

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 118359  
BALLOT MEASURE 37 (CHAPTER 1, )  
OREGON LAWS 2005) OF )  
Betty Olayos, CLAIMANT )

Claimant: Betty Olayos (the Claimant)

Property: Tax Lot 900, T 3S, R 5E, S 4, Clackamas County (the Property)

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 Betty Olayos' division of the 9.6-acre property into approximately one-acre parcels: applicable provisions of Statewide Planning Goal 14 and OAR 660-004-0040. These land use regulations will not apply to the claimant's use of her property only to the extent necessary to allow the claimant a use permitted at the time she acquired the property on August 3, 1973.
2. The action by the State of Oregon provides the state's authorization to the claimant to use her property subject to the standards in effect on August 3, 1973.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under Section (3) of the Measure.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for her to obtain a decision under Measure 37, from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under Measure 37, from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

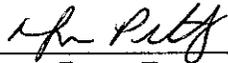
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under Measure 37, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under Measure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

FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:

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

Dated this 18<sup>th</sup> day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

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

Dated this 18<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."

### **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 18, 2005

**STATE CLAIM NUMBER:** M118359

**NAME OF CLAIMANT:** Betty Olayos

**MAILING ADDRESS:** 4807 NE 75<sup>th</sup> Avenue  
Portland, Oregon 97218

**PROPERTY IDENTIFICATION:** Township 3S, Range 5E, Section 4  
Tax Lot 900  
Clackamas County

**DATE RECEIVED BY DAS:** April 26, 2005

**180-DAY DEADLINE:** October 23, 2005

**I. SUMMARY OF CLAIM**

The claimant, Ms. Betty Olayos, seeks compensation of between \$800,000 and \$1,300,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the approximately 9.6-acre property into approximately one-acre parcels and to develop a dwelling on each parcel. The property is located at SE Wildcat Drive, Sandy, in Clackamas 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 Betty Olayos's division of the property into approximately one-acre parcels: Statewide Planning Goal 14 (Urbanization) and OAR 660-004-0040. These laws will not apply to the claimant only to the extent necessary to allow Betty Olayos a use of the property permitted at the time she acquired it in 1973. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On June 1, 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, three written comments, evidence or information were received in response to the 10-day notice.

One of the comments 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 first comment letter in the department's claim file.)

One comment appears relevant to whether the restriction of the claimant's use of the property reduces the fair market value of the property. This comment has been considered by the department in preparing this report. Another of the written letters contains relevant comments related to whether the claim provides: (1) adequate justification that there has been a reduction in value, (2) the applicability of the statewide planning goals after adoption (exemption under Section 3 of Measure 37), (3) the transferability of waivers, and (4) whether state agencies can waive state statutes. The comments have been considered by the department in preparing this report.

### **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 26, 2005, for processing under OAR 125, division 145. The claim identifies local zoning regulations 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, Betty Olayos, and her former husband, Andrew G. Olayos, acquired the subject property by contract, on August 3, 1973. A Quit Claim Deed dated May 9, 2000, conveys the property from Betty Olayos to Betty A. Olayos, Trustee for the Betty A. Olayos Trust, a revocable living trust established by the claimant.<sup>1</sup> The transfer of the property to a revocable living trust does not constitute a change of ownership for the purpose of this Measure 37 claim. The claim includes a copy of a recent property tax bill documenting the claimant’s current ownership of the property.

### **Conclusions**

The claimant, Betty Olayos, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of August 3, 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.

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<sup>1</sup> The claimant has also provided a copy of a Multnomah County Circuit Court decree involving the divorce of Andrew G. Olayos and Betty A. Olayos, which among its orders states, “Wife shall take all right, title and interest in and to the real property located in Clackamas County, Oregon, consisting of approximately ten acres, more or less, on Wildcat Mountain Drive, Sandy, Oregon, which real property is now owned in her sole name.” (Multnomah County Circuit Court, No. D8102 61137, May 21, 1981.)

## **Findings of Fact**

The claim states that there was a “changed zoning approx ‘74 to 10 acres in lieu of 1 acre at time I purchased it in 1973.”

The property is currently zoned Farm-Forest –10-Acre District (FF-10) by Clackamas County. The FF-10 zone is a rural-residential zone, with a 10-acre minimum lot size and with one single-family dwelling permitted on each parcel. The zone is in accord with Statewide Planning Goal 14 (Urbanization), which became effective January 25, 1975, and generally required that land outside of urban growth boundaries (UGB) be used for rural uses and required that local comprehensive plans identify and separate urbanizable land from rural land.

As a result of a 1986 Oregon Supreme Court decision<sup>2</sup>, the Commission in 2000, amended Goal 14 (Urbanization) and adopted OAR 660-004-0040, which became effective on October 4, 2000. The rule provides that after October 4, 2000, a county minimum lot size requirement in a rural-residential zone may not be amended to allow a smaller minimum lot size without taking an exception to Goal 14 (OAR 660-004-0040(6)). This rule does not allow the subject property to be divided without an exception to Goal 14.

The claimant acquired the subject property on August 3, 1973, prior to the establishment of the statewide planning goals and their implementing statutes and rules.

## **Conclusions**

The zoning requirements and minimum lot size standards for rural residential parcels established by Goal 14 and OAR 660-004-0040 were enacted after the claimant acquired the subject property on August 3, 1973, and do not allow the claimant’s desired division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimant in 1973.

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.”

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<sup>2</sup> *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

### **Findings of Fact**

The claim includes an informal estimate ranging from \$800,000 to \$1,300,000 for the reduction in fair market value as a result of current regulations. This amount is based on the claimant's estimate of the market value of one-acre parcels in the area.

### **Conclusions**

As explained in Section V.1 of this report, the claimant acquired the property on August 3, 1973. Under Measure 37, the claimant 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 the division of the subject property. The claimant estimates the reduction in value due to the restrictions to be between \$800,000 and \$1,300,000.

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 enacted or 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 land use laws that restrict the use of the property relative to what would have been allowed in 1973, when the claimant acquired the property. These include Statewide Planning Goal 14 and OAR 660-004-0040. None of these laws is exempt under Section 3(E) of Measure 37, which exempts laws in effect when the claimant acquired the property.

### **Conclusions**

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that the general statutory, goal and rule restrictions on divisions and residential development apply to the claimant's use of the property, and for the most part these laws are not exempt under Section 3(E) of Measure 37.

Laws in effect when the claimant acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the property that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development

permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under Sections 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 her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her use of the property.

## **VI. FORM OF RELIEF**

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law 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 approximately one-acre parcels. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by between \$800,000 and \$1,300,000. However, because the claim does not provide an appraisal or other documentation establishing how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Ballot Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Betty Olayos to use the subject property for a use permitted at the time she acquired the property on August 3, 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 Betty Olayos' division of the 9.6-acre property into approximately one-acre parcels: applicable provisions of Statewide Planning Goal 14 and OAR 660-004-0040. These land use

regulations will not apply to the claimant's use of her property only to the extent necessary to allow the claimant a use permitted at the time she acquired the property on August 3, 1973.

2. The action by the State of Oregon provides the state's authorization to the claimant to use her property subject to the standards in effect on August 3, 1973.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under Section (3) of the Measure.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for her to obtain a decision under Measure 37, from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under Measure 37, from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

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

The department issued its draft staff report on this claim on September 29, 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.