

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

August 3, 2005

**STATE CLAIM NUMBER:** M119722

**NAME OF CLAIMANT:** Lucille Aspinwall

**MAILING ADDRESS:** 4146 Waconda Road NE  
Salem, Oregon 97303

**PROPERTY IDENTIFICATION:** Township 6S, Range2W, Section. 8,  
Tax Lot 900  
Marion County

**OTHER CONTACT INFORMATION:** Daniel B. Atchison  
Wallace W. Lien, P.C.  
1775 32<sup>nd</sup> Place NE, Suite A  
Salem, Oregon 97303

**DATE RECEIVED BY DAS:** February 11, 2005

**180-DAY DEADLINE:** August 10, 2005

**I. CLAIM**

The claimant, Lucille Aspinwall, seeks \$259,362 in compensation as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimant desires the right to replace a dilapidated dwelling with a new residential structure. The property includes 11.56 acres in Marion County adjacent to Waconda Road (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 not valid because neither the Land Conservation and Development Commission (the Commission) nor the department have enforced laws that restrict the claimant's use of private real property. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On February 24, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. No comments were received in response to the notice issued by DAS. However, in response to notice by Marion County of a claim filed by the claimant before the County, an individual party provided a copy of comments to the department prior to the DAS notice (see comment letter in department's claim file).

### **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 11, 2005 for processing under OAR 125, division 145. The claim identifies ORS 215 and OAR 660 as land use laws that restrict the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Ballot 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 has been submitted within two years of December 2, 2004, the effective date of Ballot Measure 37, based on land use regulations enacted prior to December 2, 2004, and has been therefore filed in a timely manner.

## 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 claimant, Lucille Aspinwall, states that her ownership of the subject property begins on June 30, 1960. The claimant has provided various deeds and other documents that relate to the chain of title for the subject property since June 30, 1960.

The substantiating documents provided by the claimant establish that Lucille Aspinwall’s late husband, Clarence Aspinwall, acquired an approximately 23-acre parcel, of which the 11.56 acre subject property is a part, on June 30, 1960. The claimant was not included in the quit claim deed through which her husband acquired the property, (See quit claim deed, recorded on July 11, 1960 with Marion County (Volume 535, page 578), in department claim file.)<sup>1</sup>

Clarence Aspinwall died in 1994. On July 6, 1995, as personal representative of his estate, Lucille Aspinwall granted ownership of the subject claim property to herself, through a distribution of the estate assets.. (Marion County, Reel 1247, Page 81.)

The claim asserts that the claimant was an owner of the subject property, along with her husband, Clarence Aspinwall, since the date her husband acquired the property in 1960. The applicant’s attorney cites a Marion County Circuit Court’s 1970 foreclosure decree, which references

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<sup>1</sup> A portion of the original 23.06-acre parcel (tax lot 1000) was subject to a series of transfers beginning in 1970. Based on a 1970 decree resulting from a foreclosure suit before the Marion County Circuit Court, Clarence Aspinwall apparently agreed to sell a portion of the 23 acre parcel on December 1, 1967. Lucille and Clarence Aspinwall became plaintiffs in a foreclosure suit where the Court ordered return of the property to the Aspinwall’s on December 18, 1970. In its decree, the Court stated, in part, that “the plaintiffs are hereby declared to be the owners of the real property hereinafter described free from all claims of the defendants or any of them.” (Marion County Circuit Court, No. 71536, page 2-Decree).

On June 9, 1982, Clarence and Lucille Aspinwall, husband and wife, executed a sale of property for tax lot 1000 per a contract of sale recorded at Marion County on July 28, 1982. (Reel 287, page 45). This property was not partitioned by the Aspinwalls prior to the sale, as then required by state and local laws. (Marion County Board of Commissioners, Case No. ADM 97-109, Clerk’s File No. 4720).

On December 23, 1983, the purchasers of tax lot 1000 sold that parcel back to Clarence and Lucille Aspinwall, husband and wife, per a bargain and sale deed recorded at Marion County on February 16, 1984. (Reel 335, page 910).

On November 15, 1984, Clarence and Lucille Aspinwall, husband and wife, again sold tax lot 1000 to another buyer, per memorandum of contract sale recorded at Marion County on November 21, 1984. (Reel 363, page 480). Once again, this property was not partitioned by the Aspinwalls prior to the sale, as required by state and local laws in place at that time (Board of Commissioners, *ibid.*).

Lucille and Clarence Aspinwall as co-owners of the subject property (See letter to Marion County Planning Division from attorney Daniel Atchison dated April 19, 2005, file). The applicant also asserts that the applicant became a co-owner of the subject property under state laws affecting marital assets when Clarence Aspinwall purchased the property in 1960. The applicant cites authority in ORS 107.105(1)(f) as enabling “property acquired during a marriage, even if acquired by only one spouse, is presumed to be marital property” (see Letter to Marion County Planning Division from Daniel Atchison dated April 15, 2005, file). However, ORS 107.105(1)(f) does not establish that the claimant acquired a legal interest in the property, ORS 107.105(1) deals with provisions of judgment a court shall consider when it renders a judgment of marital annulment, dissolution or separation. The statute does not provide for joint property ownership to a currently married couple, which the Aspinwall’s were until the death of Clarence Aspinwall in 1994.

### **Conclusions**

The property subject to this claim was conveyed to Clarence Aspinwall in 1960. In 1994, upon the death of Clarence Aspinwall, Lucille Aspinwall acquired the property upon Clarence Aspinwall’s death.

In the claim documents, the name of Lucille Aspinwall appears in recorded instruments and court records between 1970 and 1984 in relation to the subject property. However, none of these documents establishes that the subject property was conveyed to the claimant prior to her husband’s death in 1994.

The claimant, Lucille Aspinwall, is an “owner,” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of 1994.<sup>2</sup> Clarence Aspinwall is a “family member” as defined in Measure 37, Section 11(A).

### **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 claimant’s 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 claimant or a family member acquired the property.

### **Findings of Fact**

The claimant desires the right to replace a dilapidated dwelling with a new residential structure on 11.56 acres, which is designated Agriculture on the comprehensive plan map and zoned Exclusive Farm Use (EFU) in Marion County. In 1998, Marion County denied the claimant’s request to replace the dilapidated dwelling because the property had not been partitioned when an 11.5 acre portion of the larger 23.06-acre parcel was sold in 1982, and again in 1984 (see Section V.1, above). The Marion County denial was based on the Rural Zoning Ordinance

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<sup>2</sup> There is nothing in the department’s records to establish the date of Mr. Aspinwall’s death.

requirement that a dwelling unit cannot be replaced on a lot that has been illegally partitioned, as required by Marion County's Subdivision and Partition Ordinance.<sup>3</sup>

The claim has identified ORS 215 and OAR 660, as state land use provisions that restrict the use of the property as the basis for the claim.

Goal 3, Agricultural Lands, became effective on January 25, 1975, and required that agricultural land as defined by the goal to be zoned for agricultural use (see citations to statutory and rule history under OAR 660-033-0010). Marion County amended the zoning for the subject property to EFU on March 3, 1975.

ORS 215.283 (1)(t) became effective on November 4, 1993 (it was subsequently renumbered (1)(s)). This statute makes the following uses permitted in an EFU zone:

Alteration, restoration or replacement of a lawfully established dwelling that:

- (A) Has intact exterior walls and roof structure;
- (B) Has indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;
- (C) Has interior wiring for interior lights;
- (D) Has a heating system; and
- (E) In the case of replacement, is removed, demolished or converted to an allowable nonresidential use within three months of the completion of the replacement dwelling.

ORS 215.283 (1)(s) has subsequently been amended but not in a manner affecting this case. OAR 660-033-0120 also lists a replacement dwelling as a use authorized in an EFU zone.

According to the Marion County hearings officer report on Case No. ADM 97-109 (April 21, 1998), the existing dwelling on the property satisfied the standards in (A) through (D) and would have qualified for a replacement had the subject parcel been lawful. This is the only evidence presented regarding the condition of the existing dwelling.

There is no state statute or rule mandating the dwelling replacement allowed in ORS 215.283(1) occur on a lawful parcel.

### **Conclusion**

Current state goals, rules, and statutes permit the proposed replacement dwelling. Thus, land use laws adopted since 1960 when the Aspinwall family acquired an interest in the property, do not restrict the use of the property from what could have been done when the property was acquired by the family in 1960.

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<sup>4</sup> Marion County Board of Commissioners, Case No. ADM 97-109, Clerk's File No. 4720, Order dated May 14, 1998 (see the department's claim file).

### **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 claimant desires the right to replace a dilapidated dwelling with a new residential structure on the subject 11.56 acre property.

The claimant seeks \$259,362 in compensation as a result of state and local land use regulations that are alleged to restrict the use of certain private real property.

No state regulatory provision prohibits the intended use of the property.

#### **Conclusion**

As discussed in Section V.(2), laws enforced by the Commission or the department do not restrict the use of the subject property for the use desired by the claimant. Based on the information submitted, the department determines that there is no reduction in the fair market value of the subject property as a result of land use regulations 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**

Not applicable. See section V. (2) above.

## **VI. FORM OF RELIEF**

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if 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 not to 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 record, the claimant is not entitled to relief under Ballot Measure 37. Department staff recommends that this claim be denied because neither the Commission nor the department have enforced laws that were enacted after the claimant's family acquired the property that restrict the claimant's use of the private real property that is the subject of this claim.

### **Conclusion**

Based on the record, the department recommends that this claim be denied.

## **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.