



**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: 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

AGENT CONTACT INFORMATION: Donald M. Kelley
Kelley & Kelley
110 N Second Street
Silverton, OR 97381

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 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.

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.

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. 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.

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, 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.

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

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

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 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.

Marion County has confirmed that the claimant is the current owner of tax lots 100, 200, 300 (section 5), 300 (section 32C), 400, 500, 700, 1000 (section 6), 1100, 1200, and 1400 of the property Measure 37 claim property.

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.

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:

All owners of the property have consented to the claim in writing.

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

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:

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 are currently zoned Exclusive Farm Use (EFU) by 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 make 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 2.5 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.

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 one home site 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

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, and 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, 700, 1000 (section 6), 1000 (section 31), 1100, 1200, and 1400 on May 1, 1997. As it is currently, on May 1, 1997, that portion of 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.

II. COMMENTS ON THE PRELIMINARY EVALUATION

The department issued its Preliminary Evaluation for this claim on January 26, 2010. 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.

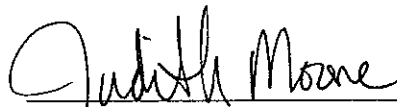
III. CONCLUSION

Based on the analysis above, the claimant 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 analysis above, the claimant does not qualify for Measure 49 home site approvals on tax lot 1000 (section 31) because the claimant no longer owns 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, Division Manager
Dept. of Land Conservation and Development
Dated this 24th day of March 2010.

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.