

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES, THE DEPARTMENT  
OF LAND CONSERVATION AND DEVELOPMENT OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM )  
FOR COMPENSATION UNDER )  
BALLOT MEASURE 37 (CHAPTER )  
1, OREGON LAWS 2005) OF )  
Walter Stone, CLAIMANT )

FINAL ORDER  
CLAIM NO. M 118379

Claimant: Walter Stone (the Claimant)

Property: Tax Lot 100, T.2S, R.1E, Section 22, W.M., Clackamas County

Claim: The demand for compensation and any supporting information received from the Claimant by the State of Oregon (the Claim).

Claimant submitted the Claim to the State of Oregon under Ballot Measure 37 (2004) (Oregon Laws 2005, Chapter 1) (hereafter, Measure 37). Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Walter Stone's division and development of the 39.17-acre property: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215, and OAR 660, division 6 enacted after December 18, 1973. These land use regulations will not apply to Walter Stone's use of the property only to the extent necessary to allow him a use permitted at the time he acquired the property on December 18, 1973.
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 December 18, 1973. On that date, the property was subject to applicable provisions of ORS 215 including the Interim Statewide Planning Goals 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.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under Measure 37, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under Measure 37, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:

  
\_\_\_\_\_  
Lane Shetterly, Director  
DLCD

Dated this 21<sup>st</sup> day of October 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
\_\_\_\_\_  
Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 21<sup>st</sup> day of October 2005.

## **NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF**

You are entitled, or may be entitled, to the following judicial remedies:

1. Judicial review under ORS 293.316: Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County and the Circuit Court in the county in which you reside.
3. A cause of action under Oregon Laws 2005, chapter 1 (Measure 37 (2004)): A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

### **FOR INFORMATION ONLY**

The Oregon Department of Justice has advised the Department of Land Conservation and Development that “[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost.”

### **FOR INFORMATION ONLY**

The Marion County Circuit Court has issued an opinion declaring that 2004 Oregon Ballot Measure 37 (2005 Or Laws chapter 1) is invalid. As of the date of this order, the court has not entered a judgment that gives legal effect to the court's opinion. Once a judgment is entered by the court, any rights granted by this order may be void or voidable.

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

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

October 21, 2005

**STATE CLAIM NUMBER:** M118379

**NAME OF CLAIMANT:** Walter Stone

**MAILING ADDRESS:** 2218 SW Redfern Avenue  
Gresham, Oregon 97080

**PROPERTY IDENTIFICATION:** Township 3S, Range 3E, Section 33  
Tax Lot 201  
Township 3S, Range 3E, Section 34  
Tax Lot 600  
Clackamas County

**DATE RECEIVED BY DAS:** May 2, 2005

**180-DAY DEADLINE:** October 29, 2005

**I. SUMMARY OF CLAIM**

The claimant, Walter Stone, seeks compensation in the amount of \$1,317,722 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 39.17-acre property into eight parcels of approximately five acres and to develop a single-family residential dwelling on each parcel. The property is located across from 21036 South Lower Highland Road near Beavercreek, Clackamas County.

**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 Walter Stone's division of the property for residential development: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215, and OAR 660, division 6 enacted after December 18, 1973. These laws will not apply to the claimant only to the extent necessary to allow Walter Stone a use of the property permitted at the time he acquired it on December 18, 1973. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On June 3, 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 May 2, 2005, for processing under OAR 125, division 145. The claim identifies OAR 660-006-0026, OAR 660-006-0027, ORS 215.705 and ORS 215.780 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, Walter Stone, acquired the subject property on December 18, 1973, as reflected by a Deed included with the claim.<sup>1</sup> Walter Stone’s current ownership of the subject property has been confirmed by the Clackamas County Assessor’s Office.

### Conclusions

The claimant, Walter Stone, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of December 18, 1973.

### 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 zoning and state laws “won’t allow division or construction of single-family homes on the tax lots and increased minimum lot size and prescribes dwellings allowed.” The claim identifies Clackamas County’s Timber District (TBR) zone, OAR 660-006-0026(1)(a) OAR 660-006-0027(1), ORS 215.705 and ORS 215.780 as laws that restrict the use of the property.

The claim is based on the County’s timber resource zone and the applicable provisions of state law that require such zoning. Statewide Planning Goal 4 (Forest Lands), (OAR 660-015-0000(4)), and laws applicable to land zoned for forest use under ORS 215, including ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6, restrict the division and residential development of the subject property. Goal 4 became effective on January 25, 1975, and required forest land, as defined by the goal, to be zoned for forest use. (See statutory and rule history under OAR 660-015-0000(4).) The forest land administrative rules (OAR 660, division 6) became effective September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993).

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<sup>1</sup> A copy of a Bargain and Sale Deed dated January 16, 1974 included copies of both the December 18, 1973 deed and a January 16, 1974 deed in which the claimant also acquired an undivided one-half interest in the subject property.

OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes. (See citations to rule history under OAR 660-015-0000(4)).

Together, ORS 215.705 to 215.755, 215.780 and OAR 660, division 6 as applied by Goal 4, 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 dwellings on them.

The claimant acquired the subject property after the October 4, 1973 the effective date of Senate Bill 100, but prior to the adoption of the Statewide Planning Goals and their implementing statutes and rules. During the period between October 4, 1973 and January 25, 1975, when the Statewide Planning Goals became effective, ORS 197.175(1) and 197.280 (1973 edition) required, in addition to any local plan or zoning provisions, the application of Interim Land Use Goals set forth in ORS 215.515 (1973 edition) to the exercise of planning and zoning responsibilities prior to the effective date of the Statewide Planning Goals (see *Peterson v. Klamath Falls*, 279 Or 249 (1977)).<sup>1</sup>

No information has been provided establishing whether or to what extent the claimant's desired division of the property for residential development complies with the interim planning goals set forth in ORS 215 (1973 edition) in effect at the time the claimant first acquired the property on October 19, 1973.

### **Conclusions**

The minimum lot size and dwelling standards established by Statewide Planning Goal 4, OAR 660-006-0026 and OAR 660-006-0027, and applicable provisions of ORS 215 enacted after claimant acquired the property restrict claimant's use of the property relative to the uses allowed at the time he acquired the property. However, it is unclear whether or to what extent the claimant's requested level of development complies with the standards in effect when he acquired the property on December 18, 1973, including provisions of ORS 215 and the interim planning goals.

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

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<sup>1</sup> The "interim" land use goals are set forth in ORS 215.515(a) to (j) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state," and (j) "To ensure that development of properties within the state is commensurate with the character and the physical limitations of the land." (ORS 215.515, 1973 edition).

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 \$1,317,722 as the reduction in the property’s fair market value, due to current regulations. This estimate is based on current sales of similar sized properties.

#### **Conclusions**

As explained in Section V.(1) of this report, the current owner is Walter Stone, who acquired the property on December 18, 1973. Under Ballot Measure 37, Walter Stone 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 restrict division of the subject property. The claimant estimates the reduction in value due to the restrictions to be \$1,317,722.

Without an appraisal or other documentation and without verification that the requested use was allowed under the standards in effect when the claimant acquired the property, it is not possible to substantiate the specific dollar amount that 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 is based on Clackamas County’s timber resource zone and related provisions of state law that have restricted the use of the property and reduced its fair market value. These include Statewide Planning Goal 4 and applicable provisions of ORS 215 and OAR 660, division 6. These laws are not exempt to the extent they were enacted after the claimant acquired the property on December 18, 1973. Applicable provisions of ORS 215 in effect when claimant acquired the property, including the Interim Statewide Planning Goals, are exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimants acquired the property.

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 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under Section (3) of Measure 37.

### **Conclusions**

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that the general statutory, goal and rule restrictions on residential development and use of forest land apply to the 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 ORS 215 and the Interim Statewide Planning Goals in effect when the claimant acquired the property in 1973 are exempt under Section 3(E) of the Measure and will continue to apply to the property.

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. The restrictions in ORS 215.730 and provisions of OAR 660, division 6, that establish fire protection standards for dwellings in forest zones are also exempt under Section 3(B) of the Measure and will continue to apply to the subject 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 Sections 3(A) to 3(D) of Measure 37. For example, the siting standards for forest dwellings related to fire protection are exempt under Section 3(B) 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 he has provided to the department in the 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 claimant's division of his property into eight parcels of approximately five- acres each and development of a single-family residential dwelling on each parcel. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$1,317,722. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the property, and without verification that the requested use was allowed under the standards in effect when the claimant acquired 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 Walter Stone to use the subject property for a use permitted at the time he acquired the property on December 18, 1973.

### **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 Walter Stone's division and development of the 39.17-acre property: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215, and OAR 660, division 6 enacted after December 18, 1973. These land use regulations will not apply to Walter Stone's use of the property only to the extent necessary to allow him a use permitted at the time he acquired the property on December 18, 1973.
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 December 18, 1973. On that date, the property was subject to applicable provisions of ORS 215 including the Interim Statewide Planning Goals 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 October 4, 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.