

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

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

September 29, 2005

**STATE CLAIM NUMBER:** M120535

**NAME OF CLAIMANT:** Lue Woolstenhulme

**MAILING ADDRESS:** 3626 Corey Road  
Central Point, Oregon 97504

**OTHER INTEREST IN THE PROPERTY:** Woolstenhulme Family Trust  
Lue Woolstenhulme, Trustee

**PROPERTY IDENTIFICATION:** Township 36, Range 1W, Section 28A  
Tax Lot 1400  
Jackson County

**OTHER CONTACT INFORMATION:** Mark S. Bartholomew, Agent  
717 Murphy Road  
Medford, Oregon 97504

**DATE RECEIVED BY DAS:** April 11, 2005

**180-DAY DEADLINE:** October 8, 2005

**I. SUMMARY OF CLAIM**

The claimant, Lue Woolstenhulme, seeks compensation in the amount of \$425,180, 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 his 27.63-acre property to create "saleable lots of approximately 5 acres each (in accordance with the standards applicable at the time of acquisition) for future home sites." The property is located at 3626 Corey Road, Central Point, 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 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 Lue Woolstenhulme's division and residential development of the property: Statewide Planning Goal 3 (Agricultural Land) and applicable provisions of ORS 215 and OAR 660, division 33 enacted after 1977. These laws will not apply to the claimant only to the extent necessary to allow Lue Woolstenhulme a use of the property permitted at the time she acquired it in 1977. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On March 2, 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, 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 April 11, 2005, for processing under OAR 125, division 145. The claim identifies Statewide Planning Goals 5, 11 and 14; ORS 92, 195, 197 and 215; provisions of OAR 660, divisions 4, 11, 12 and 33; and OAR 340, division 96 as laws that restrict the use of the property and are 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, Lue Woolstenhulme, acquired the subject property on April 27, 1977, as documented by a Deed Card, included with the claim, and a copy of a County staff report on a Measure 37 claim filed by the claimant with Jackson County. According to the claim and the County staff report, the claimant’s ownership of the property has been continuous since acquisition.<sup>1</sup> The claimant transferred the property to the Woolstenhulme Family Trust, a revocable trust, on November 11, 1990. Transfer of the property to a revocable trust does not result in a change in ownership for purposes of this Measure 37 claim.

### **Conclusions**

The claimant, Lue Woolstenhulme, is the owner of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of April 27, 1977.

### **2. The Laws that are the Basis for this Claim**

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 claimant’s agent states that the claimant wishes to divide the subject property into approximately five-acre parcels for future home sites, but that “numerous regulations enacted after applicant’s acquisition, including ORS 215.780, strictly forbid such development, with no resource.” In addition to ORS 215.780, the claim also lists the following laws that the claimant’s agent summarily asserts either “prevent or inhibit” the claimant’s use of the property as requested: Statewide Planning Goals 5, 11 and 14; ORS 92, 195, 197, and 215; OAR 660-004-0040(7)(e)(A); OAR 660-011-0060(2); OAR 660-012-0065(3); OAR 660-012-0070; all of OAR 660-033-0120; all of 660-033-0130; OAR 660-033-0135;

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<sup>1</sup> The claim asserts that the claimant acquired the property by land sale contract in 1972, but that the contract was not recorded until 1977. However, the claimant has not provided any evidence to document a 1972 acquisition date.

OAR 340-096-0020; and OAR 340-096-0034. The claim does not explain how any of these regulations restricts the use of the property. Several of these laws do not, on their face, restrict the use of the property. This report addresses only those regulations enforced by the Commission or the department that restrict the use of the property relative to uses permitted when the claimant acquired it.<sup>2</sup>

The claim is based, generally, on Jackson County's current Exclusive Farm Use (EFU) Zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU, as required by Statewide Planning Goal 3, in accord with OAR 660, division 33 and ORS 215, because the claimant's property is "Agricultural Land" as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.283, 215.284, 215.780 and OAR 660, division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80 acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones, and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f).

OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. Subsequent amendments to comply with HB 3326 (Chapter 704, Oregon Laws 2001, and effective January 1, 2002,) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

When Lue Woolstenhulme acquired the property on April 27, 1977, it was zoned Farm Residential (F-5) by Jackson County. However, on that date, Jackson County's Comprehensive Plan and land use regulations had not been acknowledged for compliance with the Statewide Planning Goals. The Commission acknowledged the Jackson County Comprehensive Plan and

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<sup>2</sup> OAR 340-096-0020 and OAR 340-096-0034 are enforced by the Department of Environmental Quality. That agency will issue a report on the validity of this claim as to those laws.

land use regulations in 1982, by acknowledgement order dated May 16, 1983. Since the Commission had not acknowledged the County's plan and land use regulations, including the F-5 zone, when Lue Woolstenhulme acquired the property in 1977, Goal 3 applied directly to his property.<sup>3</sup>

Under the Goal 3 standard in effect in 1977, a land division involving property where the local zoning was not acknowledged required that the resulting parcels must be of a size "appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area" (Goal 3). Further, ORS 215.263 (1975 edition) required that all divisions of land subject to the provisions for EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). Thus, the opportunity to divide the property when Lue Woolstenhulme acquired it in 1977, was limited to land divisions consistent with Goal 3, which required the resulting parcels to be: (1) "appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area;" and (2) shown to comply with the legislative intent set forth in ORS 215.243.

As for dwellings allowed under EFU zoning as required by Goal 3 in 1977, farm dwellings were allowed if determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1975 edition). Before a farm dwelling could be established on "Agricultural Land," the farm use to which the dwelling related must "be existing."<sup>4</sup> Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use. ORS 215.213(3) (1975 edition) authorized a non-farm dwelling only where the dwelling was compatible with farm uses, consistent with the intent of ORS 215.243, did not interfere seriously with accepted farming practices on adjacent lands, did not materially alter the stability of the land use pattern for the area, and was situated on land generally unsuitable for production of farm crops and livestock (ORS 215.213(3) (1975 edition)).

No information has been provided showing that the claimant's request to divide the property into five-acre lots for residential development complies with either the Goal 3, standard for lot size for farm parcels, or the standards for new parcels under ORS 215.263 (1975 Edition). The claimant has not provided any information to document that the proposed division of the subject 27.63-acre property could be divided to create approximately five-acre parcels in a manner that meets the requirement of Goal 3 and is (1) "appropriate for the continuation of the existing

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<sup>3</sup> Statewide Planning Goal 3 became effective on January 25, 1975, and was applicable to legislative land use decisions and some quasi-judicial land use decisions where site-specific goal provisions applied prior to the Commission's acknowledgment of the County's Goal 3 program on February 9, 1979 (*Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, *rev den* 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985)). After the County's plan and land use regulations were acknowledged by 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, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same in substance, the applicable rules must be interpreted and applied by the County in making its decision (*Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992)).

<sup>4</sup> *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) *affirmed without opinion* 70 Or App 179 (1984,) and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33 (1988).

Commercial Agricultural Enterprise in the area; and (2) shown to comply with the legislative intent set forth in ORS 215.243.” Nor has any information been provided concerning whether dwellings comply with the approval standards for dwellings under ORS 215.213 in effect at the time the claimant acquired the property in 1977.

### **Conclusions**

The zoning requirements, minimum lot size and dwelling standards established by Goal 3 (Agricultural Lands) (OAR 660-015-0000(3)) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33 were all enacted after Lue Woolstenhulme acquired ownership of the subject property in April 1977, and do not allow the division of the property. However, it is not clear that the property could have been divided for residential development in 1977.

Specifically, based on the information provided in this claim and the Jackson County Staff report dated April 12, 2005, it is not clear that the 27.63-acre property that is the subject of this claim could be divided into approximately five-acre parcels, with dwellings developed on each lot, pursuant to the standards applicable under ORS 215 and Goal 3 in 1977. Nor is it clear that approximately five-acre parcels with dwellings developed on each lot would be “appropriate for the continuation of the existing commercial agricultural enterprise within the area” or consistent with the Agricultural Land Use Policy in ORS 215.243. Further, because of the quality of the soil, the parcel is not considered “generally unsuitable for the production of farm crops and livestock,” and therefore it is not clear that the property would have been eligible for a non-farm dwelling pursuant to the applicable standards in ORS 215.215(3) that applied in 1977.

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 estimate of \$425,180, as the reduction in the property’s fair market value, as a result of current regulations. This estimate supported by a fair market comparison of the property to other residential properties in the area, prepared by an area realtor.

## **Conclusions**

As explained in Section V.(1) of this report, the current owner is Lue Woolstenhulme who acquired the property on April 27, 1977. Under Ballot Measure 37, Lue Woolstenhulme is 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 report, laws adopted since the claimant acquired the property may restrict division of the subject property. The claimant estimates the reduction in value due to the restrictions to be \$425,180.

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 laws. 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 Jackson County's EFU zone and the related provisions of state law that are claimed to restrict use of the property and reduce its fair market value, including Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33. With the exception of provisions of Goal 3 and 215 in effect in 1977, those specified laws are not exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimant acquired the property.<sup>5</sup>

## **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 farm 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. Provisions of Goal 3 and ORS 215 in effect when the claimant acquired the property in 1977 are exempt under Section 3(E) of the Measure and will continue to apply to the property.

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<sup>5</sup> The claim also lists ORS 92 as restricting the use of the property. To the extent any provisions of that statute could be construed as restricting the use of the property, ORS 92 was in effect when the claimant acquired the property and therefore is exempt under Section 3(E).

Other laws in effect when the claimant acquired the property are also 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 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 she 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 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 a 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 set forth in this report, laws enforced by the Commission or the department, restrict the division of the subject property into approximately five-acre parcels, and residential development of those parcels. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by \$425,180. However, because the claim does not provide an appraisal or other specific documentation establishing how the specified restrictions reduce the fair market value of the property, and because the level of development permitted when the claimant acquired the property is not clear, 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 Lue Woolstenhulme to use the subject property for a use permitted at the time she acquired the property on April 27, 1977.

## **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 Lue Woolstenhulme's division and development of the 27.63-acre property: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33, enacted after April 27, 1977. These land use regulations will not apply to Lue Woolstenhulme's use of his property only to the extent necessary to allow him a use permitted at the time she acquired the property on April 27, 1977.
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 April 27, 1977. On that date, the property was subject to applicable provisions of Goal 3 and ORS 215 then in effect.
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, 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 15, 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.