

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

August 4, 2005

**STATE CLAIM NUMBER:** M119743

**NAME OF CLAIMANTS:** Bernard Newland and Elaine Newland

**MAILING ADDRESS:** 26850 Southwest Pete's Mountain Road  
West Linn, Oregon 97068

**IDENTIFICATION OF PROPERTY:** Township 3S, Range 1E, Section 10  
Tax Lots 1203 and 1205  
Clackamas County

**DATE RECEIVED BY DAS:** February 14, 2005

**180-DAY DEADLINE:** August 13, 2005

**I. CLAIM**

The claimants, Bernard and Elaine Newland, seek compensation in the amount of \$1,000,000 for a 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 partition their 10.25-acre property into ten approximately one-acre parcels, and develop each with a dwelling. The property is located at 26850 Southwest Pete's Mountain Road, approximately one-mile south of the City of West Linn, in Clackamas 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 this claim is valid. Department staff recommends, in lieu of just compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimants to allow them to divide their property into one-acre parcels and develop each parcel for residential use: Statewide Planning Goal 4 (Forest Lands), ORS 215.705 and 215.780, and OAR 660, division 6, to the extent necessary to allow Mr. and Ms. Newland a use of the subject property permitted at the time they acquired it on July 22, 1977. As a result, the Newland's use of the property will be subject to those laws in effect on July 22, 1977. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS RECEIVED**

On March 2, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. In response to the notice, DAS received one letter. The comment does not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law. (See comment letter 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 14, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's Agricultural/Forest (AG/F) zoning and state 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 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 regulation 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, Bernard and Elaine Newland, acquired the subject property on July 12, 1977. According to the claimants, the subject property was partitioned into two five-acre parcels (Tax Lots 1203 and 1205) in August 1978. Shortly after the final partitioning approval, Ms. Newland transferred her interest in Tax Lot 1205 to her husband. A deed was provided by the claimants showing Ms. Newland’s interest in this Tax Lot being transferred to her husband on December 28, 1978.

To document current ownership, the claim included their 2004-2005 Tax Statements for the two Tax Lots that are the subject of this claim. They show both of the claimants as current owners of Tax Lot 1203, and Mr. Newland as the current owner of Tax Lot 1205. (Clackamas County Deed Records 79 138.)

### **Conclusions**

The claimants, Mr. and Ms. Newland are “owners” of Tax Lot 1203 and Mr. Newland is an “owner” of Tax Lot 1205 as that term is defined in Section 11 (C) of Measure 37, as of July 12, 1977.

### **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 claimants or a family member acquired the property.

### **Findings of Fact**

The claim specifically lists OAR 660-006-0026(1)(a), OAR 660-006-0027(1), ORS 215.780(1)(c) and ORS 215.705 and states:

“When property was purchased the zoning was General Use, 1-acre residential in 1977. In 1979 it was rezoned to 20-acre Transitional Timber. In 1994 it was rezoned to Agriculture/Timber 80-acres.”

The claimants’ property is zoned AG/F, which is a mixed agricultural and Forest Land zone adopted to comply with Statewide Planning Goal 4 (Forest Lands), and the implementing

provisions in OAR 660-006-0050 (effective February 5, 1990) and subsequently amended on March 1, 1994, to comply with the provisions of HB 3661 (chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Statewide Goals 3 and 4 are allowed except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993. Information was not provided in the claim showing the predominant use of the property on January 1, 1993. However, the subject property is composed of predominately Saum silt loam (74B) and Xerochrepts and Haploxerolls, very steep (92F) soils (NRCS Capability Class III and VII) with a site index for Douglas-fir that ranges from 125 to 145 (site index of 135) and from 130 to 155 (site index of 115), respectively. For 74B soils, the vegetation in areas not cultivated is mainly Douglas-fir, Oregon white oak, western hazel, poison-oak, and grasses. For 92F soils, the native vegetation is mainly Douglas-fir, Oregon white oak, bigleaf maple, western red cedar, red alder, western hazel, Oregon-grape, and salal.<sup>1</sup> Aerial photos of the subject property from 1981, and 2002 show the predominate use of the property to be forest use. Therefore, based on soils information and aerial photos, the subject property was most likely forest use in 1993, and thus, the property would be subject to the requirements for dwellings applicable under forest zoning required by Statewide Goal 4, ORS 215 and OAR 660, division 6. This includes the three provisions authorizing dwellings in forest zones under OAR 660-006-0027(1)(a) through (d), (1)(e), and (1)(f) being asserted by the claimants as restricting the use of the property.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones which implements the 80-acre minimum lot size specified in ORS 215.780. The claimants' property consists of two five-acre parcels. One parcel is currently developed with a dwelling. Under OAR 660-006-055, the claimants' property cannot be further divided as may have been possible in 1977 under Goal 4.

When the claimants purchased the property in 1977, it was zoned by Clackamas County as General Use (GU) and it had an one-acre minimum parcel size requirement for the creation of new lots or parcels. However, the County GU Zone that applied to the subject property when acquired by the claimants was not acknowledged at that time by the Commission, under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251. Since the County land use regulations were not acknowledged by the Commission until 1981, Statewide Planning Goal 4 applied directly to the subject property when the claimants acquired it in 1977.<sup>2</sup> In general, in 1977 the Goal 4 standards required local land

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<sup>1</sup> Source: Soil Survey of Clackamas County, November 1981, shows property located on Sheet #21 and the information on 78B and 92F soils is found on pages 96, 113 and 114.

<sup>2</sup> Statewide Planning Goals 1-14 (OAR 660-015-0000) became effective on January 25, 1975, and applied to legislative land use decisions and some quasi-judicial land use decisions prior to acknowledgement of a jurisdiction's comprehensive plan and land use regulations (*Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (1977), *1000 Friends v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979) and *Alexanderson v. Polk County*, 289 Or 427, rev. denied, 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985).) After the local plan and land use regulations were acknowledged by the Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions, *Byrd v. Stringer* 295 Or 311, (1983), however, state statutes continue to apply and insofar as the local implementing provisions are materially the same as the rules, the local provisions must be interpreted consistent

use regulations to “conserve Forest Lands for forest uses.” Specifically, Goal 4 only allowed land divisions that would protect Forest Lands for forest uses. Dwellings in forest zones were allowed if found to be “necessary and accessory” to one of the enumerated forest uses as defined in Goal 4.<sup>3</sup> In addition, Goal 14, also applicable to the property in 1977, generally required that land outside urban growth boundaries be used for rural uses.

The opportunity to divide the property and to place residential dwellings on the property when the claimants acquired it in 1977 was limited to land divisions that were consistent with the provisions of Statewide Planning Goals 4 and 14 that were in effect in 1977. However, no analysis of whether the subject property can be divided for dwellings under the earlier Goal 4 standards for land divisions to “protect commercial Forest Lands for commercial forest uses” and for dwellings to be “necessary and accessory to one of the enumerated forest uses” has been provided. Nor does the claim establish that the density of uses desired by the claimants was permissible under the provisions of Goal 14 in effect in 1977.<sup>4</sup>

### **Conclusions**

Lot size and dwelling standards established by amendments to Statewide Planning Goal 4, amendments to ORS 215, and OAR 660, division 6, adopted since the claimants acquired the property in 1977, do not allow the division of the property into parcels less than 80-acres in size or allow the approval of dwellings as may have been possible in 1977. The County’s AG/F zone is based on the standards required by Goal 4, ORS 215 and OAR 660, division 6. Land use laws adopted since 1977 restrict the use of the property from what could have been done when the property was acquired by the claimants in 1977.

The Newlands’ claim is based on the assumption that the County GU zone was the governing land use regulation when they acquired the subject property in 1977 and 1978. However, because the County GU Zone had not be acknowledged by the Commission at the time the claimants acquired the subject property, the Goal 4 standards for land divisions and dwellings applied to the property when the claimants acquired it in 1977, as did the requirements of

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with the substance of the rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

<sup>3</sup> Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for forest lands as well as those that were not necessary and accessory to an enumerated forest use, *Lamb v. Lane County*, 7 Or LUBA 137 (1983). Dwellings in Forest Lands were required to be “necessary and accessory” to show that such dwellings comply with the Goal 4 requirement that local land use regulations must “conserve Forest Lands for forest uses,” *1000 Friends v. LCD/Curry County*, 301 Or 447 (1986). A dwelling that may “enhance” forest uses is not “necessary and accessory” to a forest use to the extent required by Goal 4, *1000 Friends of Oregon v. LCD/Lane County*, 305 Or 384 (1988).

<sup>4</sup> For guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective September 1, 1982 and in *Lamb v. Lane County*, 7 Or LUBA 137 (1983), *1000 Friends v. LCD/Curry County*, 301 Or 447 (1986), and *1000 Friends of Oregon v. LCD/Lane County*, 305 Or 384 (1988). Another indication of the appropriate standards that applied to the property in 1977 and 1978 are the land division and dwelling standards in Clackamas County’s later-acknowledged forest zone (TT-20), acknowledged by the Commission on December 31, 1981.

Goal 14. The claim does not establish whether the uses desired by the claimants were permitted under the applicable standards in effect when they acquired the property.

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 claimant's use of the property, and that may continue to apply to the claimant's 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 permit 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 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 claim states that the fair market value of the subject property has been reduced by \$1,000,000 as a result of land use laws enacted after they acquired the property in 1977. The claimants explain the asserted reduction in the fair market value as follows:

"Nearby small acreage home sites are assessed at a market value from \$132,000 to \$200,000 per-acre. Good views demand the higher prices. See Tax Assessment attached. Under GU 1-acre we would have 10 home sites. Value would be \$160,000 X 10 lots = \$1,600,000. Difference is 1,600,000 minus \$600,000 = \$1,000,000."

There is no certified appraisal or other documentation to substantiate the claimed values either before or with state land use regulations.

#### **Conclusions**

As explained in section V. (1) of this report, Bernard and Elaine Newland are the current owners of Tax Lot 1203 and Mr. Newland is the owner of Tax Lot 1205, as of July 12, 1977. Thus, under Ballot Measure 37, the Newlands are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value. State land laws adopted since the claimants acquired the property restrict division and development of the subject property with dwellings. The claim asserts the reduction in value due to the restriction to be \$1,000,000. However, the claim does not show that the identified fair market value reduction is actually attributed to land use regulations enacted after the claimants acquired the subject property in 1977. Partitioning of the subject property at the time of acquisition in 1977 was subject to the standards under Goals 4 and 14. It is possible that under the standards at that time, at least one additional parcel could be created. Thus, since today no parcels are currently permitted, it is more likely than not that some reduction in the fair market value of the property has occurred.

Without an appraisal or other documentation, and without a showing that the uses desired were permitted under the standards in effect when the claimants acquired the property, 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**

The claim is based on Clackamas County's AG/F zone and the related provisions of state law that have restricted use of the property and reduced its fair market value. These are Statewide Planning Goal 4, "Forest Lands," and applicable provisions of ORS 215 and OAR 660, division 6. All of the specific state land use regulations cited in the claim under ORS 215 and OAR 660, division 6 were enacted after the claimants acquired the property in 1977, and restrict the use of the property in a manner that likely reduces its fair market value. With the exception of provisions of Goals 4 and 14 in effect when the claimants acquired the property, in general, these specified laws do not appear to be exempt under subsection 3(E) of Ballot Measure 37.

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..." 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) of Measure 37.

#### **Comment Received**

One letter was received commenting that the claim to create 10 new lots and developed each with a dwelling creates concerns with traffic safety over the Weiss Bridge and adjacent streets, potential impacts on water quality from storm water runoff into the Willamette River and well pumping and on-site sewage disposal, and concerns on fire and police services as public health and safety issues.

## **Response to Comment**

Any waiver of state land use laws relating to Goal 4 does not waive state laws that restrict or prohibit activities for the protection of public health and safety under Section 3(B) of Measure 37.

## **Conclusions**

The general statutory, goal and rule restrictions on the division, residential development and use of Forest Land apply to the claimants' use of the property, and for the most part these laws would not come under the exemption in subsection 3(E) of Measure 37. 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 and will also continue to apply. The restrictions in Goals 4 and 14 in effect when the claimants acquired the property will also continue to apply to the property.

There may be other laws that continue to apply to the claimants' use of the property because they were not 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 an owner of property 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 provide 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 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 findings and conclusions in this report, laws enforced by the Commission or the department, prohibit the division of the subject property into ten one-acre parcels with dwellings on them. These restrictions reduce the fair market value of the subject property to some extent, though it is unclear what level of development would be allowed under the laws in effect in

1977, when the claimants acquired the property. The claim asserts this amount to be \$1,000,000. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, no appraisal or other documentation was submitted, nor does the claim establish that the uses desired were permitted under the standards in effect when they acquired the property. Therefore, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, the department acknowledges that state land use laws 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 just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow the Newlands to use the subject property for a use permitted at the time they acquired the property on July 12, 1977.

### **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 Newlands' division of their property into lots or parcels or to the establishment of a single family dwelling on each lot or parcel created: applicable provisions of Statewide Planning Goal 4 enacted after 1977, ORS 215.780 and 215.705; and applicable provisions of OAR 660, division 6. These land use regulations will not apply to the Newlands' use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property.
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 July 12, 1977 and December 28, 1978. On those dates, the property was subject to Statewide Goals 4 and 14. The claimants will also continue to be subject to ORS 215.730 and those provisions of Goal 4 and its implementing rules in OAR 660 division 6 related to siting standards for dwelling for the protection of public health and safety and to any other laws that are exempt under Section 3 (e) of Measure 37.
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 15, 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.