

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

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

September 12, 2005

**STATE CLAIM NUMBER:** M120235

**NAMES OF CLAIMANTS:** Wesley C. and Carol L. Newman

**MAILING ADDRESS:** 525 Vineyard Lane  
Roseburg, Oregon 97470

**PROPERTY IDENTIFICATION:** Township 26S, Range 7W, Section 35B,  
Tax Lot 800  
Douglas County

**OTHER INTEREST IN PROPERTY:** John McVeigh<sup>1</sup>  
303 Vineyard Lane  
Roseburg, Oregon 97470

United States of America<sup>2</sup>  
Title Section, Branch of Land  
Bonneville Power Administration  
Post Office Box 3537  
Portland, Oregon 97208-3537

**DATE RECEIVED BY DAS:** March 21, 2005

**180-DAY DEADLINE:** September 17, 2005

**I. SUMMARY OF CLAIM**

The claimants, Wesley C. and Carol L. Newman, seek compensation in the amount of \$90,000 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 develop an additional dwelling on their 19.75-acre property. The property is located at 525 Vineyard Lane near Roseburg, in Douglas County. (See claim.)

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<sup>1</sup> John McVeigh is the owner of an access easement across the property.

<sup>2</sup>The United States of America owns a Transmission Line Easement across one corner of the property.

## **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 Newmans' residential development: Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands); and applicable provisions of ORS 215 and OAR 660, division 6. These laws will not apply to the claimants only to the extent necessary to allow the Newmans a use of the property permitted at the time they acquired it in 1951. (See the complete recommendation in Section VI. of this report.)

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

### **Comments Received**

On March 25, 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, no written comments, evidence or information were received in response to the 10-day notice.

## **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 21, 2005, for processing under OAR 125, division 145. The claim indirectly identifies Statewide Goals 3 and 4, and ORS 215 and OAR 660 division 6 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, Wesley C. and Carol L. Newman, acquired the subject property on June 12, 1951, as reflected by a Quit-Claim Deed included with the claim. A copy of a Douglas County Assessor’s Information sheet dated January 12, 2005, indicates that Wesley C. and Carol L. Newman are the current owners of the subject property. (See the department’s claim file.)

## **Conclusions**

The claimants, Wesley C. and Carol L. Newman, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of June 12, 1951.

### **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 “Article 6 [Section] 3.6.150 [of the Douglas County Land Use and Development Ordinance (LUDO) establishes a] minimum [of] 20-acre per dwelling,” as the law which restricts the claimants use of their property. Article 6 of the Douglas County LUDO is the Agricultural and Woodlot (AW) zone. The claimants already have two dwellings on the 19.75-acre property, and the County zoning prevents them from building a third dwelling on the property.<sup>3</sup>

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<sup>3</sup> Staff contacted the claimants on July 28, 2005 and learned the claimants wish to add a third dwelling to the property. This is consistent with the decision by Douglas County on a Measure 37 claim for this property filed by the claimants with the County, as reflected in the County’s letter to the applicant on April 11, 2005. (See department’s claim file.)

The claimants' property is zoned Agricultural and Woodlot (AW)<sup>4</sup>, which is a mixed Agricultural and Forest Land zone adopted to comply with Statewide Goals 3 (Agricultural Lands), 4 (Forest Lands) and the implementing provisions of OAR 660-006-0050 (effective February 5, 1990) and subsequently amended on March 1, 1994, to comply with the provisions of HB 3661 (Chapter 792, Oregon Laws 1993). Prior to amendment this zone was the Agriculture, Grazing, Timber Raising District (AGT), adopted by Douglas County in 1980.

Under OAR 660-006-0050, all the uses permitted under Statewide Goals 3 and 4 are allowed except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993. No information was provided to the department regarding the predominant use of the property on January 1, 1993. Regardless of the predominant use on January 1, 1993, the property will be subject to either the requirements for dwellings applicable under Exclusive Farm Use (EFU) zoning required by Statewide Goal 3 and OAR 660, division 33 or forest zone provisions required by Statewide Goal 4 and OAR 660, division 6. This includes the dwelling standards asserted by the claimants as restricting the use of the property. No analysis of whether any of the tax lots can be approved for a dwelling under the applicable farm or forest provisions has been provided.

The claimants acquired the subject property on June 12, 1951, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. Douglas County's AW zoning did not apply to the subject property in 1951.

## **Conclusions**

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goals 3 (Agricultural Lands), and 4 (Forest Lands) and provisions applicable to land with mixed Agricultural and Forest zoning in ORS 215 and OAR 660, division 6 were all enacted after the Newmans acquired the subject property in October 1951, and restrict the construction of additional dwellings, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the Newmans in 1951.

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

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<sup>4</sup> The AW farm or forest dwelling was originally acknowledged by LCDC as being consistent with the small-scale nature of resource activities in the AW zone. This dwelling opportunity has been an important part of the County's land use action process since adoption of this ordinance in December 1980. The name of this zone was changed to "small scale farm or forest dwelling" in December 1992, consistent with the Commission amendments to Goal 4. With the passage of HB3661 in 1993, and as interpreted by the state Department of Land Conservation and Development and the Land Use Board of Appeals, the term "small scale" can no longer be used even though the term describes the true nature of these lands as originally acknowledged by the Commission.

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 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 claim states that the fair market value of the subject property has been reduced by \$90,000 as a result of land use laws enacted after they acquired the property in 1951. This estimate is based on a realtor's comparative market analysis of five-acre parcels in the area.

The claim also includes a market analysis estimating the current real market value of the subject property with improvements to be approximately \$330,000.

#### **Conclusions**

As explained in Section V.(1) of this report, the current owners are Wesley C. and Carol L. Newman, who acquired the property on June 12, 1951. Under Ballot Measure 37, the Newmans 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, laws adopted since the claimants acquired the property restrict construction of an additional dwelling on the subject property. The claimants estimate the reduction in value due to the restrictions to be \$90,000.

Without an appraisal based on the value of a 19.75-acre parcel with three dwellings or other explanation, 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 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 1951, when the property was acquired by

the Newmans. These provisions include Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands) and applicable provisions of ORS 215 and OAR 660, division 6, which Douglas County has implemented through its AW zone

### **Conclusions**

The general statutory, goal and rule restrictions on residential development and use of Farm-Forest 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.

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 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 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 division of the subject property into parcels or lots, and the use of the property for residential purposes. The claimants cannot construct a third dwelling because laws enacted after the claimants acquired the property restrict construction of additional dwellings. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$90,000. 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, 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 the Newmans to use the subject property for a use permitted at the time they acquired the property on June 12, 1951.

### **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 Newmans' construction of an additional dwelling on the 19.75-acre property that is the subject of this claim: Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands) and applicable provisions of ORS 215 and OAR 660, division 6 enacted after June 12, 1951. These land use regulations will not apply to the Newmans' use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on June 12, 1951.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on June 12, 1951.
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 August 15, 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.