

**BALLOT MEASURE 37 (CHAPTER 1, OREGON LAWS 2005)  
CLAIM FOR COMPENSATION**

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT  
Final Staff Report and Recommendation**

August 19, 2005

**STATE CLAIM NUMBER:** M119956

**NAME OF CLAIMANTS:** Donald and Frances Brostrom

**MAILING ADDRESS:** 694 Hayter Street SW  
Dallas, Oregon 97338

**PROPERTY IDENTIFICATION:** Township 9S, Range 6W, Section 24  
Tax Lot 300  
Polk County

**OTHER PARTIES:  
(CLAIMANTS' REPRESENTATIVE)** Wallace W. Lien, P.C.  
1775 32<sup>nd</sup> Place NE, Suite A  
Salem, Oregon 97303-1674

**DATE RECEIVED BY DAS:** February 25, 2005

**180-DAY DEADLINE:** August 24, 2005

**I. CLAIM**

Donald and Frances Brostrom, the claimants, seek compensation in the amount of \$114,424 for the reduction in fair market value as a result of certain 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 property into three approximately 2.5-acre parcels with single-family dwellings on each parcel.<sup>1</sup> The subject property is 7.68-acres in Polk County. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department

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<sup>1</sup> The specifics of the claim are not clearly set forth in the State Measure 37 application form but in materials submitted that support the claimants' application. These materials also include a Measure 37 application submitted with Polk County.

not apply to allow the Brostroms to divide their property for residential development: the applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215.263, ORS 215.284, ORS 215.780 and OAR 660, division 33. These laws will not apply to the claimants' use of subject property to the extent necessary to allow Donald and Frances Brostrom a use of the property permitted at the time they acquired the property on May 17, 1960. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On March 3, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments, evidence or information were received in response to the 10-day notice.

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

#### **Requirement**

Ballot Measure 37, Section 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 the measure (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 the measure (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 February 25, 2005 for processing under OAR 125, division 145. The claim cites the Statewide Planning Goals, ORS 217, ORS 197, and OAR 660, division 33, as the basis for this claim (see claim). Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis of this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

#### **Conclusions**

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

## V. ANALYSIS OF CLAIM

### **1. Ownership**

Ballot Measure 37 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in the Measure. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

### **Findings of Fact**

The claimants, Donald and Frances Brostrom, acquired the subject property on May 17, 1960. A copy of the deed (book 174 page 182) was submitted as part of the claim. A call to the Polk County Assessors’ Office on May 27, 2005 confirmed that the Brostroms still are the owners of the subject property. (See the department’s claim file.)

### **Conclusions**

The claimants, Donald and Frances Brostrom, are “owners” of the subject property as that term is defined under Section 11(C) of Ballot Measure 37. For purposes of this Measure 37 claim, the claimants have maintained an ownership interest in the subject property since May 17, 1960.

### **2. The Laws that are the Basis for the Claim**

In order to establish a valid claim, Section 1 of Ballot Measure 37 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 or a family member acquired the property.

### **Findings of Fact**

The claim states that the following goals, rule and statutes restrict development and use of EFU-zoned property: “Statewide Planning Goals; OAR 660; ORS 197 and ORS 215.”

The claim is based, in part, on Polk County’s current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimants’ property is zoned EFU as required by Goal 3 in accord with OAR 660, division 33 and ORS 215 because the claimants’ property is “Agricultural Land” as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current state land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660, division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80-acres and establish standards for allowing the existing or any proposed parcel(s) to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (chapter 792, Oregon Laws 1993). ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and implements the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f).

OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. Subsequent amendments to comply with HB 3326, (chapter 704, Oregon Laws 2001, and effective January 1, 2002) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135)

The claim also asserts that ORS 197 regulates the use of the claimants' property resulting in the reduction in its fair market value. This statute generally does not restrict the use of property. Without more information from the claimants as to how a specific statute restricts the claimants' use of the property, the department is not able to identify a particular statute in ORS 197 that restricts the claimants' use of the property.

The claimants, Donald and Frances Brostrom, acquired their interest in the subject property on May 17, 1960 prior to the establishment of the Statewide Planning Goals or ORS 215 or the Commissions' rules.

### **Conclusion**

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3, and ORS 215, including ORS 215.780, and OAR 660-033-0090, were all adopted after the claimants acquired the subject property, and do not allow division of the subject property into three approximately two-acre parcels with dwellings on each parcel. The land use laws identified above were adopted since 1960, and restrict the use of the property relative to the uses allowed when the property was acquired on May 17, 1960.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the use(s) that the claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When a claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

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

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any law(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.”

#### **Findings of Fact**

The claim includes a comparative market analysis, conducted by a real estate broker for Windermere Western View Properties, of bare land properties generally sold in the first two months of 2005 in Polk County between 1 and 4-acres. These comparative properties sold for between \$45,000 and \$85,000 total, or from \$18,750 to \$55,147 per-acre. There is no certified appraisal to substantiate the claimed values either before or with state land use regulations.

#### **Conclusions**

Based on the record currently before the department, there is some evidence that state land use regulations have been enforced in a manner that reduces the fair market value of the property. The claim states that the reduction in value is \$114,424. However, without an appraisal based on the value of the proposed division into 2.5-acre parcel, or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enacted or enforced by the Commission or the department.

### **4. Exemptions Under Section 3 of Measure 37**

Ballot Measure 37 does not apply to certain laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

#### **Findings of Fact**

The claim includes a general list of goals, statutes and rules and states that “restrict development and use of EFU-zoned property” (See claim). The laws related to Statewide Planning Goal 3 (Agricultural Lands), OAR 660 and ORS chapters 215 and 197 were adopted after the claimants acquired the property in 1960, and do restrict the use of the property in a manner that likely reduces its fair market value. None of these specific laws appear to be exempt under subsection 3(E) of Ballot Measure 37.

#### **Conclusions**

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that the general statutory, goal and rule restrictions on residential development and use of agricultural land apply to the claimants’ use of the property, and for the most part these laws do not appear to be exempt

under section 3(E) of Measure 37. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure or because they are laws that are not covered by the Measure.

Laws in effect when the claimants acquired the property in 1960 are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the property that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When a claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the use(s) that the claimants have identified. Similarly, this report only addresses the exemptions provided for under section (3) of Measure 37 that are clearly applicable given the information provided to the department in the claim. Claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the property.

## **VI. FORM OF RELIEF**

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts 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 a law 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, that the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

### **Findings of Fact**

Based on the findings and conclusion set forth in this report, laws enforced by the Commission or the department restrict the partitioning of the subject property into three approximately 2.5-acre parcels and the establishment of a single-family dwelling on each parcel. The laws enforced by the Commission or department likely reduce the fair market value of the 7.68-acre property to some extent. The claim asserts that these restrictions reduce the fair market value of the property by \$114,424. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, no certified appraisal to substantiate the reduction in value, the specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based more likely than not have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Ballot Measure 37 authorizes the department to modify, remove or not apply all

or parts of certain land use regulations to allow claimants Donald and Frances Brostrom to use the subject property for a use permitted at the time they acquired the property on May 17, 1960.

### **Conclusion**

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to the Brostroms' division of their property into three approximately 2.5 acre parcels and to the establishment of a single family dwelling on each parcel created: applicable provisions of Statewide Planning Goals 3, ORS 215.263, ORS 215.780 and ORS 215.284, and OAR 660, division 33. These land use regulations will not apply to the Brostroms' use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on May 17, 1960.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property subject to the standards in effect on May 17, 1960.
3. To the extent that any law, order, deed, agreement or other legally-enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.
4. Any use of the property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under section (3) of the Measure.
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the property, it may be necessary for them to obtain a decision under Measure 37 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under Measure 37 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimants.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on July 22, 2005. OAR 125-145-0100(3), provided 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. Comments received have been taken into account by the department in the issuance of this final report.