

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

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

August 31, 2005

**STATE CLAIM NUMBER:** M120103

**NAME OF CLAIMANTS:** Kathy Fontaine and  
Wendell Cattron

**MAILING ADDRESSES:** Kathy Fontaine  
409 East Avenue E.  
Lakota, North Dakota 58344

Wendell Cattron  
1627 Gray Fox Road  
Ironstation, North Carolina

**PROPERTY IDENTIFICATION:** Township 1N, Range 3W, Section 36  
Tax Lot 4300  
Washington County

**OTHER CONTACT INFORMATION:** Kent Campbell  
PO Box 526  
Hillsboro, Oregon 97123

**DATE RECEIVED BY DAS:** March 11, 2005

**180-DAY DEADLINE:** September 7, 2005

**I. SUMMARY OF CLAIM**

The claimants, Kathy Fontaine and Wendell Cattron, seek compensation of an unspecified amount for the reduction in fair market value of property as a result of certain land use regulations that are alleged to restrict their use of the property. The claimants desire compensation or the right to develop a dwelling on their 21.56-acre property. The property is located on Northwest 322nd Avenue, south of Northwest Padgett Road in Washington 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 the claimants' establishment of a single family dwelling on the property: the applicable provisions of Statewide Planning Goals 3, ORS 215.213, and OAR 660-033-0130 and 0135, enacted after April 28, 1993. These land use regulations will not apply to the claimants' use of the property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on April 28, 1993. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On March 29, 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, one comment was received in response to the 10-day notice. The comment does not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects on the 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 state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation 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 March 11, 2005, for processing under OAR 125, division 145. The claim indirectly identifies Goal 3, ORS 215 and OAR 660, division 33, as 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, Kathy J. Fontaine and Wendell Cattron, acquired the subject property on April 28, 1993, as reflected by a Bargain and Sales Deed included with the claim (Washington County Records 93-38319 recorded April 28, 1993). A copy of the County’s Notice of Director’s Measure 37 Decision was provided by Washington County and indicates that the claimants have continuously owned the property since April, 1993.

### **Conclusions**

The claimants, Kathy J. Fontaine and Wendell Cattron, are the “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of April 28, 1993.

### **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 HB 3661 (effective August 3, 1993) “changed the income standards (for approval of a dwelling) from \$10,000 to \$20,000,” and in 1994 LCDC’s OAR and County Ordinance 453 “changed the income standards to ‘has produced’ \$80,000.”

The claim is based on Washington County’s current Agriculture and Forestry District (AF-20) and the applicable provisions of state law that require such zoning. The claimants property is zoned AF-20 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.<sup>1</sup> 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 215.213, 215.263 and OAR 660, division 33, as applied by Goal 3, establish standards for allowing the existing parcel to have farm or non-farm dwellings.

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 215.213.

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

The claimants acquired the subject property in April 28, 1993. Under the County's acknowledged AF-20 zone as required by Goal 3 on the date of acquisition in 1993, farm dwellings were allowed if determined to be "in conjunction with farm use or the propagation or harvesting of a forest product on a lot or parcel that is managed as part of a farm operation or woodlot if the farm operation or woodlot:

(A) Consist of 20-acres or more; and

(B) Is not smaller than the average farm or woodlot in the county producing at least \$2,500 in annual gross income from the crops, livestock or forest products to be raised on the farm operation or woodlot" (ORS 215.213(2)(a) (1991 edition)).

Farm dwellings were also allowed if determined to be "in conjunction with farm use or the propagation or harvesting of a forest product on a lot or parcel that is managed as part of a farm operation or woodlot smaller than required under [ORS 215.213(2)(a)], if the lot or parcel:

(A) Has produced at least \$10,000 in annual gross farm income in two consecutive calendar years out of the three calendar years before the year in which the application for the dwelling was made or is planted in perennials capable of producing upon harvesting an average of at least \$10,000 in annual gross farm income; or

(B) Is a woodlot capable of producing an average over the growth cycle of \$10,000 in annual gross income" (ORS 215.213(2)(b) (1991 edition)).

In April 1993, non-farm dwellings were also allowed under the County's acknowledged AF-20 zone if determined to satisfy the standards for non-farm dwellings under ORS 215.213(4) (1991 edition).

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<sup>1</sup> The claimants' property is "Agricultural Land" because it is composed predominately of NRCS (Natural Resources Conservation Service) Class II, III and IV Soils. Property is located on Sheet #30 and contains soil map units #14, 43, 44B, 44D and 46F (Soil Survey of Washington County, Oregon, July 1982).

## **Conclusions**

Most of the zoning requirements and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and amendments to ORS 215 and OAR 660, division 33, which restrict the claimants' desired use of the subject property, were enacted after the claimants acquired ownership of the subject property in April 1993, and do not allow the development of the property with a dwelling, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimants in April 1993. In April, 1993, the property was subject to the requirements of the County's acknowledged AF-20 zone and ORS 215 then in effect.

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 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. 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 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 claimants' representative has estimated the reduction in the fair market value of the property to be \$300,000, in the absence of current regulations.<sup>2</sup> The estimate is based on the value of the property if developed with a single-family dwelling minus the current value of the property as vacant land.

## **Conclusions**

As explained in section V.(1) of this report, the current owners are Kathy Fontaine and Wendell Catron who acquired the property on April 28, 1993. Under Ballot Measure 37, the claimants are 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, current land use land laws restrict the use of the subject property. The claim states that the reduction is \$300,000.

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 supplemental information included in the claim, the department determines that it is more likely than not that

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<sup>2</sup> Letter attached to a July 27, 2005 e-mail from the claimants' representative, Kent Campbell, to Doug White (DLCD).

there has been some reduction in the fair market value of the property as a result of laws 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 includes a general reference to any state land use regulations that restrict the use of the property relative to what would have been allowed in 1993 when the claimants acquired the property. These provisions include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Washington County has implemented through its AF-20 zone. With the exception of provisions of Statewide Planning Goal 3 and ORS 215 in effect on April 28, 1993, these laws are not exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimants acquired the property. Provisions of ORS 215 and Goal 3 adopted before April 28, 1993, are exempt under Section 3(E) of the Measure.

#### **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 of farm land apply to the claimants' use of the property, and for the most part these laws are not exempt under section 3(E) of Measure 37. Provisions of Statewide Planning Goal 3 and ORS 215 in effect when the claimants acquired the property in April 1993 are exempt under section 3 (E) of the Measure and will continue to apply to 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 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. The 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 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 use of the property for residential purposes. The claimants cannot develop the subject property with a residential dwelling because laws enacted after the claimants acquired the property prohibit a dwelling on this parcel. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$300,000. However, because the claim does not include an appraisal or other specific explanation for how the specified restrictions reduce the fair market value of the property, a specific amount cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based more than 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 Kathy Fontaine and Wendell Catron to use the subject property for a use permitted at the time they acquired it on April 28, 1993.

### **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' establishment of a single family dwelling on the property: applicable provisions of Statewide Planning Goals 3, ORS 215.213, and OAR 660-033-0130 and 0135, enacted after April 28, 1993. These land use regulations will not apply to the claimants' use of the property only to the extent necessary to allow them a use permitted at the time they acquired the property on April 28, 1993.
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 April 28, 1993. On that date, the property was subject to applicable 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 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 28, 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.