



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

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

July 14, 2010

STATE ELECTION NUMBER: H133754¹

CLAIMANTS: Jess Fitzhugh
PO Box 549
Brookings, OR 97415

Eagle Cap Rentals
PO Box 1630
Brookings, OR 97415

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 40S, Range 13W, Section 12
Tax lot 400
Curry County

I. ELECTION

The claimants, Jess Fitzhugh and Eagle Cap Rentals, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 4, 2006, for property located along North Bank Chetco River Road, near Brookings, in Curry 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 elected supplemental review of their 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. However, as initially enacted in 2007, a claimant was not eligible for relief under Measure 49 if the claimant did not file a Measure 49 election within 90 days of the department mailing the election packet. Jess Fitzhugh and Eagle Cap Rentals were not entitled to Measure 49 relief on that basis.

However, the Oregon State Legislative Assembly subsequently amended this Measure 49 requirement through the passage of House Bill 3225 (Chapter 855 (2009 Laws)) (HB 3225). HB 3225 extends the time period during which claimants were required to elect relief under Measure 49 to 120 days. As a result, this requirement no longer prevents the claimants, Jess Fitzhugh and Eagle Cap Rentals, from obtaining Measure 49 relief. The claimants elected to seek relief under

¹ The claimant also has submitted a claim for property not contiguous to the subject property which is identified as H133753.

Measure 49, as amended by HB 3225, and submitted the \$175 fee required by Section 18 of HB 3225 in order to have the claim reviewed.

II. SUMMARY OF PRELIMINARY EVALUATION

Based on the department's preliminary analysis, it appears that claimant Jess Fitzhugh is not eligible for any relief under Measure 49 because he no longer owns the Measure 37 claim property. It further appears that claimant Eagle Cap Rentals is not eligible for any relief under Measure 49 because the zoning and lawfully permitted uses of the property have not changed since that claimant acquired the property.

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

Under Section 6 of Measure 49, the number of home site approvals issued 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 claimants have requested supplemental review under Section 6. No waiver was issued for this claim. The Measure 37 claim filed with the state describes ten home sites. Therefore, the claimants may qualify for a maximum of three 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, as amended by HB 3225, a claimant must have filed a Measure 37 claim for the property with the state before Measure 49 became effective on December 6, 2007. If the claimant filed their state Measure 37 claim after December 4, 2006, the claimant must also have either (a) filed the claim in compliance with the provisions of OAR 660-041-0020 then in effect; (b) submitted a land use application as described in OAR 660-041-0020 then in effect prior to June 28, 2007; or (c) filed a Measure 37 claim with the county on or before December 4, 2006.

The claimants, Jess Fitzhugh and Eagle Cap Rentals, filed a Measure 37 claim, M133754, with the state on December 4, 2006. The claimants filed a Measure 37 claim, M37-0688, with Curry County on December 4, 2006. The state claim was filed on December 4, 2006.

It appears the claimants filed a timely Measure 37 claim with the state along with any additional claims or applications that the claimant had to have filed in order to be eligible for review under Measure 49, as amended by HB 3225.

In addition to timely filing a state claim, to qualify for a home site approval under Section 6 of Measure 49 the claimants must also 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 deed, submitted by the claimants, Eagle Cap Rentals is the owner of fee title to the property as shown in the Curry County deed and, therefore, is an owner of the property under Measure 49.

According to the information submitted by the claimants, Jess Fitzhugh has not established his ownership of the property for the purposes of Measure 49. He conveyed away his entire interest to Eagle Cap Rentals, a partnership, on August 3, 2006. A partnership is a separate and distinct legal entity from its partners. Therefore, Jess Fitzhugh is not an owner of the Measure 37 claim property under Measure 49. Because this requirement has not been met, the claimant Jess Fitzhugh is not entitled to any relief under Measure 49, and, therefore, the remaining approval criteria will not be evaluated for this claimant.

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

It appears that claimant Eagle Cap Rentals is the sole owner of the property. Therefore, no additional consent is required.

(c) The Majority of the Measure 37 Claim Property Is Located Outside Any Urban Growth Boundary and Outside the Boundaries of Any City or the Measure 37 Claim Property is Located within the Boundaries of A City and Entirely Outside Any Urban Growth Boundary

The Measure 37 claim property is located in Curry County and outside any urban growth boundary and outside the city boundary of the nearest city, Brookings

(d) One or More Land Use Regulations Prohibit Establishing the Lot, Parcel or Dwelling

As stated in Section III above, claimant Eagle Cap Rentals may qualify for up to three home site approvals.

The property is currently zoned Forestry Grazing (F/G) by Curry 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 claimant's property consists of 82.35 acres. Therefore, state land use regulations prohibit claimant Eagle Cap Rentals from establishing on the Measure 37 claim property the three home sites claimant Eagle Cap Rentals, 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 claimants, it does not appear that the establishment of the three home sites for which claimant Eagle Cap Rentals 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."

Curry County deed records indicate that claimant Eagle Cap Rentals acquired the property on August 3, 2006.

The zoning of the Measure 37 property has not changed since claimant Eagle Cap Rentals acquired the property. As it is currently, on August 3, 2006, the Measure 37 claim property was zoned Forestry Grazing (F/G) zone by Curry County in accordance with the applicable provisions of ORS chapter 215 and OAR 660, division 33. Therefore, claimant Eagle Cap Rentals is not qualified for Measure 49 relief on the Measure 37 claim property because the zoning and lawfully permitted uses of the property have not changed since claimant Eagle Cap Rentals acquired the property.

2. Preliminary Conclusion

Based on the department's preliminary analysis, it appears that claimant Jess Fitzhugh is not eligible for any relief under Measure 49 because he no longer owns the Measure 37 claim property.

Based on the preliminary analysis, it appears that claimant Eagle Cap Rentals, does not qualify for Measure 49 home site approvals because the zoning and lawfully permitted uses of the property have not changed since it 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 claimants and the claimants' 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 claimants and the claimants' 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 claimants and the claimants' 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.