



**OREGON DEPARTMENT OF LAND CONSERVATION AND  
DEVELOPMENT**

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

June 4, 2010

**STATE ELECTION NUMBER:** H134307<sup>1</sup>

**CLAIMANTS:** Tomasz Fijak  
Katarzyna Fijak-Leong  
22740 Rocky Point Road  
Scappoose, OR 97056

Marcin Fijak  
1607 NE 213<sup>th</sup> Street  
Fairview, OR 97060

**MEASURE 37 PROPERTY  
IDENTIFICATION:** Township 3N, Range 2W, Section 34D  
Tax lot 700  
Multnomah County

**I. ELECTION**

The claimants, Tomasz Fijak, Katarzyna Fijak-Leong and Marcin Fijak, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on March 20, 2007, for property located at 22740 Rocky Point Road, near Scappoose, in Multnomah 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 filed a Measure 37 claim with the state after December 4, 2006 but did not comply with the provisions of OAR 660-041-0020, then in effect. Tomasz Fijak, Katarzyna Fijak-Leong and Marcin Fijak 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). As a

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<sup>1</sup> On December 29, 2008, the department issued a preliminary evaluation based on the Measure 49 election E134307 in which the department indicated that the claimants would not be eligible for Measure 49 relief. This preliminary evaluation supersedes the preliminary evaluation in E134307.

result, this requirement no longer prevents the claimants, Tomasz Fijak, Katarzyna Fijak-Leong and Marcin Fijak, from obtaining Measure 49 relief. The claimants elected to seek relief under 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 the claimants are not eligible for any relief under Measure 49 because the claimants would not have been lawfully permitted to establish any additional home sites when they 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 three 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, Tomasz Fijak, Katarzyna Fijak-Leong and Marcin Fijak, filed a Measure 37 claim, M134307, with the state on March 20, 2007. The claimants filed a Measure 37 claim, T2-06-040 with Multnomah County on April 6, 2006. The state claim was filed after December 4, 2006 and the claimants also filed a county Measure 37 claim on or before 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 claimants 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 deeds submitted by the claimants, Tomasz Fijak, Katarzyna Fijak-Leong and Marcin Fijak are the owners of fee title to the property as shown in the Multnomah County deed records and, therefore, are owners of the property under Measure 49.

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

It appears that the claimants are the sole owners 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 Multnomah County and the property is located outside any urban growth boundary outside the city boundary of the nearest city, Scappoose.

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

As stated in Section III above, the claimants may qualify for up to three home site approvals.

The property is currently zoned Commercial Forest Use (CFU-2) by Multnomah 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.

The claimants' property consists of 43.92 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the three home sites the claimants 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 the claimants 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."

Multnomah County deed records indicate that the claimants acquired the property on November 29, 1983.

On November 29, 1983, the Measure 37 claim property was subject to Multnomah County's acknowledged Commercial Forest Use (CFU-80) zone. Multnomah County's CFU-80 zone required 80 acres for the creation of a new lot or parcel on which a dwelling could be established. The claimants' property consists of 43.92 acres and is developed with a dwelling. Therefore, the claimants lawfully could not have established any additional home sites on their date of acquisition.

**2. Preliminary Conclusion**

Based on the preliminary analysis, it appears that the claimants, Tomasz Fijak, Katarzyna Fijak-Leong and Marcin Fijak, do not qualify for Measure 49 home site approvals because the claimants were not lawfully permitted to establish the lots, parcels or dwellings on the claimants' date of acquisition.

## 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.**