

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

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

August 12, 2005

STATE CLAIM NUMBER: M119864 (South)

NAME OF CLAIMANTS: Leroy L. and Jean R. Laack,
M. Duane Rawlins, Greg M. Eide
Andrew A. and Margaret Rainone

MAILING ADDRESS: Leroy L. and Jean R. Laack
5601 66th Avenue NE
Salem, Oregon 97305

M. Duane Rawlins
23221 Powerline Road
Harrisburg, Oregon 97446

Greg M. Eide
550 Winding Way SE
Salem, Oregon 97302

Andrew A. and Margaret R. Rainone
5 Ames Place
South Huntington, New York 11746-4701

IDENTIFICATION OF PROPERTY: Township 9S, Range 3W, Section 3
Tax Lots 400, 500, 600
Marion County

DATE RECEIVED BY DAS: February 22, 2005

180-DAY DEADLINE: August 21, 2005

I. CLAIM

Leroy L. Laack, Jean R. Laack, M. Duane Rawlins, Andrew A. Rainone, Margaret R. Rainone, and Greg M. Eide, the claimants, seek compensation in the amount of \$17,355,000 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 divide the property into approximately 80 lots or parcels ranging in size from 2 acres to 3.5 acres for residential use. Each residence would be served by an individual septic system and well. The

subject property is located at 9600 Liberty Road South, south of the City of Salem (approximately ½ mile west of Interstate 5). The property contains approximately 215 acres.

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 the claimants to allow them to divide the 215-acre property into lots or parcels from 2 to 3.5-acres in size and develop a single family residence on each lot or parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33, that were took effect after each of the claimants acquired their respective interests in the property. These laws will not apply to the claimants' use of the property only to the extent necessary to allow them a use of the property permitted at the time each of them acquired their present interest in the property that is the subject of this claim. The department acknowledges that the relief recommended in this report will not allow Jean Laack, M. Rawlins, or Mr. Eide to use the property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 2, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, three written comments were received in response to the 10-day notice. The comments do 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

This claim was submitted to DAS on February 22, 2004 for processing under OAR 125, division 145. The claim includes a list of land use regulations (see claim) all of which were enacted prior to December 2, 2004, the effective date of Measure 37. (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 property that is the subject of this claim was acquired by the claimants Leroy L. Laack, Jean R. Laack, M. Duane Rawlins, Andrew A. Rainone, Margaret R. Rainone, along with Melvin Eide on November 15, 1971. (See copy of warranty deed included with the claim.) Mr. Eide passed away on May 9, 1992. On that date, Melvin Eide’s interest passed to his heir, Greg M. Eide, who is also a claimant. Information provided with the claim confirms that the claimants are the present owners the property. (See the department’s claim file.)

LeRoy Laack and Jean Laack, as Trustees of the LeRoy L. Laack and Jean Raymonda Laack Family Trust, are the owners of an undivided ¼ interest. Leroy and Jean Laack acquired an interest in the property on November 15, 1971. There is evidence that Jean Laack conveyed her interest to Leroy Laack in 1989. Leroy Laack conveyed his interest to himself and Jean as trustees of the Laack Family Trust on April 16, 1997.

M. Duane Rawlins is the owner of an undivided ¼ interest. There is evidence in the department’s record that Mr. Rawlins acquired an interest in the property on June 14, 1979 by a warranty deed from Chester Rawlins.

Andrew A. Rainone and Margaret R. Rainone are owners of an undivided ¼ interest in the property. There is evidence in the department's record that the Rainone's acquired their interest in the property on October 4, 1973 by a warranty deed from Richard and Janet Merrill.

Greg M. Eide is the owner of an undivided ¼ interest in the property. It appears based on the materials in the department's record that Greg Eide acquired a portion of his present interest in the property on November 16, 1992. At some point thereafter, Greg Eide acquired the remainder of his present ¼ interest in the property.

Conclusions

The claimants Leroy L. Laack and Jean R. Laack are owners of the property. Leroy Laack acquired and has continuously held an interest in the property since November 15, 1971. Jean Laack acquired her present interest in the property on April 16, 1997.

The claimant M. Duane Rawlins is an owner of the property. It appears based on the materials in the department's record that M. Duane Rawlins acquired his present interest in the property on June 14, 1979.

The claimants Andrew A. Rainone and Margaret R. Rainone are owners of the property. It appears based on the materials in the department's record that Andrew and Margaret Rainone acquired their interest in the property on October 4, 1973.

The claimant Greg M. Eide is an owner of the property. It appears based on the materials in the department's record that Greg Eide acquired at least part of his present interest in the property on May 9, 1992.

2. The Laws that are the Basis for the 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 indicated that the property was zoned Residential Acres (RA), which allowed the subdivision of the land, at the time the property was acquired, and that EFU zoning prevents subdivision of the property now. The Measure 37 claim the Laack submitted to Marion County indicates that the owners desire to subdivide the property into approximately 80 lots, and a written statement by Mr. Laack indicates that the owners wish to subdivide the property into approximately 80 lots of 2 to 3.5 acres each, with each lot being served by its own well and septic system.

Statewide Planning Goal 3 (Agricultural Lands) and the provisions applicable to land zoned for Exclusive Farm Use under ORS 215 and OAR 660, division 33, including ORS 215.780, restrict

the division of the subject property into lots or parcels and the development of dwellings on EFU-zoned land. Goal 3 became effective on January 25, 1975, and required Agricultural Land, as defined by the Goal, to be zoned EFU pursuant to ORS 215. (See citations to statutory and rule history under OAR 660-015-0000(3).) ORS 215.780 became effective on November 4, 1993 (chapter 792, Or Laws 1993).

ORS 215.780(1) establishes an 80-acre minimum lot size for the creation of a new lot or parcel in an EFU zone. Other provisions of state law establish the standards for the approval of dwellings on land zoned EFU. These include the statutes ORS 215.283, 215.284 and 215.705. These current state laws restrict the claimant's ability to develop the property as stated in the claim.

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.

OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993.

The claimant Leroy L. Laack, acquired his interest in the subject property in 1971. At that time, Statewide Planning Goal 3 and administrative rules were not in effect. Provisions of ORS 215 were adopted in 1963 but did not directly limit the use of the subject property at that time. The other claimants acquired their interests later in time. The latest date of acquisition is in 1997. Even since that time, at least some of the laws addressed above have been amended in a fashion that restricts the division or residential development of the property.

Conclusion

The minimum lot size and dwelling standards established by Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, were all adopted after the claimant Leroy L. Laack acquired an interest in the property that is the subject of this claim, and restrict the claimants' ability to divide the subject property and develop it for residential use.

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 use(s) that the claimants have identified. There may be other laws that currently apply to the claimants' 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. In this particular case, the department notes that the claimants indicate that dwellings on the property would be served by individual septic and well systems. Such systems may require authorization(s) from one or more state agencies. 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 law(s) 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 value if the property were fully developed as proposed. The estimate relies on a list of comparables property values. The claimant estimates a reduction in value of \$17,355,000. No certified appraisal is included.

Conclusions

As explained in section V.(1) of this report, the current owners of the subject properties are Leroy L. Laack, Jean R. Laack, M. Duane Rawlins, Andrew A. Rainone, Margaret R. Rainone. Leroy Laack acquired his interest in who the property in 1971. The evidence in the department’s record indicates that land use regulations enacted after each of the present owners acquired their interests in the property restrict their use to at least some extent. Mr. Laack has submitted some evidence that the restrictions on his use of the property have reduced its fair market value. The department has no evidence to the contrary.

Under Ballot Measure 37, the claimants are due compensation for land use laws 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, and the evidence in the department’s record, laws adopted since the claimants acquired their property interests restrict their ability to divide the subject property and to establish dwellings on it. The claim asserts the reduction in value due to the restriction to be \$17,355,000. However, without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under Section 3 of Measure 37

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

Findings of Fact

The claim references EFU zoning as the basis for the claim. Goal 3, and the EFU statutes and rules that generally were enacted subsequent to the date that Mr. Laack acquired his interest in the property in 1971. Statewide Planning Goal 3 took effect in January, 1975. The EFU statutes and rules generally have effective dates after that time. The provisions of ORS 215 and of Goal 3 and OAR 660, division 33, that became effective after the date each claimant (or family

member of that claimant) acquired their respective interest in the property are exempt under subsection 3(E) of Measure 37.

The proposed use is for residential subdivision served by well and septic systems. One commenter referenced a nearby groundwater study that indicated the groundwater might be over-appropriated. There maybe laws that regulate the use of the ground water resource that, were not identified in the claim. Such laws generally are exempt under section 3 of Measure 37. Laws applying to the use of septic systems also generally are exempt under section 3 of Measure 37.

Conclusions

The claim refers to EFU laws as restricting the use of the property. It appears that the general statutory, goal and rule restrictions on minimum lot size, residential development and use of the property by Mr. Laack were not in effect at the time he acquired his interest in the property, and so are not exempt under subsection 3(E) of the Measure as to his use of the property.

Some provisions of ORS 215 will be exempt under subsection 3(E) as to other of the claimants, with the specific laws that apply being determined by their respective dates of acquisition (or the date a family member of theirs acquired an interest). Furthermore, laws relating to protection of the ground water resource, though not specifically identified in the claim may be exempt under Section 3 of Measure 37 if adopted to protect public health and safety.

Laws in effect when the claimants acquired their interests in the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' 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 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 use(s) 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. Claimants should be aware that the less information they have provided to the department in their claim, 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.

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 a law to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has

directed that if the department determines a claim is valid, that 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 conclusion set forth in this report, laws enacted or enforced by the Commission or the department, specifically Goal 3 and provisions of ORS 215 and OAR 660, division 33, restrict the partition of the subject properties and thus, the claimant cannot divide the property into parcels with dwellings. The laws enforced by the Commission or department reduce the fair market value of the approximately 215-acre property to some extent. The claim asserts this amount to be \$17,355,000: Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, no appraisal or other substantiating documentation was submitted and it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, the department determines that it is more likely than not that state land use regulations 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 Leroy L. Laack, Jean R. Laack, M. Duane Rawlins, Andrew A. Rainone, and Margaret R. Rainone to use the subject property for a use permitted at the time they acquired their interests in the property.

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 the claimants' division of the property into approximately 80 lots or parcels of 2 to 3.5 acres each, or to the establishment of a single family dwelling on each lot or parcel created:
 - A. As to Leroy Lack, applicable provisions of Statewide Planning Goals 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780, and OAR 660, division 33, that took effect after November 15, 1971;
 - B. As to Jean R. Laack, applicable provisions of Statewide Planning Goals 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780, and OAR 660, division 33 that took effect after April 16, 1997;
 - C. As to M. Duane Rawlins, applicable provisions of Statewide Planning Goals 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780, and OAR 660, division 33, that took effect after June 14, 1979;

D. As to Andrew and Margaret Rainone, applicable provisions of Statewide Planning Goals 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780, and OAR 660, division 33, that took effect after October 4, 1973;

E. As to Greg Eide, applicable provisions of Statewide Planning Goals 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780, and OAR 660, division 33 that took effect after May 9, 1992.

These land use regulations will not apply to the claimants' use of their property only to the extent necessary to allow the claimants to a use permitted at the time they acquired their respective interests in the property.

2. The action by the State of Oregon provides the state's authorization to the claimants to use their respective interests in the property subject to the standards in effect when they each acquired their respective interests in the property. The department acknowledges that the relief recommended in this report will not allow Jean Laack, Duane Rawlins, or Greg Eide to use the property in the manner set forth in this claim.

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 215.412 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 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 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 claimants to use the property, it may be necessary for them 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 22, 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.