

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**  
**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**  
**Draft Staff Report and Recommendation**

July 18, 2006

**STATE CLAIM NUMBER:** M122456

**NAMES OF CLAIMANTS:** John M. and Cindy L. Billups

**MAILING ADDRESS:** 10151 SE Sunnyside Rd., Suite 499  
Clackamas, Oregon 97015

**PROPERTY IDENTIFICATION:** Township 1S, Range 2E, Section 22  
Tax lot 5100  
Multnomah County

**OTHER CONTACT INFORMATION:** Mark P. O'Donnell  
1650 NW Naito Pkwy., Suite 302  
Portland, Oregon 97209

**DATE RECEIVED BY DAS:** September 23, 2005

**180-DAY DEADLINE:** August 8, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimants, John and Cindy Billups, seek compensation in the amount of \$990,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 53,000 square-foot property into four parcels and to develop a dwelling on each parcel. The subject property is located on SE 120th Avenue and Lexington Street in the City of Portland, in Multnomah County. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the preliminary findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is not valid because neither the Land Conservation and Development Commission (the Commission) nor the department has enforced laws that restrict the claimants' use of the private real property. (See the complete recommendation in Section VI of this report.)

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<sup>1</sup> This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On October 11, 2005, pursuant to Oregon Administrative Rules (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, one written comment was received in response to the 10-day notice.

The comment is relevant to whether the restriction of the claimants' use of the subject property reduces the fair market value of the property and whether a state agency may waive state law. The comment has been considered by the department in preparing this report. (See the comment letter in the department's claim file.)

### **IV. TIMELINESS OF CLAIM**

#### **Requirement**

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

#### **Findings of Fact**

This claim was submitted to DAS on September 23, 2005, for processing under OAR 125, division 145. The claim identifies ORS 92, 197, 215 and 227 and a list of administrative rules as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

#### **Conclusions**

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

## V. ANALYSIS OF CLAIM

### 1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

### Findings of Fact

The claimants, John and Cindy Billups, acquired the subject property on March 31, 1978, as reflected by a land sale contract included with the claim. The City of Portland’s Planning Department confirms the claimants’ current ownership of the subject property.

### Conclusions

The claimants, John and Cindy Billups, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of March 31, 1978.

### 2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimants’ use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants acquired the property.

### Findings of Fact

The claimant indicates that the claimants desire the right to divide their 53,000 square-foot property into four lots and to develop a dwelling on each parcel and assert that a variety of City of Portland’s code provisions required by state law do not allow the desired development.<sup>2</sup>

The subject property is located within the City of Portland and is zoned for residential development. In general, the zoning of a particular property within a city is determined by the city with land use jurisdiction over the property. In some circumstances, the Commission’s rules or state statutes may apply to a local government decision regarding zoning, but usually within city limits, state laws require or encourage a higher intensity of development rather than restrict the use of real property.

The claim is based generally on the City of Portland’s Environmental Zone (section 430), which, in part, implements Statewide Planning Goal 5 (Natural Resources) and OAR 660, division 23, that require such zoning. The claimants’ property is subject to chapters 33 and 40 of the City of

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<sup>2</sup> The claimants have summarily listed the following state land use regulations as those that restrict the use of the subject property compared to uses permitted in 1978: ORS 92, 215 and 227; ORS 197 in its entirety (except Measure 37); and portions of OAR 660, divisions 4, 6, 8, 9, 11, 12, 15, 16, 18, 23, 31, 33, and 45. The claimants have not established how any of these state laws restrict the use of their property and have the effect of reducing its fair market value.

Portland Zoning Code and PRK-2.01 Urban Forestry Management Plan as required in part by Goal 5 in accordance with OAR 660, division 23. Goal 5 became effective on January 25, 1975, and required the inventory of significant natural resources and their protection through appropriate zoning.

The claimants acquired the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged the City of Portland's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the city's plan and land use regulations when the claimants acquired the subject property on March 31, 1978, the statewide planning goals, and Goal 5 in particular, applied directly to the claimants' property when they acquired it.<sup>3</sup>

As adopted on January 25, 1975, Goal 5 required the inventory of significant natural resources and their protection through appropriate zoning. Goal 5 does not, however, impose specific criteria or limitations on the use of individual parcels of land. The Goal rather requires the city to consider appropriate protection of natural resources considering economic, social and energy consequences of allowing development.

No information has been presented in the claim to establish that the claimants' desired division of the subject property into four parcels is not permitted under any provisions of the City of Portland zoning code that implement and are required by Goal 5. Based on the information in the claim, the department has not identified any state laws that restrict the claimants' use of the subject property.

### **Conclusions**

The claim does not establish any state laws that currently restrict the use of the claimants' property. Neither the Commission nor the department enforces laws that require specific zoning for natural resource protection of the subject property or otherwise restrict the claimants' desired division of the property into four parcels for urban residential development. The claimants have not demonstrated that the proposed development is prohibited by state land use regulations.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

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<sup>3</sup> The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's comprehensive plan and implementing regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev. den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer applied directly to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

As explained in Section V.(2) of this report, the claimants, John and Cindy Billups, have not established that any state laws restrict the use of the subject property. Accordingly, the department cannot determine that any laws enforced by the Commission or the department have had the effect of reducing the fair market value of the subject property.

#### **4. Exemptions Under ORS 197.352(3)**

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352. As explained in Section V.(2) of this report, the claimants, John and Cindy Billups, have not established that any state laws restrict the use of the subject property. Accordingly, the department cannot determine that any exemptions under ORS 197.352(3) apply to this claim.

### **VI. FORM OF RELIEF**

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

#### **Findings of Fact**

Based on the record for this claim, the claimants have not established that any state laws enforced by the Commission or the department restrict the use of the subject property, and have the effect of reducing the fair market value of the subject property. Neither the Commission nor the department enforces laws that require specific zoning of the subject property.

#### **Conclusions**

Based on the record before the department, the claimants, John and Cindy Billups, have not established that they are entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department. Therefore, the department recommends that this claim be denied.

### **VII. NOTICE OF OPPORTUNITY TO COMMENT**

This staff report is not a final decision by the department and does not authorize any use of the property that is the subject of this report. OAR 125-145-0100 provides an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Such response must be filed no more than 10 calendar days after the date this report is mailed to the claimants and any third parties. Responses to this draft staff report and recommendation will be considered only as comments related to the claim described in this report. All responses must be delivered to the Oregon

Department of Administrative Services (DAS), Measure 37 Unit, Risk Management–State Services Division, 1225 Ferry Street SE, U160, Salem, Oregon 97301-4292 and will be deemed timely filed if either postmarked on the tenth day, or actually delivered to DAS by the close of business on the tenth day. Note: Please reference the claim number, claimant name and clearly mark your comments as “Draft Staff Report comments.” Comments must be submitted in writing only. Those comments submitted electronically or by facsimile will not be accepted.