

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT  
Final Staff Report and Recommendation**

September 8, 2005

**STATE CLAIM NUMBER:** M120177

**NAMES OF CLAIMANTS:** Colin and Lynn Eells

**MAILING ADDRESS:** 16650 South Thayer Road  
Oregon City, OR 97045

**PROPERTY IDENTIFICATION:** Township 3S, Range 2E, Section 11  
Tax Lot 100<sup>1</sup>  
Clackamas County

**DATE RECEIVED BY DAS:** March 16, 2005

**180-DAY DEADLINE:** September 12, 2005

**I. SUMMARY OF CLAIM**

The claimants, Colin and Lynn Eells, seek compensation 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 claimants desire compensation or the right to subdivide their property into 20-acre parcels and to develop a dwelling on each parcel. The property is located at 16650 South Thayer Road near, Oregon City, 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 the claim is valid. Department staff recommends that, 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 to Mr. and Ms. Eells' division of their 85.90-acre property into 20-acre parcels and to develop a dwelling on each parcel: Statewide Planning Goal 4 (Forest Lands), ORS 215.700-750 and 215.780, and applicable provisions of OAR 660, division 6. These laws will not apply to the claimants only to the extent necessary to allow Mr. and Ms. Eells a use of the property permitted

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<sup>1</sup> The claim also references Tax Lots 101 and 102. However, the claimants no longer have an ownership interest in these properties and they are not considered by the department in reviewing this Measure 37 claim. (See Section V. (2) of this report.)

at the time they acquired it in 1991. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On March 24, 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, three written comments, evidence or information were received in response to the 10-day notice. The comments do 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 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 March 16, 2005, for processing under OAR 125, division 145. The claim cites ORS 215.780 as the law 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 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 claimants, Colin and Lynn Eells, acquired property then described as tax lot 100, on June 24, 1991. In 1992, the Eells partitioned tax lot 100 into three parcels, tax lots 100 (85.90 acres); 101 (26.08 acres); and 102 (26.15 acres). They subsequently conveyed tax lots 101 and 102 to family members, and retained ownership of tax lot 100.<sup>2</sup>

Information provided by Clackamas County Assessment and Taxation on July 25, 2005, indicates that Colin and Lynn Eells are the current owners of the 85.90-acre tax lot 100. Based on the information in the current record, the Eells no longer have an ownership interest in tax lots 101 and 102, and thus these tax lots are not considered as part of the review of this Measure 37 claim.

### **Conclusions**

The claimants, Colin and Lynn Eells, are “owners” of tax lot 100, as that term is defined by Section 11(C) of Ballot Measure 37, as of June 24, 1991. Colin and Lynn Eells are not “owners” of tax lots 101 and 102.

### **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 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.

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<sup>2</sup> The claimants sold Tax Lot 101 to Stacie Keith in 1992 and sold Tax Lot 102 to Oregon City Excavating and Development, Inc. in 1999.

## **Findings of Fact**

The claim cites ORS 215.780, stating that “We purchased it to build houses for members of our family on 20-acre parcels. Now we are restricted to 80-acres.” The claim further requests to “get our TT-20 zoning back or even 10-acre.”<sup>3</sup>

The subject property is zoned Timber (TBR) by Clackamas County, as authorized under Statewide Planning Goal 4 (Forest Land) and OAR 660, division 6. The Clackamas County comprehensive plan designates tax lot 100 as Forest Land in compliance with Statewide Planning Goal 4. The subject property is subject to Statewide Goal 4 because it is composed of forest soils that are well-suited to the production of harvestable timber.<sup>4</sup>

The claimants acquired the subject property on June 24, 1991, prior to the establishment of an 80-acre minimum lot size and the establishment of current standards for the placement of dwellings on lands designated for forest use. Statewide Planning Goals and their implementing statutes, including the applicable provisions of OAR 660, division 6, and ORS 215, applied to the subject property in 1991.

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 OAR 660, division 6, restrict the right of an owner to divide the property for the purpose of sale and residential use. 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.

When the claimants acquired the property in 1991, it was zoned TTD-20 (Transitional Timber District, twenty-acre minimum parcel size) which may have allowed them to create 20-acre

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<sup>3</sup> The claim also cites “ORS 217.80.” However, Oregon Revised Statutes do not currently contain a chapter 217 and staff concludes that the citation is simply a typographical error and that this reference was intended to be to ORS 215.780.

<sup>4</sup> The subject property includes a combination of Jory silty clay loam, site index 140 to 160 for Douglas-fir (45B - 2 to 8 percent slopes), Jory stony silt loam, site index 140 to 155 for Douglas Fir (46C - 8 to 15 percent slopes), Saum silt loam, site index 125 to 145 (78E - 30 to 60 percent slopes) and Xerohrepts and Haploxerolls, very steep, site index 130 to 155 for Douglas-fir (92F - 20 to 60 percent slope) (1985 Soil Survey of Clackamas County Oregon. Soil map units for 45B, 46C, 78E and 92F found on pages 23, 24, 113 and 114, and Table 6).

parcels with additional dwellings on these new parcels.<sup>5</sup> That zone would not have permitted the requested 10-acre parcels.

### **Conclusions**

Provisions of the current minimum lot size and dwelling standards established by Statewide Planning Goal 4 and OAR 660-006-0026 and 0027 and the provisions of ORS 215, were adopted after Colin and Lynn Eells acquired an interest in the subject property in 1991 and do not allow the division of property that is zoned TBR into parcels less than 80-acres in size or the approval of dwellings on 20-acre or 10-acre parcels. Twenty -acre parcels may have been permitted when the claimants acquired the property in 1991.

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 uses that the claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and that may continue to apply to the claimants' 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 claimants seek 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 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**

The claim indicates that the property value has been reduced but that the claimants have not been able to determine an exact amount of that reduction. According to the claimants, they contacted 14 appraisers, none of whom were able to determine how to quantify a reduction in value for purposes of Measure 37. Thus, the claim does not provide an estimate of the property's fair market value under current land use laws or in the absence of current regulations.

### **Conclusions**

As explained in section V.(1) of this report, the current owners are Colin and Lynn Eells, who acquired the property on June 24, 1991. Under Ballot Measure 37, Mr. and Ms. Eells are due compensation for land use regulations 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

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<sup>5</sup> The Transitional Timber District was adopted to comply with Statewide Goal 4, Forest Lands in 1981 (see LCDC Continuance Order dated December 31, 1981, Goal 4 section pp. 26-28). A staff report prepared by Clackamas County in response to a Measure 37 claim the claimants filed with the County indicates that the TTD-20 zoning would have permitted the creation of 20-acre parcels. The County report also indicates that the test for establishing a dwelling in the TTD-20 zone at that time was to "demonstrate through a management plan that a farm or forest use would be occurring on the property." (See a copy of the County staff report in the department's claim file.)

report, laws adopted since the claimants acquired the property restrict division and development of dwellings on the subject property.

The claimants assert they are unable to determine an exact amount of the reduction due to appraisers' inability to determine how to quantify a reduction in value for purposes of Measure 37. Without an appraisal or other substantiating documentation, it is not possible to substantiate a specific dollar amount of compensation due to the claimants for the reduction in value caused by land use regulations enacted after they acquired their property. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in fair market value of the subject property as a result of land use regulations enacted or 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 cites ORS 215.780 and includes a general reference to land use regulations that restrict the use of the property relative to what would have been allowed in 1991 when the claimants acquired the property. These provisions include Statewide Planning Goal 4 (Forest Lands), and applicable provisions of ORS 215 and OAR 660, division 6, which Clackamas County has implemented through its TBR zone. With the exception of provisions of Goal 4 and ORS 215 in effect in 1991, none of these laws are exempt under Section 3(E) of Ballot Measure 37, which exempt laws enacted prior to the claimants' acquisition of the property. Provisions of Goal 4 and ORS 215, adopted before June 24, 1991, are exempt under Section 3 (E) of the Measure.

While not directly raised by the claimants, 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..." To the extent they may be applicable under OAR 660-006-0050, the department finds that siting standards for dwellings in forest zones under ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under section (3) of Measure 37.

#### **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 statutory, goal and rule restrictions on residential development and use of Forest Land apply to the claimants' use of the property, and for the most part these laws are not exempt under section 3(E) of Measure 37. The provisions of Goal 4 and ORS 215 in effect when the claimants acquired the property in 1991 are exempt under section 3(E) of the Measure and will continue to

apply to the property, as will standards in ORS 215.730 and OAR 660, division 6, related to siting of dwellings in forest zone, to the extent they are exempt under Section 3(B).

Other laws in effect when the claimants acquired the property are also exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' 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 claimants seek 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. The siting requirements of ORS 215.730, Goal 4, and its implementing rules related to dwelling siting standards based on health and safety will also continue to apply.

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 uses 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. The claimants 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 the owners 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 in order to allow the present owners to carry out a use of the property permitted at the time the present owners 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 set forth in this report, laws enforced by the Commission or the department restrict the division of the subject property into parcels or lots, and the use of the property for residential purposes. The claimants cannot create the desired 20-acre parcels out of the subject property, or develop those parcels for residential use because laws enacted after the claimants acquired the property prohibit lot sizes smaller than 80-acres. The claim asserts that laws enforced by the Commission or department reduce the fair market value of the subject property. Because the claim does not provide an appraisal or other specific documentation 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 all or parts of certain land use regulations to allow

Mr. and Ms. Eells to use the subject property for a use permitted at the time they acquired the property on June 24, 1991.

### **Conclusion**

Based on the record, the department recommends that the claim be approved, subject to following terms:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Mr. and Ms. Eells' division of the 85.90-acre property or to the establishment of a single family dwelling on each lot created: applicable provisions of Statewide Planning Goal 4, ORS 215.700-750 and 215.780, and OAR 660, division 6, enacted after June 24, 1991. These land use regulations will not apply to Mr. and Ms. Eells' use of the property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on June 24, 1991.
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 June 24, 1991. On that date, the property was subject to applicable provisions of Statewide Planning Goal 4, ORS 215, and OAR 660, division 6, then in effect. In addition, provisions of ORS 215.730 and OAR 660-006-0050 that are exempt under Section 3 (B) of Measure 37 will continue to apply to the subject property.
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 215.402 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.
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 August 8, 2005. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' 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.