

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

IN THE MATTER OF THE CLAIM ) FINAL ORDER  
FOR COMPENSATION UNDER ) CLAIM NO. M 118322  
BALLOT MEASURE 37 (CHAPTER 1, )  
OREGON LAWS 2005) OF )  
Linden Longbrake, CLAIMANT )

Claimant: Linden Longbrake (the Claimant)

Property: Tax Lot 1400, T.25S, R.4W, Section 6, W.M., Douglas 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 Linden Longbrake's division and development of the 36.12-acre property: applicable provisions of Statewide Planning Goal 3, ORS 215.213 and 215.780, and OAR 660, division 33, enacted after December 18, 1975. These land use regulations will not apply to Linden Longbrake's use of property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property on December 18, 1975.
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, 1975. On that date, the property was subject to applicable provisions of Statewide Planning 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.

This Order is entered by the Deputy 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 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



George Naughton, Deputy Director  
DLCD

Dated this 6<sup>th</sup> day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:



David Hartwig, Administrator  
DAS, State Services Division

Dated this 6<sup>th</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.”

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

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

October 6, 2005

**STATE CLAIM NUMBER:** M118322

**NAME OF CLAIMANT:** Linden C. Longbrake

**MAILING ADDRESS:** 12480 Driver Valley Road  
Sutherlin, Oregon 97479

**PROPERTY IDENTIFICATION:** Township 25S, Range 4W, Section 6  
Tax Lot 1400  
Douglas County

**OTHER CONTACT INFORMATION:** Dorothy L. Longbrake  
12480 Driver Valley Road  
Sutherlin, OR 97479

**DATE RECEIVED BY DAS:** April 15, 2005

**180-DAY DEADLINE:** October 12, 2005

**I. SUMMARY OF CLAIM**

The claimant, Linden Longbrake, seeks compensation in the amount of \$390,512 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 partition the 36.12-acre property into three parcels of at least ten-acres, and to develop a dwelling on each parcel. The property is located at 12480 Driver Valley Road, near the city of Sutherlin, in Douglas 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 Linden Longbrake's division and development of the subject property: Statewide Planning Goal 3 (Agricultural Lands), ORS 215.283, 215.284, 215.780, and applicable provisions of OAR 660, division 33, enacted after December 18, 1975. These laws will not

apply to the claimant only to the extent necessary to allow Linden Longbrake a use of the property permitted at the time he acquired it on December 18, 1975. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On April 21, 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, two written comments, evidence or information were received in response to the 10-day notice.

The comments are relevant to when the claimant became the present owner of the property. The comments have been considered by the department in preparing this report. (See comment letters in the department's claim file.)

### **IV. TIMELINESS OF CLAIM**

#### **Requirement**

Ballot Measure 37, Section 5, requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of the Measure (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of the Measure (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

#### **Findings of Fact**

This claim was submitted to DAS on April 15, 2005, for processing under OAR 125, division 145. The claim identifies Douglas County's Exclusive Farm Use-Grazing (FG) zoning that restricts the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

## **Conclusions**

The claim has been submitted within two years of December 2, 2004; the effective date of Measure 37, based on land use regulations adopted prior to December 2, 2004, and is therefore timely filed.

## **V. ANALYSIS OF CLAIM**

### **1. Ownership**

Ballot Measure 37 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in the Measure. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

### **Findings of Fact**

The claimant, Linden Longbrake, acquired the subject property on December 18, 1975, as reflected by a Warranty Deed included with the claim. Information provided by the Douglas County Assessor indicates that Linden and Dorothy Longbrake are the current owners of the subject property.<sup>1</sup>

### **Conclusions**

The claimant, Linden Longbrake, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of December 18, 1975.

### **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 property is zoned FG zone minimum parcel of 80 acres can’t place dwelling (sic).” In a department staff conversation with the claimant on August 11, 2005, Linden Longbrake indicated his intent to divide the property into three parcels, the smallest of which would contain not less than 10 acres, and to develop each parcel with a dwelling.

The claim is based, generally, on Douglas County’s current FG zone and the applicable provisions of state law that require such zoning. The claimant’s property is zoned Exclusive

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<sup>1</sup> Dorothy Longbrake is identified by the county as a current owner of the subject property but is not listed as a claimant in this claim for compensation filed by Linden Longbrake.

Farm Use-Grazing 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.<sup>2</sup> Goal 3 became effective on January 25, 1975, and required that Agricultural Lands, as defined by the Goal, be zoned Exclusive Farm Use (EFU) pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 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 smaller 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.)

The claimant acquired the subject property on December 18, 1975. At that time the property was zoned under Douglas County's General Agriculture (AG), a qualified farm use zone under ORS 215. However, on that date, Douglas County's Comprehensive Plan and land use regulations had not been acknowledged for compliance with the statewide planning goals. The Commission acknowledged the Douglas County Comprehensive Plan and land use regulations on December 21, 1982. Since the Commission had not acknowledged the County's plan and land use regulations, including the AG zone, when Mr. Longbrake acquired the property in 1975, Statewide Planning Goal 3 applied directly to property.<sup>3</sup> In 1975, the Goal 3 standards for a land division involving farm property where the local zoning was not acknowledged, were that the resulting parcels must be of a size that are "appropriate for the continuation of the existing commercial agricultural enterprise in the area" (Statewide Planning Goal 3). Further,

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<sup>2</sup> The claimant's property is Agricultural Land because it contains predominantly NRCS (Natural Resources Conservation Service) Class I-IV Soils.

<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 prior to the Commission's acknowledgment of the County's Goal 3 program on December 21, 1982 (*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

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 Linden Longbrake acquired it in 1975, was limited to land divisions consistent with Goal 3, which required the resulting farm or non-farm 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 1975, 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 to establish whether the claimant’s requested level of development, complies with either the Goal 3 standard for lot size or for farm parcels, or the standards for new parcels under ORS 215.263 (1975 edition). Nor has any information been provided concerning whether additional dwellings comply with the approval standards for dwellings under ORS 215.213, in effect at the time that Linden Longbrake acquired the property in 1975.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and current provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were enacted prior to Linden Longbrake’s acquisition of the subject property in December 1975. Current land use regulations, do not allow further division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by Linden Longbrake in 1975. In 1975, the property was subject to compliance with the Statewide Planning Goals, as described above. It is not clear whether the claimant’s requested level of development would have been permitted at the time he acquired the property.

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

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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).

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 the property's reduction in fair market value as a result of current regulations that restrict the use of the property relative to uses permitted when the claimant acquired the property as \$390,512. Information from the Douglas County Assessor indicates that the property's current assessed market value is \$59,488.

#### **Conclusions**

As explained in Section V.(1) of this report, Linden Longbrake is a current owner who acquired the property on December 18, 1975. Under Ballot Measure 37, Linden Longbrake 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.

Based on the submitted information, the department determines that there may have been some reduction in the fair market value of the subject property as a result of land use regulations enacted or enforced by the Commission or the department. The Claimant estimates the reduction in value to be \$390,512. However, without an appraisal or other analysis, it is not possible to verify the Claimant's estimate of reduction in value.

### **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 land use regulations that restrict the use of the property relative to what would have been allowed in 1975, when the property was acquired by Linden Longbrake. These provisions include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Douglas County has implemented through its current EFU-FG zone. To the extent these regulations were enacted after December 18, 1975, they are

not exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimant acquired the property. The provisions of Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 in effect on December 18, 1975, are exempt under Section 3(E) of Measure 37, and will continue to apply to 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 statutory, goal and rule restrictions on residential development and use of farm land apply to the claimant's use of the property. These laws are not exempt under Section 3(E) of Measure 37, to the extent they were enacted after December 18, 1975. Provisions of Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215, in effect when the claimant acquired the property in 1975, 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 also 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 he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his use of the property.

## **VI. FORM OF RELIEF**

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

### **Findings of Fact**

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the division of the subject property into three parcels of at least 10-acre and the development of a dwelling on each parcel. The claim asserts that these laws have reduced the fair market value of the property by \$390,512.

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 Linden Longbrake to use the subject property for a use permitted at the time he acquired the property on December 18, 1975.

### **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 Linden Longbrake's division and development of the 36.12-acre property: applicable provisions of Statewide Planning Goal 3, ORS 215.213 and 215.780, and OAR 660, division 33, enacted after December 18, 1975. These land use regulations will not apply to Linden Longbrake's use of property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property on December 18, 1975.
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, 1975. On that date, the property was subject to applicable provisions of Statewide Planning 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.