

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

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

August 19, 2005

**STATE CLAIM NUMBER:** M119989

**NAME OF CLAIMANTS:** Linda and Craig Martell

**MAILING ADDRESS:** 4705 Lone Star Road NW  
Salem, Oregon 97394

**PROPERTY IDENTIFICATION:** Township 6S, Range 4W, Section 1  
Tax Lots 200  
Polk County

**OTHER CONTACT INFORMATION:** Dennis Koho  
Wallace W. Lien, P.C.  
1775 32<sup>nd</sup> Place NE, Suite A  
Salem, Oregon 97303-1674

**DATE RECEIVED BY DAS:** March 1, 2005

**180-DAY DEADLINE:** August 28, 2005

**I. CLAIM**

The claimants, Linda and Craig Martell, seek compensation in the amount of \$574,920 for a 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 and develop their 36.96-acre EFU-zoned property. The property is located at 5487 Lone Star Road NW, near the City of Salem. (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 just compensation, the requirements of the following 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 subject property into six lots of slightly less than five acres each, and one larger lot and to establish a single-family dwelling on each lot: the applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780, and OAR 660, division 33, that took effect after June 1, 2004. These laws

will not apply to the claimants' use of the property only to the extent necessary to allow Linda and Craig Martell a use of the subject property permitted at the time they acquired it on June 1, 2004. The department acknowledges that the relief recommended in this report will not allow the claimants to use their property in the manner set forth in their claim. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS RECEIVED**

#### **Comments Received**

On April 4, 2005, pursuant to OAR 125-145-0080 the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, one written comment, evidence or information was received in response to the 10-day notice.

The comment is relevant to when the claimant became the present owner of the property. The letter states that the claimants acquired the property after the laws that are the basis of their claim went into effect, and that the property must still comply with those rules. The comments have been considered by the department in preparing this report. (See the comment letter in the department's claim files.)

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

#### **Requirement**

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

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

#### **Findings of Fact**

The claim was submitted to DAS on March 1, 2005 for processing under OAR 125, division 145. The claim identifies Polk County zoning and state laws that restrict 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 claimants, Linda and Craig Martell acquired the subject property on June 1, 2004. Linda Martell’s parents purchased the property on March 29, 1949 (see Warranty Deed included with the claim). On February 8, 1995 the property was transferred to the Nina C. Owen Revocable Living Trust dated April 29, 1994. A June 1, 2004 Bargain and Sale Deed records the conveyance of the property from Linda Owen-Martell, as Trustee of the Nina C. Owens Revocable Living Trust, to Linda Owen Martell. Another Bargain and Sale Deed, also dated June 1, 2004, conveyed an undivided half interest in the subject property to Craig Martell. A Real Property Assessment Report, dated December 21, 2004, further substantiates that Linda and Craig Martell are the present owners of the property (see the department’s claim file).

### **Conclusions**

The claimants, Linda and Craig Martell, are the present “owners” of the subject property as that term is defined in Section 11 (C) of Measure 37. The subject property has been owned by family members as that term is defined in Section 11 (A) of Measure 37, since March 29, 1949. The property was acquired by the present owners on June 1, 2004.

### **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 claimants state that they are filing a claim because “ORS 215 and OAR 660 “restricts development and use of EFU-zoned property.” The claimants did not mention the specific sections of ORS 215 or OAR 660. In their claim to Polk County, the claimants stated that they would like to subdivide the subject property into six lots of approximately 5-acres each and one

lot of approximately 8-acres. The claimants also propose to establish a dwelling on each of the six five-acre lots.

The claim is based, in part, on Polk County's current Exclusive Farm Use (EFU Zone) and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Goal 3 in accord with OAR 660, division 33 and ORS 215 because the claimants' property is "Agricultural Land" as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned 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 less than 80-acres and establish standards for allowing the existing or any proposed parcel(s) 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.)

Family members of the claimants acquired the subject property on March 29, 1949, prior to the establishment of ORS 215, the Statewide Planning Goals and their implementing rules. At that time the property was not zoned by the County.

### **Conclusions**

The minimum lot size and dwelling standards established by Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, adopted since the claimants' family acquired the property in 1949, do not allow the division of the property into parcels less than 80-acres in size or allow the approval of dwellings as would have been allowed in 1949. Land use regulations adopted since 1949 restrict the use of the property from what could have been done when the property was acquired by a family member of the claimants in 1949.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimants have identified. There may be other laws that currently apply to the claimants' 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 claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any laws described in Section V. (2) of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

#### **Findings of Fact**

The claim states that the fair market value of the subject property has been reduced by \$574,920 as a result of land use laws enacted after the family acquired the property in 1949. The claim includes a 2004 Real Property Assessment Report that valued the property at \$352,770. The current value without the EFU land use regulation was estimated to be \$927,690 based on comparable values of other properties. Based on the claim, the reduction in value would be \$574,920. However, no appraisal was submitted.

#### **Conclusions**

As explained in section V. (1) of this report, Linda and Craig Martell are the present owners of the subject property as of June 1, 2004. The claimants' family has owned the property since 1949. Under Ballot Measure 37, the Martells 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, laws adopted since the claimants acquired the property restrict the division of the property and the building of dwellings on the subject property. The claim asserts the reduction in value due to the restriction to be \$574,920.

Without an appraisal based on the value of 5 or 8-acre lots or other explanation, 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 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 Polk County's EFU Zone and the related provisions of state law that restrict the claimants' use of the property and reduced its fair market value. These are Statewide Planning Goal 3, (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660,

division 33. All of the specific state land use regulations cited in the claim were enacted after the claimants' family acquired the property in 1949. Therefore, none of the laws identified in the claim are exempt under subsection 3(E) of Ballot 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 farm land are not exempt under subsection 3(E) of Measure 37.

Laws in effect when the claimants acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the property that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the use(s) that the claimants have identified. Similarly, this report only addresses the exemptions provided for under section (3) of Measure 37 that are clearly applicable given the information provided to the department in the claim. Claimants should be aware that the less information they have provided to the department in their claim, 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 the 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, 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 in this report, laws enforced by the Commission or the department prohibit the division of the subject property and the building of dwellings on it. These restrictions reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$574,920. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, no appraisal or other

documentation was submitted and it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, the department acknowledges that state land use laws 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 just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow the Martells to use the subject property for a use permitted at the time they acquired the property on June 1, 2004.

### **Conclusion**

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of just compensation, the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department will not apply to the claimants to allow them to divide the subject property into six lots of slightly less than five acres each, and one larger lot, and to establish a single-family dwelling on each lot: the applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780, and OAR 660, division 33, that took effect after June 1, 2004. These land use regulations will not apply to the Martells' use of their property only to the extent necessary to allow the claimants to a use permitted at the time they acquired the property on June 1, 2004. The department acknowledges that the relief recommended will not allow the claimants to use the property in a manner set forth in their claim.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property subject to the standards in effect on June 1, 2004. On that date, the property was subject to the provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33 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 claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.
4. Any use of the property by 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 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.