



OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT

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

January 26, 2010

STATE ELECTION NUMBER: E132918A¹

CLAIMANT: Fox Land Company, LLC
16364 Fox Road SE
Silverton, OR 97381

MEASURE 37 PROPERTY IDENTIFICATION: Township 7S, Range 1E, Section 31
Tax lots 1000, 1100, 1200, and 1400
Section 32C, Tax lots 300 and 500
Township 8S, Range 1E
Section 5, Tax lot 300
Section 6, Tax lots 100, 200, 400, 700, and 1000
Marion County

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I. ELECTION

The claimant, Fox Land Company, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on December 1, 2006, for property located at 922 Drift Creek Road SE, 17485 Katherine Lane SE, and 16364 Fox Road SE, near Silverton, in Marion 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 its Measure 37 claim

¹ Claim E132918 has been divided into five claims because the claim includes multiple tax lots or parcels that are not in the same ownership or because the Measure 37 claim sought relief for two or more non-contiguous parcels. E132918A refers to tax lots 1000, 1100, 1200, 1400 (T7S R1E S31), tax lots 300 and 500 (T7S R1E S32C), tax lot 300 (T8S R1E S5), and tax lots 100, 200, 400, 700, and 1000 (T8S R1E S6) and claimant Fox Land Co., LLC. E132918B refers to tax lot 600 (T7S R1E S32C) and claimant S. Thomas Fox. E132918C refers to tax lots 500 and 900 (T8S R1W S23) and claimant Fox Land Co., LLC. E132918D refers to tax lots 600 and 800 (T9S R1W S9) and claimant Fox Land Co, LLC. E132918E refers to tax lot 200 (T9S R2W S18), tax lots 600 and 800 (T9S R2W S19), and tax lot 900 (T9S R3W S13) and claimant Fox Land Co., LLC.

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 on tax lots 100, 200, 300 (section 5), 300 (section 32C), 400, 500, 700, 1000 (section 6) 1100, 1200, 1400, under Measure 49 because the zoning and lawfully permitted uses of the claimant's property have not changed since the claimant acquired it.

Based on the department's preliminary analysis, it appears that the claimant is not eligible for any relief on tax lot 1000 (section 31) under Measure 49 because the claimant no longer owns tax lot 1000 of the Measure 37 claim 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. However, if the number of lots, parcels and dwellings currently in existence on the Measure 37 claim property and the contiguous property under the same ownership is equal to or greater than the maximum number of home sites a claimant could otherwise qualify for under Section 6 of Measure 49, a claimant may qualify for only one home site approval.

The claimant has requested three home site approvals in the election material. No waiver was issued for this claim. The Measure 37 claim filed with the state describes more than three home sites.² However, because it appears that the Measure 37 claim property and contiguous property in the same ownership contain three or more lots or parcels that are developed with dwellings the claimants may qualify for a maximum of one home site approval.

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.

² The Measure 37 claim described the property and requested relief for the property before the claim was split (approximately 1800 acres).

The claimant, Fox Land Company, filed a Measure 37 claim, M132918, with the state on December 1, 2006. The claimant filed a Measure 37 claim, M02-292, with Marion County on December 1, 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 Marion 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, Fox Land Company is the owner of fee title to tax lots 100, 200, 300 (section 5), 300 (section 32C), 400, 500, 700, 1000 (section 6) 1100, 1200 and 1400 of the Measure 37 claim property as shown in the Marion County deed records and, therefore, is an owner of those tax lots under Measure 49.

According to the deed obtained by the department, Fox Land Company has not established its ownership of tax lot 1000 (section 31) of the Measure 37 claim property for the purposes of Measure 49. The claimant conveyed its ownership interest to Thomas and Karen Fox on March 13, 2009.

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

It appears that the claimant is the sole owner of tax lots 100, 200, 300 (section 5), 300 (section 32C), 400, 500, 700, 1000 (section 6) 1100, 1200 and 1400 of the Measure 37 property. Therefore, no additional consent is required.

(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 Marion County, outside the urban growth boundary and outside the city limits of the nearest city, Silverton.

(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 a maximum of one home site approval.

Tax lots 100, 200, 300 (section 5), 400, 500, 700, 1000 (section 6), 1000 (section 31), 1100, 1200, 1400 of the Measure 37 claim property are currently zoned Exclusive Farm Use (EFU) Marion County, in accordance with ORS chapter 215 and OAR 660, division 33, because the property is "agricultural land" as defined by Goal 3. Goal 3 requires agricultural land to be zoned exclusive farm use. Applicable provisions of ORS chapter 215 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, generally prohibit the establishment of a lot or parcel less than 80 acres in size in an EFU zone, and regulate the establishment of dwellings on new or existing lots or parcels. Those provisions also regulate the establishment of dwellings on new or existing lots or parcels and include restrictions on establishing more than one dwelling on a single tract.

The Measure 37 claim property zoned EFU consists of 925.6 acres that makes up a single tract. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the one home site the claimant may qualify for under Section 6 of Measure 49.

Tax lot 300 (section 32C) of the Measure 37 claim property is currently zoned Farm/Timber (FT) 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 Measure 37 claim property zoned FT consists of 2.50 acres. Therefore, state land use regulations prohibit the claimant from establishing on the Measure 37 claim property the one home site 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 one home site 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."

Marion County deed records indicate that the claimant acquired tax lots 100, 200, 300 (section 5), 300 (section 32C), 400, 500, 700, 1000 (section 6), 1000 (section 31), 1100, 1200, 1400 of the Measure 37 claim property on May 1, 1997.

The zoning of the Measure 37 claim property has not changed since the claimant acquired tax lots 100, 200, 300 (section 5), 400, 500, 1000 (section 6), 1000 (section 31), 1100, 1200 and 1400 on May 1, 1997. As it is currently, on May 1, 1997 the Measure 37 claim property was zoned Exclusive Farm Use (EFU) by Marion County in accordance with applicable provisions of ORS chapter 215 and OAR 660, division 33, because the property is agricultural land as defined by Goal 3.

The claimant is not qualified for Measure 49 relief on tax lots 100, 200, 300 (section 5), 400, 500, 700, 1000 (section 6), 1000 (section 31), 1100, 1200 and 1400 of the Measure 37 claim property because the zoning and lawfully permitted uses of the property have not changed since the claimant acquired that portion of the property.

The zoning of the Measure 37 claim property has not changed since the claimant acquired, tax lot 300 (section 32C) on May 1, 1997. As it is currently, on May 1, 1997 tax lot 300 (section 32C) of the Measure 37 claim property was zoned Farm/Timber (FT) by Marion County in accordance with Goals 3 and 4, as implemented by OAR 660-006-0050.

The claimant is not qualified for Measure 49 relief on tax lot 300 (section 32C) of the Measure 37 claim property because the zoning and lawfully permitted uses of the property have not changed since the claimant acquired that portion of the property.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimant, Fox Land Company, does not qualify for Measure 49 home site approvals on tax lots 100, 200, 300 (section 5), 300 (section 32C), 400, 500, 700, 1000 (section 6) 1100, 1200 and 1400 because the zoning and lawfully permitted uses of the claimant's property have not changed since the claimant acquired it.

Based on the preliminary analysis, the claimant, Fox Land Company, does not qualify for Measure 49 home site approvals on tax lot 1000 (section 31) because the claimant no longer owns 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.