkentin. Without the consent of all non-claimant owners, the department is not authorized to provide any relief under Measure 49.

(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 Polk County, outside the urban growth boundary and outside the city limits of the nearest city, Dallas.

(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 two home site approvals.

The property is currently zoned Farm Forest (FF) by Polk 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. Under ORS 215.780(2)(a), counties may adopt minimum lot sizes smaller than 80 acres, subject to approval by the Land Conservation and Development Commission (the Commission). The Commission has approved Polk County's FF zone, which requires a minimum lot size of 40 acres.

The claim property consists of 24.67 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the two home sites the claimant may qualify for under Section 6 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 two 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 6 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."

Polk County deed records indicate that the claimant acquired tax lot 100 of the property on January 8, 2008.

On January 8, 2008, the Measure 37 claim property was subject to Polk County's acknowledged Farm Forest (FF) zone. Polk County's FF zone required 40 acres for the creation of a new lot or parcel on which a dwelling could be established. Tax lot 100 consists of 4.85 acres. The zoning and lawfully permitted uses have not changed since the claimant's acquisition date and the claimant would not have been lawfully permitted to establish any additional home sites when she acquired the property.

2. Preliminary Conclusion

Based on the preliminary analysis, it appears that the claimant, Betty Fisher, is not eligible for any relief under Measure 49 for tax lot 119 because she no longer owns tax lot 119 of the Measure 37 claim property.

Based on the preliminary analysis, it appears that the claimant, Betty Fisher, is not eligible for any relief under Measure 49 for tax lot 100 because the zoning and lawfully permitted uses have not changed since the claimant's acquisition date and she would not have been lawfully permitted to establish any additional home sites when she acquired the property.

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.