

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

August 2, 2005

**STATE CLAIM NUMBER:** M119707

**NAME OF CLAIMANTS:** Arlene Foster  
Jean Komlofske

**MAILING ADDRESS:** Arlene Foster  
24319 Walden Lane  
Philomath, Oregon, 97370

Jean Komlofske  
830 Eric Loop  
Grants Pass, Oregon 97526

**IDENTIFICATION OF PROPERTY:** Township 12, Range 6W, Section 22,  
Tax Lot 400  
Benton County

**OTHER INTEREST IN PROPERTY:** James Foster

**DATE RECEIVED BY DAS:** February 10, 2005

**180-DAY DEADLINE:** August 9, 2005

**I. CLAIM**

Arlene Foster and Jean Komlofske, the claimants, seek compensation in the amount of \$94,397 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. Ms. Foster, and Ms. Komlofske desire compensation or the right to divide their 24.38-acre property into three lots. The property is located at 24319 Walden Lane, Philomath, in Benton 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 in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not

apply: Statewide Planning Goal 4 (Forest Lands), ORS 215.705, 215.755, and 215.780, and applicable provisions of OAR 660, division 6, enacted after the claimants acquired the property. These laws will not apply to the claimants only to the extent necessary to allow the claimants a use of the property permitted when they acquired it on May 19, 2000. The department acknowledges that the relief recommended in the report will not allow the claimants to use the property in a manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

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

On February 28, 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, one written comment, evidence, or information was received in response to the 10-day notice. The comment received is not specific to the criteria required under Measure 37 for the department's review of this claim. Because no funds have been made available for payment of compensation, comments regarding the possible impact of the proposed or intended development of the claimant's property are not relevant to the evaluation and determination of the claimant's Ballot Measure 37 claim. (See comment letters in the departments' claim files.)

### **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 criterion 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 criterion, whichever is later.

#### **Findings of Fact**

This claim was submitted to DAS on February 10, 2005 for processing under OAR 125, division 145. The claim identifies state and local zoning, including county Rural Residential and Forest Conservation zoning, as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

## **Conclusions**

The claim was submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulations enacted 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 to “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, Arlene Foster and Jean Komlofske, acquired the subject property as tenants in common, from the estate of Ms. Foster’s husband and Ms. Komlofske’s father, Durward Foster, on May 19, 2000.<sup>1</sup> Claimants assert, and Benton County planning staff confirms, that Durward Foster acquired the property on June 1968. (See claim file.)

### **Conclusions**

The claimants, Arlene Foster and Jean Komlofske, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. The claim establishes family ownership, for purposes of Ballot Measure 37, as of June, 1968.

### **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 claimants state that they cannot divide their 24.38-acre property into three, approximately 8-acre parcels, because of zoning designations placed on the property in 1974, 1979, and on an unspecified date that resulted in the subject property’s current FC-80 zoning.

Benton County’s FC-80 (Forest Conservation Zone) standards are based on the standards contained in Statewide Planning Goal 4 (Forest Lands) and OAR 660, division 6.

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<sup>1</sup> James Foster, Jean Komlofske’s brother and Arlene Foster’s stepson, is also an owner of the property. Based on the information included with the claim, James Foster is not a claimant for purposes of this Measure 37 claim.

Statewide Planning Goal 4, (Forest Lands) (OAR 660-015-0000(4)) and laws applicable to land zoned for forest use under ORS 215, including ORS 215.705 to 215.755, and 215.780, and applicable provisions of OAR 660, division 6, restrict the claimant's right to divide the property. Goal 4 became effective on January 25, 1975, and required Forest Land as defined by the goal to be zoned for forest use. (See citations to statutory and rule history under OAR 660-015-0000(4).) The Forest Land administrative rule (OAR 660, division 6) became effective September 1, 1982 and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (chapter 792, Or Laws 1993), and were adopted into OAR 660-006-0026 and 0027 on March 1, 1994. (See citations to rule history under OAR 660-015-0000(4).)

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 0027 establish an 80-acre minimum lot size for the creation of a new parcel in a forest zone and also establish the standards for dwellings in forest zones under Statewide Planning Goal 4.

### **Conclusions**

The minimum lot size and dwelling standards established by Statewide Planning Goal 4 and OAR 660-006-0026 and 0027, and by provisions of ORS 215, were all adopted after the claimants' family acquired the property in 1968, and do not allow the division of the property into parcels less than 80-acres in size. Land use laws adopted since 1968, restrict the use of the property relative to the uses allowed when the property was acquired in 1968.

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

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any laws 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 claimants estimate a reduction in real market value of \$94,397.<sup>2</sup> According to Benton County Tax Assessor Records, the 2004 real market value of the subject property was \$263,004. (See claim.)

The claim includes a realtor's assessment that estimates the value of the subject property in a divided and undivided state. A list price for the entire property was suggested at \$450,000. The suggested price for an 8-acre parcel that includes Ms Foster's current dwelling a (mobile home) is \$184,000.

### **Conclusions**

As explained in section V. (1) of this report, claimants Arlene Foster and Jean Komlofske are current owners who acquired the property on May 19, 2000 from the estate of Durward Foster. Mr. Foster's ownership dates to June 1968. Thus, under Ballot Measure 37, the claimants are

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<sup>2</sup> In their Measure 37 Benton County claim form lists a reduction of \$184,000 "and damages."

due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value.

The claim provides some evidence to demonstrate the reduction in fair market value of the property due to restrictions relating to State and County regulations. Without an appraisal or other substantiating documentation based on the value of property when divided, 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 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 Measure 37, certain types of laws are exempt from the Measure.

#### **Findings of Fact**

The claim references local zoning that restricts the use of the property relative to what would have been allowed in 1968, when Durward Foster acquired the property. These provisions are required by Statewide Planning Goal 4 (Forest Lands), and applicable provisions of ORS 215 and OAR 660, division 6, all of which were adopted after 1968.

The department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding Forest Lands. Section 3 (B) of Measure 37 specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes...” Therefore, siting standards for dwellings in forest zones in ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under subsection (3)(B) of Measure 37.

#### **Conclusions**

The versions of ORS 215, Goal 4 and OAR 660, division 6, relating to Forest Lands and applicable to the subject property, were enacted after June 1968, and generally not appear to be exempt under section 3 of Measure 37. However, the siting requirements of ORS 215.730, Goal 4 and its implementing rules related to dwelling siting standards based on health and safety, are exempt under Section 3(B) and will continue to apply. 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.

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

Section 1 of Measure 37 requires payment of compensation to an owner of private real property if the Commission or the department has enacted or 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, 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 division of the subject property into three, approximately 8 acre parcels. The laws or enforced by the Commission or the department reduce the fair market value of the property to some extent. The claim asserts this amount to be \$94,397. However, because the claim does not provide a detailed explanation for how the specified restrictions reduce the fair market value of the property, a 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 likely 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 one or more land use regulations to allow the present owners, Arlene Foster and Jean Komlofske to use the subject property for a use allowed when they acquired the property on May 19, 2000.

### **Conclusions**

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 claimants division of their property: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215.705, 215.755, and 215.780, and OAR 660, division 6, enacted after July 24, 2000. These land use laws will not apply to the claimants' use of their property only to the extent necessary to allow the claimants to a use permitted at the time they acquired the property on May 19, 2000. The department acknowledges that the relief recommended in this report will not allow the claimants to use the property in the manner set forth in their claim.
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 19, 2000. On that date, the property was subject to Statewide Goal 4 (Forest Lands), and applicable provisions of OAR 660, division 4, and ORS 215.
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 215.412 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 11, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's 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.