

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

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

September 16, 2005

**STATE CLAIM NUMBER:** M120290

**NAMES OF CLAIMANTS:** Leland E. Dundas  
Elizabeth L. Dundas

**MAILING ADDRESS:** 15680 NE Yamhill Road  
Yamhill, Oregon 97148

**PROPERTY IDENTIFICATION:** Township 4S, Range 1W, Section 6,  
Tax Lot 100  
Yamhill County

**OTHER INTEREST IN PROPERTY:** Alan and Vicky Peters<sup>1</sup>  
16855 NE Mt. Home Road  
Sherwood, Oregon 97140

**DATE RECEIVED BY DAS:** March 24, 2005

**180-DAY DEADLINE:** September 20, 2005

**I. SUMMARY OF CLAIM**

The claimants, Leland E. and Elizabeth L. Dundas, seek compensation in the amount of \$125,000 plus \$12,000 per year in lost rents, 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 subdivide their 3.4 acre property into two parcels and to occupy a second existing house on the property year round. The property is located at 37280 NE Wilsonville Road, Newberg, near in Yamhill 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 not valid

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<sup>1</sup> According to the claim, Alan and Vicky Peters have an earnest money agreement for the purchase of the subject property on a land sale contract.

because neither the Land Conservation and Development Commission (the Commission) nor the department have enforced laws enacted after July 9, 1975 that restrict the claimant's use of their private real property relative to uses permitted when the claimants acquired the property. (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, 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 24, 2005, for processing under OAR 125, division 145. The claim indirectly identifies local zoning ordinances and minimum lot size requirements 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, Leland E. and Elizabeth L. Dundas, acquired the subject property on July 9, 1975, as reflected by a Warranty Deed included with the claim. According to the claim, the property was transferred to a revocable living trust, created by the claimants on April 29, 1996, with Leland E. and Elizabeth L. Dundas as trustees. A copy of a Title Report dated March 22, 2005, indicates that Leland E. and Elizabeth L. Dundas, Trustees of the Trust, are the current owners of the subject property. Transfer of the property to a revocable trust does not constitute a change in ownership for purposes of Measure 37.

### **Conclusions**

The claimants, Leland E. and Elizabeth L. Dundas, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of July 9, 1975.

### **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 “zoning ordinance restricts and limits the use of one of the houses and minimum lot size restricts the partitioning of 2 existing houses.”

The claim is based, in part, on Yamhill County’s current rural residential zone (VLDR 2 ½ ) and the applicable provisions of state law that require such zoning. The VLDR 2 ½ zone permits divisions of property into 2 ½ acre parcels, and permits a secondary dwelling on each parcel as a conditional use. The claimants’ property has been zoned rural residential in accord with Statewide Planning Goal 14 and OAR 660, division 4, since 1976.

Statewide Planning Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses and became effective on January 25, 1975. As a result of a 1986, Oregon Supreme Court decision, 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 Rural Residential (RR) 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 into less than 2 ½ parcels as permitted in the VLDR 2 ½ zone without an exception to Goal 14.

When the claimants acquired the subject property on July 9, 1975, the property was zoned “Agriculture.” However, at that time the County’s Agriculture zone had not been 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 Yamhill County’s plan and land use regulations when the claimants acquired the property in 1975, the statewide planning goals applied directly to the property.<sup>2</sup>

In 1975, the state standards for a land division involving agricultural property where the local zoning was not acknowledged, were that the resulting parcels must be of a size “appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area” (Statewide Planning Goal 3). Further, ORS 215.263 required that all divisions of land subject to the provisions for EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy.) Thus, the opportunity to divide the property when the claimants acquired it was limited to land divisions consistent with Goal 3, which required the resulting parcels to be: (1) “appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area;” and (2) shown to comply with the legislative intent set forth in ORS 215.243.

There is no evidence in the claim to establish that the uses permitted in the unacknowledged agricultural zone in 1975, when the claimants acquired the property, were less restrictive than the uses currently permitted in the VLRR 2 ½ zone. In fact, given the standards for approval of a division of the property when the claimants acquired it in 1975, the uses permitted in the rural residential zone currently in effect are less restrictive than those permitted under the standards in effect in 1975.

## **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 the claimants acquired the subject property in 1975 and do not allow the division of the property into parcels less than 2 ½ acres without an exception. However, this zone is less restrictive than the unacknowledged

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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).

agricultural zone in effect on the property when the claimants acquired it in 1975. At that time, land divisions consistent with Statewide Planning Goal 3 required the resulting parcels to be: (1) “appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area;” and (2) shown to comply with the legislative intent set forth in ORS 215.243. There is no indication in this record that parcels less than 3.4 acres in size could be construed to be appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area and shown to comply with the legislative intent set forth in ORS 215.243.

Based on the current record, land use regulations enacted after the claimants acquired the subject property have not restricted the claimants’ use of the property relative to uses permitted at the time they acquired the property.

### **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 includes an informal estimate of \$125,000 (and \$12,000 each year in lost rents) as the property’s reduction in fair market value as a result of regulations that restrict the use of their property. This estimate is based on the claimants’ research of the market value of current building sites and current rental charges for comparable housing. No documents were submitted on how the estimates were derived

#### **Conclusions**

As explained in Section V.(1) of this report, Leland E. and Elizabeth L. Dundas acquired the property on July 9, 1975, and are the current owners of the property. Based on information in the record, the claimants are not due compensation because land use restrictions enacted after the claimants acquired the property have not restricted the use of their property relative to uses permitted when they acquired it and therefore have not reduced the fair market value of their property.

### **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 Statewide Planning Goal 14 (Urbanization), and applicable provisions of OAR 660, division 4, which Yamhill County has implemented through its rural residential zone. With the exception of provisions of Goal 14, and other Statewide Planning Goals in effect on

July 9, 1975, these laws are not exempt under Section 3(E) of Ballot Measure 37. Provisions of what is now Goal 14 adopted before July 9, 1975 are exempt under Section 3(E) of the Measure.

### **Conclusions**

It appears that the general statutory and goal restrictions on the partitioning of rural residential land apply to the claimants' anticipated use of the property. These laws are exempt under Section 3(E) of Measure 37 to the extent they were enacted before the claimants acquired the property in 1975. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure, or because they are laws that are not covered by the Measure.

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. 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 enacted and enforced by the Commission or the department since the claimants acquired the subject property have not restricted the use of the property and reduced its fair market value relative to uses permitted when the claimants acquired it in 1975. Therefore, the claimants are not entitled to relief under Ballot Measure 37.

### **Conclusion**

Based on the record, the claimants are not entitled to relief under Ballot Measure 37. Department staff recommends that this claim be denied because neither the Commission or the department have enforced laws that were enacted after the claimants acquired the property in 1975 that restrict the claimants' use of the subject property relative to uses permitted when they acquired it.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on August 23, 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.