

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT  
Final Staff Report and Recommendation  
September 2, 2005**

**STATE CLAIM NUMBER:** M120129

**NAME OF CLAIMANT:** Bettie Frye

**MAILING ADDRESS:** 7355 Wagner Creek Road  
Talent, Oregon 97540

**PROPERTY IDENTIFICATION:** Township 38S, Range 1W, Section 35B  
Tax Lot 1100  
Jackson County

**OTHER INTEREST IN PROPERTY:<sup>1</sup>** Linda Lathrop, Lana Hjorten,  
Lorelei Frye, and Lisa Sesar

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

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

**I. CLAIM**

The claimant, Bettie Frye, seeks compensation in the amount of \$1,000,000 to \$1,240,000 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 claimant desires compensation or the right to subdivide her approximately 4.76-acre property into five parcels of less than one-acre each for residential development. The property is located at 7355 Wagner Creek Road, near Talent, in Jackson 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 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 claimant to allow her to divide her 4.76-acre property into five parcels of less than one-acre each for residential development: Statewide Planning Goal 14 (Urbanization) and OAR 660-004-0040. These laws will not apply to Ms. Frye only to the extent necessary to allow

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<sup>1</sup> The claimant lists these persons as having an interest in the property but provides no documentation of their interest. They are not claimants for the purposes of this Measure 37 claim.

Ms. Frye a use of the subject property permitted at the time she acquired it on February 5, 1961. (See the complete recommendation in Section VI of this report.)

### **III. COMMENTS RECEIVED**

On March 18, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to 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 March 14, 2005, for processing under OAR 125, division 145. The claim identifies Jackson County's Rural Residential – Five-Acre zoning that restricts 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 of 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, Bettie Frye, acquired the subject property by contract on February 5, 1961. (See document nos. 506601 and 74-08500 in file.) A July 13, 2005, copy of Jackson County Assessor’s Account 1-079935-7 confirms that Bettie Frye is the current owner of Tax Lot 1100. (See department’s claim file.)

On the claim submitted to the Department of Administrative Services, the claimant lists the property for which the claim is made as Assessors Parcel 381W35 Tax Lot 800. A search of the online assessor’s files shows the owners of Tax Lot 800 to be Stephen and Julie Brairton. The same source indicates Bettie Frye owns the adjacent Tax Lot 1100. Assessor’s Account 1-079935-7 confirms that Bettie Frye is the current owner of Tax Lot 1100. (See department’s claim file.)

### **Conclusions**

The claimant, Bettie Frye, is the “owner” of Tax Lot 1100 (Assessor’s Parcel 381W35B 1100), the subject property, as that term is defined in Section 11 of Ballot Measure 37.

### **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 claim states: “[t]he zone changed from Exclusive Farm Land with no restrictions to 5-acre per dwelling zoning.”

The subject property is zoned Rural Residential – Five-Acre (RR-5), in accord with Statewide Planning Goal 14 (Urbanization), which became effective January 25, 1975, and which generally requires that land outside of urban growth boundaries be used for rural uses. According to Jackson County, development of the property is also restricted by floodplain standards and a riparian setback from Wagner Creek.

As a result of a 1986 Supreme Court decision<sup>2</sup>, in 2000 the Commission amended Statewide Planning Goal 14 and adopted OAR 660-004-0040, which became effective on October 4, 2000. The rule provides that after October 4, 2000, a county minimum lot size requirement in RR zone may not allow a smaller minimum lot size without taking an exception to Goal 14 (OAR 660-004-0040(6)). This rule prevents the subject property from being divided without an exception to Goal 14.

At the time the owner acquired the property in 1961, there was no county zoning restricting the use or density of development on the property.

### **Conclusions**

The County's RR-5 zone and provisions of Statewide Planning Goal 14 and OAR 660-004-0040(6) were adopted after the claimant became the owner of the subject property. Land use laws adopted since February 5, 1961, restrict the use of the property relative to the uses allowed when the claimant acquired the property on February 5, 1961.

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 that the claimant has 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 the 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 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 claimant states that the fair market value of the subject property has been reduced by \$1,000,000 to \$1,240,000 as a result of land use laws enacted after she acquired the property in 1961. The claimant relies on the estimates of a realtor to determine the reduction in value as a result of land use regulations enacted after the claimant acquired the property.

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

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<sup>2</sup> *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or App 447 (1986).

## **Conclusions**

As explained in section V.1 of this report, Bettie Frye is the current owner of the subject property, Tax Lot 1100, as of February 5, 1961. Under Ballot Measure 37, Bettie Frye 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 claimant acquired the property in 1961 restrict division of the subject property. The claimant asserts the reduction in value due to the restrictions to be \$1,000,000 to \$1,240,000. However, without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimant demands 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 includes only a reference to local land use regulations that restrict the use of the property relative to what would have been allowed in 1961 when the claimant acquired the property. The department has identified state regulations applicable to the claim in Section V.2 of this report, including Statewide Planning Goal 14 and OAR 660-04-0040. These specified state laws were enacted after the claimant acquired the property and, therefore, are not exempt under Section 3(E) of Measure 37, which exempts laws enacted prior to the claimant's acquisition of the subject property.

Although not identified in the claim, Statewide Planning Goal 6 (Air, Water and Land Resources Quality) and Goal 7 (Areas Subject to Natural Disasters and Hazards), and OAR 660, division 23, appear to apply to the property due to Jackson County's designation of a flood hazard area and a riparian corridor on the site.<sup>3</sup> Generally, regulations for flood hazard protection and protection of water quality are exempt under Section 3(B) of Ballot Measure 37. In addition, land use regulations under Statewide Planning Goal 6 were adopted to meet local requirements established under the federal Clean Water Act and thus may be exempt under Measure 37 as laws adopted to meet federal requirements.

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<sup>3</sup> Jackson County's riparian setbacks were originally adopted as a riparian protection measure under Statewide Planning Goal 5. Subsequently, the Department of Environmental Quality (DEQ) designated the county as a designated management agency for the implementation of the agency's TMDL water quality plan for Bear Creek. DEQ considers the riparian setbacks as a water quality protection measure implementing the TMDL plan.

## **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 goal and rule restrictions on the division of rural residential land apply to the claimant's use of the property, and for the most part these laws are not exempt under section 3(E) of Measure 37.

To the extent that Statewide Planning Goal 6 (Air, Water and Land Resources Quality) and Goal 7 (Areas Subject to Natural Disasters and Hazards), and OAR 660 division 23 apply to the property for the protection of public health and safety, or to meet federal requirements, they are exempt under Section 3 of Ballot Measure 37.

Laws in effect when the claimant acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimant's use of the property. There may be other laws that 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 the 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 that the claimant has 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. The claimant 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 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 five parcels of less than one-acre each. The claim asserts these restrictions reduce the fair market value of the subject property by \$1,000,000 to \$1,240,000. Although the claim provides an explanation about how the specified

restrictions reduce the fair market value of the property, no appraisal or other substantiating documentation was submitted and it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, the department acknowledges that state land use laws 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 just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow Bettie Frye to use the subject property for a use permitted at the time she acquired the property on February 5, 1961.

### **Conclusions**

Based on the record, and subject to the claimant providing documentation to verify which property is the subject of the claim and to verify ownership of that property, 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 Bettie Frye's division of her 4.76-acre property into five parcels of less than one-acre each for residential development: applicable provisions of Statewide Planning Goal 14, and OAR 660-004-0040. These laws will not apply to Bettie Frye's use of her property only to the extent necessary to allow the claimant to a use permitted at the time she acquired the property on February 5, 1961.
3. The action by the State of Oregon provides the state's authorization to the claimant to use her property subject to the standards in effect on February 5, 1961.
4. 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 215.402 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.
5. 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.
6. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property it may be necessary for her to obtain a decision under Measure 37 from a city and/or county 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 26, 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.