

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

August 3, 2005

**STATE CLAIM NUMBER:** M119727

**NAME OF CLAIMANTS:** Lowell Patton

**MAILING ADDRESS:** Post Office Box 83  
Carver, Oregon 97105

**IDENTIFICATION OF PROPERTY:** Township 8N, Range 8W, Section 19  
Tax Lot 2500  
Clatsop County

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

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

**I. CLAIM**

The claimant, Lowell Patton, seeks compensation in the amount of \$2,500,000 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 claimant desires compensation or the right to divide and develop the subject property into 55 one-acre lots. The subject property is located in Clatsop, Oregon. (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, that the following requirements of state laws enforced by the Land Conservation and Development Commission (the Commission) of the department not apply to the claimant to allow him to divide the property and establish a dwelling on each lot or parcel created: (a) for the portion of the property zoned RA-1, the state will not apply OAR 660-004-0040; (b) for the remainder of the property currently zoned AF-20, the state will not apply those provisions of Goal 4 and OAR 660-006-0055, OAR 660-006-0026 and 0027, and ORS 215.705 to 215.755 and 215.780, that were enacted after January 25, 1989. These laws will not apply only to the extent they are not exempt under subsections 3(A) to 3(D) of Ballot Measure 37, and only to the extent necessary to permit the claimant a use of the property permitted at the time he became the owner of the property, on January 25, 1989. The department acknowledges that the relief provided by this action will not allow the claimant to use the

property in the manner that he appears to desire based on the claim. (See the complete recommendation in Section VI. of the report.)

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

#### **Comments Received**

On March, 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, there were five (5) written comments, evidence or information received by DAS in response to the 10-day notice. The comments were not specific to the criteria required under Measure 37 to be used in 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 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 Goal 4 and OAR 660-16-0055 and OAR 660-14-0040, Goal 5 and OAR 660, division 16, and OAR 660, division 23, all other applicable Statewide Planning Goals affecting the subject property and applicable elements of the Clatsop County zoning code 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 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 claim documents provided by the applicant include a Pacific Title Company Lot Book Search Report and Deed that substantiates that the present owner of the subject property is Mr. Lowell Patton.<sup>1</sup> The claimant acquired the property from John B. Franzwa, Inc., by Bargain and Sale Deed dated January 25, 1989. This transaction established the date the claimant, Lowell Patton, became the present owner of the property.

### **Conclusions**

Mr. Patton acquired the property on January 25, 1989 and is an “owner” as that term is defined by section 11 (C) of Measure 37.

### **2. The Laws that are the Basis for this 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 claim states that, “at the time of his purchase (1969) the property could have been divided into 55 one-acre lots. Instead 50.3 of its acres were rezoned to AF-20 allowing, at most, one residence. The remaining 5-acres were zoned RA-1 (one-acre parcels).” The claim is based on Mr. Patton’s desire to subdivide the entire property into one-acre lots.

The claim lists the following state land use regulations as restricting the use of the property: OAR 660-14-0040 (Establishment of New Urban Development on Undeveloped Rural Lands)<sup>2</sup>; Goal 5 (Natural Resources, Scenic and Historic Areas and Open Spaces) and the applicable

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<sup>1</sup> A company owned by Mr. Patton first acquired an interest in the property on July 30, 1969. That company filed for bankruptcy in 1988 under Chapter 7. The bankruptcy petition, when filed, transferred the assets of the company (including the subject property) to the bankruptcy estate. The present owner of the property, Lowell Patton, acquired the property via a Bargain and Sale deed from the bankruptcy trustee on January 25, 1989.

<sup>2</sup> The reference in the claim to OAR 660-014-0040 appears to be a typographical error. The Commission rule concerning the level of permissible residential development of rural residential lands is OAR 660-004-0040. The remainder of this report addresses that rule.

Goal 5 implementing regulations (OAR 660-16-0000 to 0020 and 660-23-0000 to 0250); and Goal 4 (Forest Lands) and its applicable implementing regulations in OAR 660-06-0055. Each of these state land use regulations is addressed below.

OAR 660-004-0040, (Application of Goal 14 (Urbanization) to Rural Residential Areas), specifies how Goal 14 applies to rural lands in acknowledged exception areas planned for residential uses. As a result of a 1986 Supreme Court decision, the Commission amended Goal 14 (Urbanization) and adopted OAR 660-004-0040 to clarify what level of residential density is permissible under Goal 14 on rural residential lands. The new land use regulation became effective on October 4, 2000. OAR 660-004-0040(5)(b)) specifies that until a local government amends its land use regulations, the minimum lot size requirement in a rural residential zone is two acres. Clatsop County has not amended its land use regulations to comply with OAR 660-004-0040, and as a result 0040(5)(b) applies to that portion of the claimant's property that is zoned for residential use (the RA-1 portion) and may restrict the use of this five-acre portion of the property by requiring a minimum lot size of two acres. It should be noted, however, that prior to the adoption of OAR 660-004-0040, the Oregon courts interpreted Statewide Planning Goal 14 to prevent rural residential densities at a level of one dwelling per acre under certain factual circumstances. As a general matter, the Commission adopted OAR 660-004-0040 to clarify the application of Goal 14, rather than to restrict residential use of rural exception lands. While it is not certain that the rule restricts the use of the 5-acre portion of claimant's property relative to what was allowed when the claimant became the present owner, the department concludes that it is more likely than not that the rule does so.

(Goal 5 Natural Resources, Scenic and Historic Areas and Open Spaces), and the applicable implementing OAR 660-16-0000 to 0020, 660-23-0000 to 0250, apply to significant resource sites that have been inventoried by Clatsop County. The Clatsop County Goal 5 inventory does not currently identify any significant resources located on the subject property. As a result, Goal 5 and its implementing rules do not apply to the claimant's use of this property.

Statewide Planning Goal 4 (Forest Lands) and OAR 660, division 6, in conjunction with the statutes applicable to land zoned for forest use under ORS 215 (specifically, ORS 215.705 to 215.755 and 215.780), control the division and development of forest lands for residential uses. Approximately 48 acres of the property is zoned AF-20 by Clatsop County. The AF-20 zone is a forest zone. ORS 215.705 to 215.755 and 215.780, and Goal 4 and its implementing rules apply to this portion of claimant's 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 Goal 4 administrative rule (OAR 660, division 6) became effective September 1, 1982. The Commission acknowledged the Clatsop County Comprehensive Plan and Zoning Ordinance on January 31, 1985. At the time the claimant acquired the property in 1989, the Clatsop County AF-20 zone allowed a residence, with a minimum lot size of 20 acres, as a conditional use. The corresponding state law governing dwellings on forest lands at that time was Goal 4 itself. The courts construed Goal 4 as allowing dwellings that were necessary for and accessory to a forest use, and non-forest dwellings only where the property was shown to be generally unsuitable for forest use. Under Goal 4 (as it existed in 1989), it is unlikely that the claimant could have established more than a couple of dwellings on the subject property.

The current Clatsop County Agriculture Forest Zone partition and dwelling approval standards, which contain an 80-acre minimum, are based on the requirements contained in OAR 660-006-0055 which first became effective on February 5, 1990, and have since been amended. The state rules, and corresponding provisions of 215.705 to 215.755 and 215.780, require a minimum lot size of 80 acres for a dwelling. As a result, these state land use regulations restrict the claimant's use of the property relative to the uses permitted at the time the claimant became the owner of the property in 1989.

### **Conclusions**

Goal 5 (Natural Resources, Scenic and Historic Areas and Open Spaces), and the applicable implementing rules at OAR 660-16-0000 to 0020, 660-23-0000 to 0250, apply to specific significant resource sites that have been inventoried by Clatsop County. The Clatsop County Goal 5 inventory does not currently identify any significant resources as being located on the subject property. Goal 5 and the implementing administrative rules listed above do not apply to the subject property and thus, do not restrict the use of the subject property.

OAR 660-004-0040 applies to the portion of subject property zoned RA-1. This requirement has been applied by Clatsop County beginning as of October 4, 2000, and effectively reduces the density permitted on the portion of the subject property zoned RA-1, from one-acre-lot minimum lot size to 2-acres. Goal 4 and its implementing rules, and ORS 215, 705 to 215.755 and 215.780, apply to the portion of the subject property zoned AF-20. These laws restrict the claimant's use of the subject property by requiring a minimum lot size of 80 acres. The current land use regulations restrict the use of the properties from what could have been done when Mr. Patton acquired the property in 1989.

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

In order to establish a valid claim, Section (1) of Ballot Measure 37 requires that any land use regulation 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**

According to the claimant, changes in land use regulations after 1969 resulted in a reduction in the number of lots that could be created from the property from 50 one-acre lots to a single residential parcel. The claim calculates a loss in value as \$2,500,000, the market value of the 50 one-acre lots at \$50,000 each. The claimant asserts that the value given for the one-acre lot size is the current fair market value for similar lots in that area.

The claim is based on an erroneous date for when the claimant became the present owner of the property. Nevertheless, in 1989, when the claimant became the present owner, it may have been possible to create two parcels from the portion of the property zoned AF-20, and several more for the portion zoned RA-1. It appears that a smaller number of parcels would be allowed today. As a result, the department believes it is more likely than not that the fair market value of the

property has been reduced as a result of state land use regulations administered by the department.

## **Conclusions**

As explained in section V.(1) of this report, Lowell Patton is the current owner of the subject property as of January, 1989. Thus, under Ballot Measure 37, Mr. Patton is due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in section V.(2) of this report, laws adopted since the property was acquired in 1989, restrict the division of the subject property and the establishment of dwellings. The claim asserts the reduction in value due to the restrictions to be \$2,500,000. However, without an appraisal 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 enforced by the Commission or the department.

## **4. Exemptions under Section (3) of Measure 37**

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

## **Findings of Fact**

Of the state land use regulations that the department has found may restrict the use of the claimant's property (in Section V.(2)), several were enacted before the claimant became the present owner of the property in 1989. Those state land use regulations enacted before January 25, 1989, are exempt under section 3(E) of Ballot Measure 37. These include: Statewide Planning Goal 14, Statewide Planning Goal 5 (and the implementing rules in division 6), and Statewide Planning Goal 4.

Other exemptions, under subsections 3(A)-3(D) of Measure 37 also may apply, depending on the specific characteristics of the use(s) the claimant carries out. Until the department knows the characteristics of the claimant's use of the property, it is not able to make a final determination concerning all the laws that may apply, or concerning which of these laws may be exempt under section 3 of Measure 37.

Finally, while not directly raised by the claimant, the department notes that ORS 215.731 and OAR 660, division 6, include standards for siting dwellings in forest zones. This provision includes 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..." The department finds that 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) for Measure 37.

## **Conclusions**

Those state land use regulations enacted before January 25, 1989 are exempt under section 3(E) of Ballot Measure 37. These include: Statewide Planning Goal 14, Statewide Planning Goal 5 (and the implementing rules in division 16), and Statewide Planning Goal 4. The siting standards for forest dwellings in ORS 215.730, Goal 4, and the Goal 4 implementing rules are also exempt under section 3(B) of Ballot Measure 37 (public health and safety). Other laws and other exemptions, under subsections 3(A)-3(D) of Measure 37 also may apply, depending on the specific characteristics of the use(s) the claimant carries out.

## **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 department 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 the 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 before the department, laws enforced by the Commission or the department, restrict the division of subject property into parcels or lots, and use of the property for residential purposes. The laws enforced by the Commission or department reduce the fair market value of the subject property to some extent. No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Lowell Patton to use the subject property for a use permitted at the time he acquired the property on January 25, 1989.

## **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 claimant to allow him to divide the property and establish a dwelling on each lot or parcel created: (a) for the portion of the property zoned RA-1, the state will not apply OAR 660-004-0040; (b) for the remainder of the property currently zoned AF-20, the state will not apply those provisions of Goal 4 and OAR 660-006-0055, OAR 660-006-0026 and 0027, and ORS 215.705 to 215.755 and 215.780, that were enacted after January 25, 1989. These laws will not apply to the claimant's use of the property only to the extent they are not exempt under subsections 3(A) to 3(D) of Ballot Measure 37, and only to the extent necessary to permit the claimant a use of the property permitted at the time he became the owner of the property, on January 25, 1989.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the property subject to the standards in effect on January 25, 1989. Those standards include, but are not limited to the 1989 editions of: Statewide Planning Goal 4 (Forest Lands) for the portion of the property zoned AF-20, and Statewide Planning Goal 14 for the portion of the property zoned RA-1.
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 claimant first obtains 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 claimant 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 claimant 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 claimant 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 claimant.

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

The department issued its draft staff report on this claim on July 13, 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.