

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

September 7, 2005

**STATE CLAIM NUMBER:** M120176

**NAME OF CLAIMANT:** Manuel Sandoval

**MAILING ADDRESS:** 25313 S. Hwy 213  
Mulino, Oregon 97042  
Clackamas County

**PROPERTY IDENTIFICATION:** Township 4S, Range 2E, Section 8  
Tax Lot 700  
Clackamas County

**DATE RECEIVED BY DAS:** March 16, 2005

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

**I. CLAIM**

The claimant, Manuel Sandoval, seeks compensation in the amount of \$540,000 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 claimant desires compensation or the right to subdivide his 12.13-acre property into eight buildable lots. The property is located at 25313 S. Hwy 213, near Mulino, 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 this claim is valid. Department staff recommends, in lieu of compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to Mr. Sandoval's division of the 12.13-acre property into eight buildable lots: Statewide Planning Goal 14 and OAR 660-004-0040. These laws will not apply to the claimant only to the extent necessary to allow Mr. Sandoval a use of the subject property permitted at the time he acquired it on February 7, 1977. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS RECEIVED**

On March 24, 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, two written comments, evidence or information 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 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 March 16, 2005, for processing under OAR 125, Division 145. The claim identifies Goal 14 and OAR 660-004-0040 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 regulation 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, Manuel Sandoval, acquired the subject property on February 10, 1977, based on an Assignment of Contract document included with the claim. A Clackamas County Tax Statement submitted with the claim confirms Mr. Sandoval’s current ownership of the subject property.

### **Conclusions**

The claimant, Manuel Sandoval, is an “owner” of the subject property as that term is defined in Section 11 (C) of Ballot Measure 37, as of February 7, 1977.

### **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 states that “OAR 660-004-0040 7a, Oct 2000, prohibits lots smaller than 2 [acres]”.

The property is currently zoned RRFF-5 by the county. The RRFF-5 zone is a rural-residential zone, with a five-acre minimum lot size and with one single family dwelling permitted per lot or 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 be used for rural uses.

As a result of a 1986, Oregon Supreme Court decision<sup>1</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.

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<sup>1</sup> *1000 Friends of Oregon v. LCDL (Curry County)*, 301 Or 447 (1986).

When the claimant acquired the subject property in 1977, it was zoned Single Family Residential (RA-1) by the County and allowed a single family dwelling on a parcel at least one-acre in size. However, this zoning was not acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged Clackamas County's plan and land use regulations when Mr. Sandoval acquired the property in 1977, the statewide planning goals applied directly to the property.<sup>2</sup>

As stated above, Goal 14 (Urbanization) required that local comprehensive plans identify and separate urbanizable land from rural land. Prior to 2000, Goal 14 was held to prohibit residential development outside urban growth boundaries at densities of one to four-acres per lot or parcel (see *DLCD v. Klamath County*, 38 Or LUBA 769 (2000).) Amendments to Goal 14 in 2000 authorized the Commission to adopt rules for rural residential development outside urban growth boundaries. The rules (OAR 660-004-0040) require a minimum lot size of 2-acres for rural residential development.

The claim does not establish whether the level of development requested by the claimant would have been permitted under the laws in effect in 1977 when he acquired the property.

## **Conclusions**

The zoning requirements, minimum lot size and dwelling standards for rural residential lots or parcels established by OAR 660-004-0040 were enacted after Manuel Sandoval acquired the subject property in February, 1977, and do not allow the division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by Manuel Sandoval in 1977. When Mr. Sandoval acquired the subject property in 1977, the general requirement of Goal 14 (Urbanization) applied to the property. Goal 14, as interpreted by the Commission (OAR 660-040-0040) generally requires a minimum lot size of 2-acres. It is not clear what level of development would have been permitted when the claimant 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 other laws that currently apply to the claimant's use of the

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<sup>2</sup>The Statewide Planning Goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the County's plan and implementing regulations. (*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. denied, 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 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).

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 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 includes an informal estimate of \$540,000 as the reduction in the property's fair market value, in the absence of current regulations. This estimate is based on the claimant's estimate of the market value of lots less than 2-acres. The claimant provided copies of "Property Account Summaries" of neighboring properties less than 2-acres in size and his own calculations to determine the amount of reduction in fair market value. However, no certified appraisal to substantiate the claimed values either before or with state land use regulations was submitted.

#### **Conclusions**

As explained in Section V. (1) of this report, the current owner is Manuel Sandoval who acquired the property on February 7, 1977. Under Ballot Measure 37, Manuel Sandoval 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 in Section V. (2) of this report, laws adopted since the claimant acquired the property restrict division of the subject property.

Without an appraisal or other substantiating documentation, and without knowing the extent of development that would have been permitted when the claimant acquired the property, 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 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 amendments to Statewide Planning Goal 14 and OAR 660-004-0040, which restrict the use of the property relative to what would have been allowed in 1977 when the claimant acquired it. With the exception of Statewide Planning Goal 14 as enacted in 1975, none

of these laws is 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 14 enacted in 1975 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 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. Provisions of Statewide Planning Goal 14 in effect when the claimant acquired the property in 1977 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 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. Claimants should be aware that the less information he has 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 set forth in this report, laws enforced by the Commission or the department restrict the division of the subject property into parcels or lots, and the use of

the property for residential purposes. The claimant cannot create desired lots less than 2-acres out of the subject property, or develop those lots for residential use because laws enacted after the claimant acquired the property prohibit lot sizes that small. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$540,000. However, because the claim does not provide an appraisal or other specific explanation for how the specified restrictions reduce the fair market value of the property, and because it is not clear what level of development would have been allowed when the claimant acquired 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 Mr. Manuel Sandoval to use the subject property for a use permitted at the time he acquired the property on February 7, 1977.

### **Conclusions**

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 Mr. Sandoval's division of his 12.13-acre property into eight buildable lots: applicable provisions of Statewide Planning Goal 14 and OAR 660-004-0040 amended and enacted after 1977. These land use regulations will not apply to Mr. Sandoval's use of his property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property on February 7, 1977.
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 February 7, 1977. On that date, the property was subject to the applicable provisions of Statewide Planning Goal 14 then in effect and including provisions relating to a 2-acre minimum lot size for rural residential zones. .
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 August 9, 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.