

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

**Final Staff Report and Recommendation
August 15, 2005**

STATE CLAIM NUMBER: M118324

NAME OF CLAIMANTS: Kim D. Ward, L.L.C.
Kim D. Ward
Sally Ward
Dayna Ward
Justin Ward
Jessica Ward
Donna Moore

MAILING ADDRESS: 60801 Brosterhous Road
Bend, Oregon 97702

IDENTIFICATION OF PROPERTY: Township 24S, Range 9E, Section 30CC
Tax Lot 1700, Klamath County

Township 24S, Range 9E, Section 31
Tax Lots 200 and 400, Klamath County

Township 24S, Range 9E, Section 31BB
Tax Lot 300, Klamath County

Township 24S, Range 9E, Section 31BC
Tax Lot 200, Klamath County

OTHER CONTACT INFORMATION: Donald Joe Willis (Attorney)
Schwabe, Williamson & Wyatt, PC
1211 Southwest Fifth Avenue
Portland, Oregon 97204-3795

DATE RECEIVED BY DAS: February 23, 2005

180-DAY DEADLINE: August 22, 2005

I. CLAIM

Kim D. Ward, L.L.C., and its owners, the claimants, seeks compensation in the amount of \$750,000 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 claimants desire compensation or the right to construct mixed-use residential/commercial/industrial development on five tax lots in T2S R9E, identified as: tax lots 200 and 400 in section 31; tax lot 300 in section 31BB; tax lot 1700 in section 30CC; and tax lot 200 in section 31BC (the “subject property”). Tax lot 1700 in section 30CC is hereafter described in this report as the “Kim Ward property.” The other tax lots that are part of the subject property are hereafter described in this report as the “LLC property.” These tax lots contain approximately 142 acres of land located along Highway 97, near the town of Crescent in Klamath County. (See claim.)

I. 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 allow the Kim D. Ward L.L.C. to use the LLC property for a mixture of residential, commercial and industrial uses: the applicable provisions of Goal 4 (Forest Lands), Goal 14 (Urbanization), ORS 92 and 215, and OAR 660 that became effective after December 28, 1994. These laws will not apply to Kim D. Ward, L.L.C.’s use of the LLC property only to the extent necessary to allow it to use the LLC property as permitted at the time it acquired the LLC property on December 28, 1994. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Commission or the department not apply to allow Kim D. Ward to use the Kim D. Ward property for a mixture of residential, commercial and industrial uses: the applicable provisions of Goal 4 (Forest Lands), Goal 14 (Urbanization), ORS s 92 and 215 and OAR 660 that became effective after September 1, 1968. These laws will not apply to Kim D. Ward’s use of the Kim D. Ward property only to the extent necessary to allow Kim D. Ward to use the Kim D. Ward property as permitted at the time Kim D. Ward acquired an interest in the Kim D. Ward property on September 1, 1968. The Department recommends that the claim be denied as to the other claimants: Sally Ward, Dayna Ward, Justin Ward, Jessica Ward and Donna Moore. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 9, 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, there was one written comment, evidence or information 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

The claim was submitted to DAS Risk Management Division on February 23, 2005, for processing under OAR 125, division 145. The claim identifies multiple sections of the following state laws: ORS 92, ORS 215 and OAR 660. 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

A letter from Donald Joe Willis, attorney for the claimant, and other materials in the department’s file (including a chain of title report provided by Mr. Willis) indicate that Mr. Kim D. Ward acquired an interest in the subject property on September 1, 1968, via a land sale contract. Information from the claimants and from the Klamath County Assessor indicates that Mr. Ward owned an interest in the subject property continuously, until he conveyed four of the tax lots to the Kim D. Ward, L.L.C. on December 28, 1994. Records from the

Klamath County Assessor's office indicate that Tax Lot 1700 of Tax Map T24, R09, Section 30CC, is still owned by Kim D. Ward.

The Secretary of State, Corporation Division, indicates that Kim D. Ward, L.L.C., was initially formed on December 12, 1994.¹ Additional information submitted with the claim indicates that Kim D. Ward, L.L.C., continues to own four of the five tax lots, and remains a limited liability company in good standing with the State of Oregon. According to material submitted by the claimants, Kim Ward, Jessica Ward, Sally Ward, Justin Ward, Dayna Ward, and Donna Moore are members of the Kim D. Ward, L.L.C. According to the title information submitted, and the county assessor's office, the LLC property is owned by the Kim D. Ward, L.L.C. and none of the individual claimants are shown as being present owners of the LLC property.

Conclusions

Based on the record currently before the department, Kim D. Ward, L.L.C., is the current "owner" of the LLC property (the four tax lots, described as T24S, R9E, Section 31, tax lots 200 and 400; Section 31BB, tax lot 300; and Section 31 BC, tax lot 200, Klamath County, containing approximately 141-acres), as that term is defined in Section 11(C) of the Measure. Kim D. Ward is the current "owner" of one tax lot, described at T 24S, R9E, section 30CC, tax lot 1700 (the "Kim D. Ward property").

Kim D. Ward, L.L.C., became the present owner of the L.L.C. property on December 28, 1994. Kim D. Ward is a "family member" of Kim D. Ward, L.L.C., as that term is defined by Section 11(A) of the Measure. Kim D. Ward acquired the L.L.C. property on September 1, 1968.

Kim D. Ward became the present owner of the Kim D. Ward property on September 1, 1968.

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.

Findings of Fact

The claim states that:

"The Ward family's plan for the property is to develop a mixture of residential, commercial and industrial uses, with suitable access and signage along the state highway frontage."

¹ Family members mentioned in the claim letter as having an interest in the property (Kim Ward, Jessica Ward, Sally Ward, Justin Ward, Dayna Ward, Donna Moore) appear to be members of the limited liability company.

The claim further states that:

“The State of Oregon DLCD had no land use regulations in effect when the property was first acquired by the Ward family, nor did the State of Oregon have land use regulations in effect that restricted access to this property from the public highway, posting of large signs along the highway, or development for a mixture of residential and non-residential uses.”

In claims submitted to DAS, the Oregon Department of Forestry and the department, the claimants cite several sections of Oregon Administrative Rules and Oregon Revised Statutes, including the following:

ORS 629	Department of Forestry
ORS 526	Forestry Administration
ORS 527	Insect and Disease Control; Forest Practices
ORS 92	Subdivisions and Partitions
ORS 215	County Planning; Zoning; Housing Codes
OAR 660	Land Conservation and Development
ORS 374	Control of Access to Public Highways
ORS 377	Highway Beautification; Motorist Information Signs
OAR 731-015	Department of Transportation – Procedural Rules
OAR 734-051	Department of Transportation – Highway Approaches, Access Control, Spacing Standards and Medians

The claim lists a large number of specific land use regulations as potentially restricting the use of the subject property for the very general uses stated in the claim. Included in that list are Statewide Planning Goal 4 (Forest Lands) and sections of OAR 660, ORS 92 and ORS 215 as regulations enacted by the Commission or the department, which restrict the use of the subject property described in the claim letter.

Klamath County zoning on the parcels is a combination of Forestry (F) and Rural Residential (R-2). The subject property is partially Forest Land, and has been designated as Forestry (F) under Klamath County’s comprehensive plan and zoning, pursuant to Goal 4 and implementing regulations in OAR 660, division 6. The portion of the subject property that is zoned for forest use is also subject to applicable provisions of ORS 215 restricting land divisions and residential development of forest land.

The Klamath County comprehensive plan designates Tax Lots 200 and 400 of County Tax Map T24, R09, Section 31, as both Forest Land in compliance with Statewide Planning Goal 4 and Rural Residential (R-2). Tax Lots 200 of County Maps T24, R09, Sections 31BB and 31BC are designated for a combined zoning of Forestry (F) and Rural Residential (R-2). Tax Lot 1700 of County Map T24 R09, Section 30CC is zoned Rural Residential (R-2). The Commission acknowledged Klamath County’s comprehensive plan and land use regulations to be in compliance with the Statewide Planning Goal 4 on June 1, 1984. The Commission acknowledged exception areas of the Klamath County comprehensive plan, including those areas zoned for Rural Residential (R-2) development, on October 4, 1985.

Goal 4 became effective on January 25, 1975, and required Forest Lands, 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. 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).)

The provisions of OAR 660, division 6, and ORS 215 related to Forest Lands limit the division of the portion of property that is zoned Forestry into parcels smaller than 80-acres and strictly limit the approval of dwellings on those parcels. 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. The Klamath County Forestry zone (F) is an acknowledged forest zone and its zoning standards are based on the standards contained in Statewide Planning Goal 4 and OAR 660, division 6.

Statewide Planning Goal 4 and current 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 division of the subject property for the purpose of sale and development.

The claim also identifies OAR 660, division 4, applicable to the parcels zoned Rural Residential (R-2), which restricts the minimum allowable lot size to two-acres for a single-family dwelling in rural residential zones. As a result of a 1986 Oregon Supreme Court decision, in 2000 the Commission amended Goal 14 (Urbanization) and adopted OAR 660-004-0040, which became effective on October 4, 2000.² The rule provides that, after October 4, 2000, a county minimum lot size in a rural residential area (including the parcels subject to this claim that are zoned R-2 by Klamath County) shall not be amended to allow a smaller minimum lot size without taking an exception to Goal 14 (OAR 660-004-0040(6)). This rule would not allow the subject parcels zoned R-2 to be divided without an exception to Goal 14.

The claim indicates that the claimants also wish to use the subject property for industrial and commercial uses, as well as residential. Statewide Land Use Planning Goal 14 and its implementing rules at OAR 660-004-0022 limit industrial and commercial development on land outside of an acknowledged urban growth boundary to rural levels, and may limit the claimants' intended use(s) of the subject property.

When Kim D. Ward acquired the subject property in 1968, it was not subject to the provisions of Statewide Planning Goals 4 and 14, or to the provisions of OAR 660, divisions 4 and 6. However, provisions of ORS 92, which generally prohibit the sale of property unless it is a lawfully created lot or parcel were adopted prior to 1968, when Kim D. Ward acquired the subject property.

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

Conclusions

The 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 Kim D. Ward acquired an interest in the subject properties in 1968.

Goal 14, OAR 660-004-0022 and OAR 660-004-0040, restrict the density of residential, commercial and industrial development outside of an urban growth boundary. Goal 14 became effective in 1975; OAR 660-004-0022 first became effective in 1983; OAR 660-004-0040 became effective on October 4, 2000, all after Kim D. Ward acquired the subject property. Except for the provisions of ORS 92, which generally were in effect when Kim D. Ward acquired the property, Statewide Planning Goals 4 and 14, ORS 215.705 to 215.755 and 215.780, OAR 660-004-0040, 660-004-0022 and OAR 660, division 6, were adopted since 1968, and restrict the use of the property relative to the uses permitted when Kim D. Ward acquired the property in 1968.

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 claimant's 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 a 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 asserts an estimated reduction in value of \$750,000 due to restrictive land use regulations. The claim letter does not include an estimate of the property's current fair market value nor does the claim include an estimate of the value of the property in the absence of restricting land use regulations. The claim does not include an appraisal or other analyses to support the claimants' estimates, although a letter from the claimants' attorney, submitted with the claim, indicates that an appraisal was prepared to assess the value of the property.

Conclusions

As explained in section V.(1) of this report, Kim D. Ward, L.L.C., is the current owner of four of the tax lots cited in the claim, and it acquired this portion of the property in 1994. Kim D. Ward is the current owner of one of the tax lots cited in the claim, and he acquired an interest in it in 1968. Kim D. Ward also is a "family member" of the Kim D. Ward, L.L.C., and he acquired an

interest in the four tax lots now owned by the Kim D. Ward, L.L.C. in 1968. Thus, under Ballot Measure 37, Kim D. Ward, L.L.C., is due compensation for land use regulations that restrict its use of the LLC property in a manner that reduces its fair market value. And, Kim D. Ward is due compensation for land use regulations that restrict his use of the Kim D. Ward property in a manner that reduces its fair market value. The claim estimates the loss in value at \$750,000. Without an appraisal based on the value of the property for a specific development proposal, it is not possible to substantiate the dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

4. Exemptions under Section 3 of Measure 37

Ballot Measure 37 does not apply to certain land use regulations. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The claim generally identifies provisions of Statewide Planning Goals 4 and 14, OAR 660, divisions 4 and 6, and ORS 92 and 215 as restricting the use of the property. Under section 3(E) of Measure 37, the measure does not apply to laws enacted prior to the date of acquisition of the property by the owner or a family member of the owner. Most of the regulations identified in the claim as restricting development of the property are not exempt under the provisions of subsection 3(E) of Measure 37. However, those laws, including provisions of ORS 92 that were adopted prior to Kim D. Ward's acquisition of the subject property in 1968, are exempt under subsection 3(E) of the Measure.

While not directly raised by the claimant, the department notes that ORS 215.730 and OAR 660, division 6 include standards for siting dwellings in forest zones. This provision includes 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..." The department finds that siting standards for dwellings in forest zones in ORS 216.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under subsection (3)(B) of Measure 37.

Conclusions

Laws in effect when the claimants acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. Provisions of ORS 215 and ORS 92 that were adopted prior to Kim D. Ward's acquisition of the subject property in 1968 are exempt under subsection 3(E) 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 because they are exempt under subsection 3(B) of Measure 37. 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.

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. Claimants should be aware that the less information they have provided to the department in their claim concerning the nature of the use they wish to carry out, 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.

VII. 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 owners to carry out a use of the property allowed at the time the present owners acquired the property. The Commission has by rule 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 development of the subject property for a mixture of residential, commercial and industrial uses, and reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$750,000, a figure substantiated by claimant estimates and based on an appraisal that is not included in the claim. Without an appraisal based on the value of the property for development, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, 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.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Kim D. Ward to use the Kim D. Ward property, and the Kim D. Ward, L.L.C. to use the LLC property, for a use permitted at the time they acquired the respective properties in 1968 and 1994.

When the LLC acquired the LLC property on December 28, 1994, the tax lots were subject to Statewide Planning Goals 4 and 14, OAR 660-004-0022, and the applicable provisions of ORS 92, ORS 215 and OAR 660, division 6.

When Kim D. Ward acquired the Kim D. Ward property on September 1, 1968, the tax lot was subject to the provisions of ORS 92 that were then in effect.

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, as applicable, to Kim D. Ward, L.L.C.'s development of the LLC property for a mixture of residential, commercial and industrial uses: the applicable provisions of Statewide Planning Goals 4 and 14, their implementing rules at OAR 660-006, OAR 660-004-0022 and 660-004-0040, and ORS 92 and ORS 215.705 to 215.755 and 215.780, that became effective subsequent to December 28, 1994.

In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws, as applicable, to Kim D. Ward's development of the Kim D. Ward property for a mixture of residential, commercial and industrial uses: the applicable provisions of Statewide Planning Goals 4 and 14, their implementing rules at OAR 660-006, OAR 660-004-0022 and 660-004-0040, ORS 92, ORS 215.705 to 215.755 and 215.780, that became effective subsequent to September 1, 1968.

2. The action by the State of Oregon provides the state's authorization to the claimants to develop the subject property for a mixture of residential, commercial and industrial uses. The Kim D. Ward, L.L.C.'s use of the LLC property will be subject to those standards in effect when the LLC became the present owner of the LLC property. Those standards include the provisions of Statewide Planning Goals 4 and 14, OAR 660-004-0022, ORS chapters 92 and 215, and OAR 660-006 in effect on December 28, 1994. Mr. Kim D. Ward's use of the Kim D. Ward property will be subject to those standards in effect when he became the present owner of the Kim D. Ward property. Those standards include the provisions of ORS 92 in effect on September 1, 1968.

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 any of 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 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 excepted 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 the claimants 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 July 18, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.