



**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:** E130501

**CLAIMANT:** Betty Fisher<sup>1</sup>  
Cooper Hollow Road  
Dallas, OR 97338

**MEASURE 37 PROPERTY  
IDENTIFICATION:** Township 8S, Range 5W, Section 20  
Tax lot 100<sup>2</sup>  
Polk County

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

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.

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 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

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

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

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.

## **B. Qualification Requirements**

To qualify for a home site approval under Section 6 of Measure 49, the claimant must meet each of the following requirements:

### **1. 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 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.

The claimant timely filed a Measure 37 claim with both the state and Polk County.

### **2. 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 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.

### **3. 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:**

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.

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

**5. 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 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.

**6. 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 claimant, it does not appear that the establishment of the two home sites for which the claimant may qualify on the property is prohibited by land use regulations described in ORS 195.305(3).

### **7. 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."

### **Findings of Fact and Conclusions**

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.

## **II. COMMENTS ON THE PRELIMINARY EVALUATION**

The department issued its Preliminary Evaluation for this claim on September 29, 2009. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. No written comments were received in response to the 28-day notice.

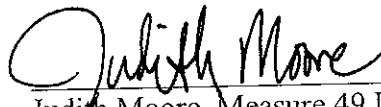
## **III. CONCLUSION**

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.

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:



Judith Moore, Measure 49 Division Manager.  
Dept. of Land Conservation and Development  
Dated this 19<sup>th</sup> day of November 2009.

#### 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 it 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.