

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

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

September 15, 2005

**STATE CLAIM NUMBER:** M120339

**NAME OF CLAIMANT:** Crayton Rister

**MAILING ADDRESS:** 3824 SE Stark Street  
Portland, Oregon 97214

**PROPERTY IDENTIFICATION:** Township 21S, Range 10E, Section 28  
Tax Lots 3600 and 3601  
Deschutes County

**OTHER CONTACT INFORMATION:** Craig Fahner  
538 Highland Avenue  
Redmond, Oregon 97756

**DATE RECEIVED BY DAS:** March 25, 2005

**180-DAY DEADLINE:** September 21, 2005

**I. SUMMARY OF CLAIM**

The claimant, Crayton Rister, seeks compensation in the amount of \$7,491,875 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 develop the property for single-family residences with minimum lot sizes of between 0.5 and 1.5 acres. The property is located at 15600 and 15650 Deedon Road near LaPine, in southern Deschutes 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. Rister's division of the property for residential development: applicable provisions of Statewide Planning Goals 4 (Forest Lands), Goal 14 (Urbanization),

ORS 215 and OAR 660, division 6. These laws will not apply to the claimant only to the extent necessary to allow Mr. Rister a use of the property permitted at the time he acquired it on November 5, 1991. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On March 28, 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, one written comment was received in response to the 10-day notice.

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 March 25, 2005, for processing under OAR 125, division 145. The claim identifies Deschutes County's Forest Use (F-2) and Wildlife Area (WA) combining WA zones 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 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 claimant, Crayton Rister, acquired the subject property on November 5, 1991 by a Bargain and Sale Deed. Recent Deschutes County Tax Records document that Crayton Rister remains the owner of the subject property. (See department’s claim file.)

Information included in the claim shows that the claimant’s parents, Floyd Rister and Marjorie (Deedon) Rister, acquired part of the subject property from Genevieve Deedon on October 11, 1968 and the remainder on October 7, 1970 by three Warranty Deeds. The southerly most 40-acres of the subject 160-acre property was acquired by the claimant’s family members on October 11, 1968 by two Deeds, and the remaining 120-acres was acquired by the claimant’s family members on October 7, 1970 by Deed (see department’s claim file).<sup>1</sup>

## **Conclusions**

The claimant, Crayton Rister, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. Mr. Rister acquired the subject property on November 5, 1991.

Information provided by the claimant shows that the claimant’s family members acquired the property in 1968 and 1970.

### **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.

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<sup>1</sup> The department understands that the claimant’s mother, Marjorie Rister, was the daughter of Edwin and Genevieve Deedon who was the original homesteader on the subject property. However, without verification of the date of the claimant’s grandparent, Edwin Deedon, acquisition of the property, no evaluation of the laws in effect prior to 1968 is possible.

## **Findings of Fact**

The claim states the county F, Forest Zone, WA, Wildlife Habitat, and F2 “restricts subdividing to ½-acre lots.”

The claim identifies Deschutes County’s Forest Use (F-2) zone as the land use regulation that restricts the use of the property. The cited Deschutes County regulations implements Statewide Planning Goal 4 (Forest Lands) and statutes applicable to land zoned for Forest use under ORS 215, including ORS 215.705 to 215.755 and 215.780, and provisions of OAR 660, division 6 that restrict the property’s zoning, use and division.<sup>2</sup> Goal 4 became effective on January 25, 1975, and required Forest land as defined by the Goal to be zoned for Forest use. The Forest Land Administrative Rule, OAR 660, division 6, became effective September 1, 1982. ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Or Laws 1993) and were implemented by OAR 660-006-0026 and 0027 on March 1, 1994. (See citations to rule history under OAR 660-006-0026 and 0027.) ORS 215.730(1)(b) establishes approval standards for dwellings on lands zoned for Forest use to protect the public health and safety with regard to fire safety, water supply and development on steep slopes.

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.

The claim also identifies the County’s wildlife habitat provisions, specifically Chapter 18.88, Wildlife Area combining WA Zone, as a land use regulation that restricts the use of the property. The cited County regulation implements Statewide Planning Goal 5 (effective on January 25, 1975) and its implementing rules, OAR 660, division 16, effective on June 29, 1981) and division 23 (effective September 1, 1996).

Statewide Planning Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses and also became effective on January 25, 1975.

The claimant’s family has had ownership interest in the subject property since as early as 1968 and 1970, all prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules.

## **Conclusions**

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 4 (Forest Lands) and provisions applicable to land zoned for Forest use in ORS 215 and OAR 660, division 6 were all enacted after the claimant’s family members acquired ownership of the subject property in 1968 and 1970, and do not allow the division of

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<sup>2</sup> The subject property is composed of Shanahan loamy coarse sand, low, 0 to 3 percent slopes, (soil map unit 115A) (NRCS Capability Class VI) with a 100 year site index of 76 for lodgepole pine (Soil Survey of Upper Deschutes River Area, Oregon) Parts of Jefferson, Deschutes and Klamath Counties, Table 8 (p. 342) sheet # 134, published in 2002 based on field work completed in 1982).

the property into lots or parcels less than 80-acres in size, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimant's family members in 1968 and 1970.

The County's dwelling standards applied to lands designated as significant wildlife habitat established by application of Goal 5 and its implementing rules (OAR 660, divisions 16 and 23) were all enacted after the claimant's family members acquired ownership of the subject property in 1968 and 1970, and limit land divisions, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimant's family members in 1968 and 1970.

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 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 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 includes an informal estimate of \$7,491,875 as the property's fair market value, in the absence of current regulations. This estimate is based on the claimant's estimate of the market value of the property if developed into single-family residences with minimum lot sizes of between 0.5 and 1.5 acres, minus the current value of the property.

The claim also includes a market analysis estimating the current real market value of the subject property with improvements to be approximately \$349,039.

Information included in the claim does not show that the identified fair market value reduction of approximately \$7.5 million is actually attributable to land use regulations enacted after the claimant acquired the property. No appraisal has been submitted to substantiate the estimate.

#### **Conclusions**

As explained in Section V.(1) of this report, the current owner is Crayton Rister who acquired the property on November 5, 1991. Family members acquired the property in 1968 and 1970. Under Ballot Measure 37, Mr. Rister is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value relative to the uses

allowed when Mr. Rister's family members acquired the property. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimant's family members acquired the property restrict division of the subject property. The claimant estimates the reduction in value due to the restrictions to be approximately \$7.5 million.

Without an appraisal of the value of 0.5 and 1.5 acre lots or other explanation, the specific amount of any reduction in the fair market value of the property cannot be determined. Nevertheless, based on the submitted information, the department determines that it is likely 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 a general reference to any state land use regulations that restrict the use of the property relative to what would have been allowed in 1968 and 1970 when the property was acquired by Mr. Rister's family. These provisions include Statewide Planning Goals 4 (Forest Lands), Goal 5 (Natural Resources) and applicable provisions of OAR 660, divisions 6 and 16, which Deschutes County has implemented through its Forest Use (F-2) and Wildlife Area combining WA zones, respectively. These laws were enacted after the claimant's family members acquired the property in 1968 and 1970 and, as a result, are not exempt under subsection 3(E) of 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 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 under ORS 215.730, Goal 4 and 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 claimant's use of the property, and for the most part these laws are not exempt under subsection 3(E) of Measure 37.

Laws in effect when the claimant's family 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. Specifically, 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 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 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 he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his 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 in order to allow the present owner to carry out a use of the property permitted at the time the current 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 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 claimant cannot create the desired 0.5 and 1.5 acre lots out of the subject property, or develop those lots for residential use because laws enacted after the claimant acquired the property prohibit lot sizes that small. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$7,491,875. However, without an appraisal or other specific explanation 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. Rister to use the subject property for a use permitted at the time he acquired the property on November 5, 1991.

The claimant acquired the subject property on November 5, 1991. The requirements for land divisions and standards for Forest and non-forest dwellings under the County's acknowledged Forest Use (F-2) Zone applied to the use of the property when Mr. Rister acquired it.<sup>3</sup> The F-2 zone in 1991 required a 40-acre minimum parcel size for the creation of new lots or parcels, except planned and clustered development were allowed an equivalent density of one unit per 30-acres (Deschutes County Title 18, Section 18.40.060(A) and (B)). Dwellings customarily provided in conjunction with Forest use, defined as management, propagation or harvesting of a forest product, were permitted in 1991 upon approval by the Planning Director or Hearings Body of a Forest Management Plan (Title 18, Section 18.40.020(E)). Forest Management Plan criteria in 1991 required that information be included on physical characteristics of the land, stocking levels, non-timber resources, and alternatives to be implemented. The County amended these criteria under Resolution No. 81-030 to require that housing be sited on nonproductive or the least productive land, impacts of a house on commercial and noncommercial forest uses are minimized, and that a notarized statement be provided that the management plan will be followed, and that the house is necessary for managing the Forest Lands. (See the department's April 22, 1981, Staff Report, p. 6.)<sup>4</sup>

Dwellings not provided in conjunction with Forest or Farm use, partitions, planned developments and subdivisions were permitted as conditional uses in 1991 under the F-2 zone subject to the limitations on conditional uses under Section 4.080(4) and in accordance with the terms of County Code Title 17 (Subdivision and Partitioning) and policies set forth by the Comprehensive Plan (Title 18, Section 18.40.030(J) and County Ordinance 91-005, Section 23).

The dwelling standards applied to lands designated as significant wildlife habitat established by application of Goal 5 and its implementing rules (OAR 660, division 16) were all enacted before the claimant acquired the property in 1991.<sup>5</sup> The County's Wildlife Area combining WA Zone in 1991 provided that all residential development within the WA zone shall be done in accordance with the County's standards for a clustered development or planned development (Title 18, Section 18.88.050). The WA zone in 1991 had a 40-acre minimum lot size for the creation of new lots or parcels in the Metolius, North Paulina and Tumalo deer winter ranges, a

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<sup>3</sup> The County's F-2 zone (originally FU-2), adopted on November 1, 1979 (Ordinance PL-15), and amended on September 17, 1980, including Board Resolution No. 81-030, was acknowledged by the Commission on April 22, 1981, under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251 (LCDC Acknowledgment Order, dated May 11, 1981 and Director's April 22, 1981 staff report, pp. 5-7). On May 29, 1991, the County adopted Title 18 repealing Ordinance PL-15 and amending the acknowledged F-2 Zone.

<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*, Or LUBA 137 (1983), *1000 Friends of Oregon v. LCDC/Curry County*, 301 Or 447 (1986), and *1000 Friends of Oregon v. LCDC/Lane County*, 305 Or 384 (1988).

<sup>5</sup> The County's Wildlife Area Combining WA zone (originally Section 4.190, PL-15), adopted on November 1, 1979, was acknowledged by the Commission on April 10, 1980, under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251 (LCDC Continuance Order, dated May 19, 1980 and Director's March 26, 1980 staff report, pp. 17-19, 27 and 28). On May 29, 1991, the County adopted Title 18 (Ordinance PL-020) repealing Ordinance PL-15, which included readopting the acknowledged WA Zone under Chapter 18.88 with only minor changes.

320-acre minimum lot size in the Antelope Range, and a minimum in riparian areas as determined by the County with advice for the Oregon Department of Fish and Wildlife, necessary to protect the health and safety of the public as well as fish and wildlife resources (Title 18, Section 18.888.060).<sup>6</sup>

## **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 Mr. Rister's division and development of the 160 acre property: applicable provisions of Statewide Planning Goal 4, ORS 215, and OAR 660, division 6 enacted after November 5, 1991. These land use regulations will not apply to Mr. Rister's use of the property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property on November 5, 1991. The department acknowledges that this relief will not allow Mr. Rister to use the property in the manner described in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property subject to the standards in effect on November 5, 1991. On that date, the property was subject to applicable provisions of the Deschutes County Forest Use (F-2) and Wildlife Area Combining WA zones then in effect as acknowledged to be in compliance with the Statewide Planning Goals. The claimant will also continue to be subject to ORS 215.780 and those provisions of Goal 4 and its implementing rules in OAR 660, division 6 related to siting dwellings for the protection of public health and safety and to any other laws that are exempt under Section 3 of Measure 37. In addition, the use of the property will be subject to those applicable provisions of Goal 4, ORS 215, and OAR 660, division 6 that were in effect on November 5, 1991.
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 215.402 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 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 him to obtain a decision under Measure 37

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<sup>6</sup> The subject property is located within the North Paulina deer winter range (personal communication on August 8, 2005 between Doug White (DLCD) and Kevin Harrison (Deschutes County)).

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 August 22, 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.