

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

September 26, 2005

**STATE CLAIM NUMBER:** M120463

**NAME OF CLAIMANT:** Toynette Butolph, Administrator of  
The Gail E. Woldahl Foote Estate

**MAILING ADDRESS:** 1001 SE 15<sup>th</sup> Street, Space 120  
Bend, Oregon 97702

**PROPERTY IDENTIFICATION:** Township 7S, Range 2W, Section 36B  
Tax Lot 1600  
Marion County

**OTHER INTEREST IN THE PROPERTY:** Bruce E. Robbins, Agent  
Post Office Box 5788  
Salem Oregon 97304

**DATE RECEIVED BY DAS:** April 5, 2005

**180-DAY DEADLINE:** October 2, 2005

**I. CLAIM**

The claimant, Toynette Butolph, seeks compensation in the amount of \$550,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the subject 14.35-acre parcel, and to develop it as a 13-lot residential subdivision. The property is located at 390 SE Howell Prairie Road, near Salem, in Marion 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 the following laws not apply to the claimant's division and development of the subject property: Statewide Planning Goal 14 (urbanization) and OAR 660-004-0004 law enacted after January 1, 2005. The laws will not apply to the claimant only to the extent necessary to allow Toynette Butolph, Administrator of

the Gail E. Woldahl Foote Estate, a use of the property permitted at the time the Estate acquired the property on January 1, 2005. The department acknowledges that the relief, to which the claimant is entitled under Measure 37, will not allow the claimant to use the subject property in a manner set forth in the claim. (See the complete recommendation in Section VI. of the report.)

### **III. COMMENTS RECEIVED**

On March 1, 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, two written comments were received in response to the 10-day notice.

The comments are relevant to the ownership of the property that is the subject of this claim. The comments have been considered by the department in preparing this report. (See comment letters in the department's claim files.)

### **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**

The claim was submitted to the Department of Administrative Services Risk Management Division on April 5, 2005, for processing under OAR 125. The claim identifies Marion County Rural Zoning 128.070, which restricts development to a minimum of two-acre parcels. 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 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 claim documents provided in the claim include a Deed showing that Richard and Gail Woldahl purchased the property on April 9, 1969. Richard Woldahl and Gail Woldahl Foote are both deceased. Gail Woldahl Foote died on January 1, 2005. A Letter of Administration from the Marion County Circuit Court shows Toynette Butolph, the sister of Gail E. Woldahl Foote, was appointed Administrator of the estate of Gail E. Woldahl Foote on January 31, 2005.

### **Conclusions**

Based on the documents provided in the claim, the property transferred to the estate of Gail E. Woldahl Foote at the time of her death on January 1, 2005. Toynette Butolph is the Administrator of the Gail E. Woldahl Foote Estate, and the Estate is the owner of the property. Family ownership of the subject property, as defined by Section 11(A) of the Measure, began in 1969.

### **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 that Marion County’s Rural Zoning 128.070 “Restricts development to [a] minimum of two-acre parcels.” The zoning that currently applies to the subject property is Agriculture Residential (AR).

The County's AR zone is a rural-residential zone, with a two-acre minimum lot size and with one single-family dwelling permitted per lot or parcel. The zone is in accord with Statewide Planning Goal 14 (Urbanization), which became effective January 25, 1975, and generally required that land outside of urban growth boundaries be used for rural uses.

As a result of a 1986 Oregon Supreme Court decision,<sup>1</sup> the Commission in 2000 amended Goal 14 (Urbanization) and adopted OAR 660- 004-0040, which became effective on

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<sup>1</sup>1000 *Friends of Oregon v. LCDC (Curry County)*, 301 Or App (1986).

October 4, 2000. The rule provides that after October 4, 2000, a County minimum lot size requirement in a rural-residential zone may not be amended to allow a smaller minimum lot size without taking an exception to Goal 14 (OAR 660 004 0040(6)). This rule does not allow the subject property to be divided into lots less than two acres in size without an exception to Goal 14.

When the claimant's family acquired the property in 1969, the state land use planning goals and implementing statutes and regulations were not in effect.

### **Conclusions**

The zoning requirements, minimum lot size and dwelling standards for rural-residential lots or parcels established by OAR 660-004-0040 were enacted after the claimant's family acquired the subject property in 1969, and do not allow the division of the property into one-acre lots, thereby restricting the use of the property relative to the uses allowed when the property was acquired by Gail E. Woldahl Foote in 1969.

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 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 approximately \$550,000 as a result of land use laws enacted after the family acquired the property in 1969. According to the claimant, as currently zoned, the value of seven allowed parcels is \$200,000 each, whereas the value of 13 parcels allowed, when they acquired the property, would be \$150,000 each. The net difference, according to the claimants, is \$550,000. The claimant does not provide any substantiating documentation for the estimated values.

### **Conclusions**

As explained in Section V. (1), the claimant's family has owned the subject property since April 9, 1969. Thus, under Ballot Measure 37, the Gail E. Woldahl Foote Estate, through Toynette Butolph, Administrator, 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 family acquired the property in 1969 restrict division of the subject property. The claim asserts the reduction in value due to the restrictions to be \$550,000. 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 than likely that there has been a 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 state laws upon which the claim is based include Statewide Planning Goal 14 (Urbanization) and OAR 660-004-0040, which the county has implemented through its AR zone. None of these laws are exempt under Section (E) of Measure 37, which exempt laws in effect when the claimant's family acquired the property.

#### **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 rural-residential division and development 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.

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.

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 she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her 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 since the claimant's family acquired the property in 1969, do restrict the division of the subject property into the desired one-acre lots and residential development of those lots. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$550,000. However, because the claim does not provide an appraisal or other documentation to establish 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 Toynette Butolph, Administrator of the Gail E. Woldahl Foote Estate, to use the subject property for a use permitted at the time she acquired the property on January 1, 2005.

When the claimant acquired the property on January 1, 2005, it was subject to the land use regulations currently in effect. No land use regulations have been enacted since the claimant acquired the property that has the effect of reducing the fair market value of the property.

### **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 claimant's division and development of the 14.35- acre property: applicable provisions of Statewide Planning Goal 14 and OAR 660-004-0040 amended or enacted after January 1, 2005. These land use regulations will not apply to the claimant's use of the property only to the extent necessary to allow the claimant a use permitted at the time she acquired the property on January 1, 2005. The department acknowledges that the relief to which the claimant is entitled under Measure 37 will not allow the claimant to use the property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the property subject to the standards in effect on January 1, 2005. On that date, the property was subject to the applicable provisions of Statewide Planning Goal 14 and OAR 660, division 4 currently in effect, including provisions relating to a two-acre minimum lot size for rural-residential zones.
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 her to obtain a decision under Measure 37 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under Measure 37 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

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

The department issued its draft staff report on this claim on September 2, 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.