

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

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

September 15, 2005

**STATE CLAIM NUMBER:** M120294

**NAME OF CLAIMANT:** Mike Blackwell

**MAILING ADDRESS:** 2224 SW 17<sup>th</sup> St.  
Gresham, Oregon 97080-9711

**PROPERTY IDENTIFICATION:** Township 1S, Range 5E, Section 20,  
Tax Lot 900  
Multnomah County

**OTHER CONTACT INFORMATION:** Dale R. Burkholder, P.C.  
950 Kelly Avenue  
Gresham, Oregon 97030

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

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

**I. SUMMARY OF CLAIM**

The claimant, Mike Blackwell, seeks compensation in the amount of, between \$150,000 - \$170,000, 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 claimant desires compensation or the right to subdivide the 9.5-acre property into two parcels, and residential development of those parcels. The property is located east of the intersection of Gordon Creek Road and SE Hogg Mill Road, in the Corbett area of Multnomah 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 Mr. Blackwell's division of the 9.5-acre property into two parcels, and residential development of those parcels: Statewide Planning Goal 4 (Forest Lands), ORS 215.705 to 215.755 and 215.780, and applicable provisions of OAR 660, division 6. These laws will not

apply to the claimant only to the extent necessary to allow Mr. Blackwell a use of the property permitted at the time he acquired it on October 11, 1965. (See the complete recommendation in Section VI of this report.)

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

#### **Comments Received**

On April 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 written 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 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 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 letter in the department 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 24, 2005, for processing under OAR 125, division 145. The claim cites the Multnomah County's current Commercial Forest Use (CFU-4) zoning as the law that restricts the use of the property and is 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 claimant, Mike Blackwell, acquired the subject property on October 11, 1965, as evidenced by a Warranty Deed included with the claim. A copy of the tax assessment information for Tax Year 2004-2005 indicates that Mike Blackwell is the current owner of the subject property.

### **Conclusions**

The claimant, Mike Blackwell, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of October 11, 1965.

### **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, “Current zoning is CFU-4 [and] requires an 80acre minimum to qualify as a parcel for home site and...dwelling is limited to one home site.”

The claim is based on Multnomah County’s current Commercial Forest Use (CFU-4) zone and the applicable provisions of state law that require such zoning. The claimant’s property is zoned CFU-4 as required by Statewide Planning Goal 4 in accord with OAR 660, division 6, and ORS 215, because the property is comprised of forest land subject to Goal 4.

Statewide Planning Goal 4, (Forest Lands) (OAR 660-015-0000(4)), and laws applicable to land zoned for forest use under ORS 215, including ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6, restrict the right of an owner to divide the property for the purpose of sale and residential use. Goal 4 became effective on January 25, 1975, and required Forest Land, as defined by the Goal, to be zoned for forest use. (See citations to statutory and rule history under OAR 660-015-0000(4).) The Forest Land administrative rule (OAR 660, division 6) became

effective September 1, 1982 and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993, (Chapter 792, Or Laws 1993) and were adopted into OAR 660-006-0026 and 0027 on March 1, 1994. (See citations to rule history under OAR 660-015-0000(4).)

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 0027 establish an 80-acre minimum lot size for the creation of a new parcel in a forest zone and also establish the standards for dwellings in forest zones under Statewide Planning Goal 4.

The claimant acquired the subject property on October 11, 1965, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. The property was zoned Agriculture (F-2) by the county when the claimant acquired it. The F-2 zoning required a two-acre minimum lot size.

### **Conclusions**

The minimum lot size and dwelling standards established by Goal 4 (Forest Lands) and provisions applicable to land zoned for forest use in ORS 215 and OAR 660, division 6, were all enacted after Mr. Blackwell acquired the subject property in October 1965, 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 Mike Blackwell in 1965. The county's F-2 zoning in effect when the claimant acquired the property required a two-acre minimum lot size for the creation of new lots or parcels.

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 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 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 between \$150,000 - \$170,000 as the reduction in the property's fair market value, as a result of current regulations. This amount is based on the claimant's agent's (a realtor) estimate of the market value of three- to five-acre residential parcels in the area.

## **Conclusions**

As explained in Section V.(1) of this report, the current owner is Mike Blackwell, who acquired the property on October 11, 1965. Under Ballot Measure 37, Mike Blackwell 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 and conclusions in Section V.(2) of this report, laws adopted since the claimant acquired the property restrict division of the subject property. The claimant estimates the reduction in value due to the restrictions to be between \$150,000 - \$170,000.

Without an appraisal or other documentation, 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 is based on the County's CFU-4 zone, which restricts the use of the property relative to what would have been allowed in 1965 when the claimant acquired the property. This zone implements state land use laws including Goal 4 (Forest Lands), and applicable provisions of ORS 215 and OAR 660, division 6. None of these laws are exempt under Section 3(E) of Ballot Measure 37, which exempts laws enacted prior to the claimant's acquisition of the property.

## **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 Forest Land apply to the claimant's use of the property, and these laws are generally not exempt under Section 3(E) of Measure 37.

Laws in effect when the claimant acquired the property are 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. In some cases, some of these laws may be exempt under Sections 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 claimant should be aware that the less information he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his 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 9.5-acre property into two parcels and residential development of those parcels. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by between \$150,000 - \$170,000. However, because the claim does not provide an appraisal or other documentation to establish 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 Mr. Blackwell to use the subject property for a use permitted at the time he acquired the property on October 11, 1965.

### **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 Mike Blackwell's division of the 9.5-acre property into two parcels or to residential development of those parcels: applicable provisions of Statewide Planning Goal 4, ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6. These land use regulations will not apply to Mr. Blackwell's use of his property only to the extent necessary to allow him a use permitted at the time he acquired the property on October 11, 1965.
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 October 11, 1965.

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 25, 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.