

**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:** M120296

**NAMES OF CLAIMANTS:** Robert E. and Shirley J. Noteboom

**MAILING ADDRESS:** 3290 Brush College Road NW  
Salem, Oregon 97304

**PROPERTY IDENTIFICATION:** Township 7S, Range 3W, Section 6  
Tax Lot 400  
Polk County

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

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

**I. SUMMARY OF CLAIM**

The claimants, Robert and Shirley Noteboom, seek compensation in the amount of \$928,000 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 partition their 40-acre property into one 14-acre parcel and two 13-acre parcels and to develop a dwelling on each parcel. The property is located at 3290 Brush College Road, near the City of Salem in Polk 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 Robert and Shirley Noteboom's division of the property into three parcels and the development of a dwelling on each parcel: Statewide Planning Goal 3 (Agricultural Lands); ORS 215.263, 215.284, and 215.780; and applicable provisions of OAR 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow Robert and Shirley Noteboom a use of the property permitted at the time they acquired it on October 13, 1960. (See the complete recommendation in Section VI of this report.)

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

#### **Comments Received**

On April 4, 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, two written comments were received in response to the 10-day notice.

One set of comments 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 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 letter in the department's claim file.)

A second set of comments was submitted and is relevant to when the claimants became the present owners of the property; the nature of the claim being a request to partition, not for compensation; and if a partition is truly a "land use regulation." The comments have been considered by the department in preparing this report.

### **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 identifies specific sections of the rules, statutes and Statewide Planning Goals, as laws that restrict the use of the property and are 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, Robert and Shirley Noteboom, acquired the subject property on October 13, 1960, as reflected by a Deed included with the claim. A copy of a Property Tax Statement for July 1, 2004, through June 30, 2005, and a preliminary title report, demonstrate that Robert and Shirley Noteboom remain the owners of the property.

One of the comments from interested parties challenged the date of ownership for the Notebooms. Research done on July 19, 2005, by Tom Brateng, the cartographer for the Polk County Assessor’s Office, confirms that the Notebooms have been the owners of the property since 1960.

### **Conclusions**

The claimants, Robert and Shirley Noteboom, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of October 13, 1960.

### **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 claimants’ 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 claimants or a family member acquired the property.

### **Findings of Fact**

The claim indicates that land use laws or rules “...Prohibits land partition sought by claimant to divide property into three parcels: one 14-acre parcel and two 13-acre parcels.” The claimants also submitted a list of laws, and rules that the claimant asserts restricts the use of the property, including 86 provisions of statute. This list includes:

1. Parts of Oregon Administrative Rules (OAR) 660, related to the Land Conservation and Development Department;
2. Parts of Oregon Revised Statutes (ORS) 92.010 through 92.990, related to Subdivisions and Partitions;
3. Parts of ORS 197.005 through 197.763, related to Comprehensive Land Use Planning Coordination;
4. Parts of ORS 215.185 through 215.780, related to County Planning; Zoning; Housing Codes; and
5. ORS 227.110 related to City Planning and Zoning.

Many of the laws identified in the claim do not apply to or restrict the use of the property described in the claim, including OAR 660, divisions 1, 2, 4, 8, 12, 16, 18, 21, 22, 23, 25, 31, 34 and 45; and ORS 197.005 through 197.763. Additionally, some provisions of ORS 92 were in effect at the time the claimants acquired their property in 1960, and those provisions since enacted generally do not restrict the use of the property described in the claim. Those laws that apply to, or restrict the claimants' use of their property are discussed in more detail below.

The claim is based on Polk County's current Exclusive Farm Use (EFU) Zone, and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Statewide Planning Goal 3 in accord with OAR 660, division 33, and ORS 215 because the claimants' property is "Agricultural Land" as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284, and 215.780 and OAR 660, division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80 acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

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 215.283(1)(f).

OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. Subsequent amendments to comply with HB 3326 (Chapter 704, Oregon Laws 2001, and effective January 1, 2002) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

The claimants acquired the subject property on October 13, 1960, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. At that time the property was not zoned.

## **Conclusions**

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) (OAR 660-015-0000(3)) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted after Robert and Shirley Noteboom acquired ownership of the subject property in October 1960, 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 the Notebooms in 1960.

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 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 claim includes an informal estimate of \$928,000 as the property's fair market value, in the absence of current regulations. This estimate is based on a comparison with comparable properties in the vicinity, although no additional information was supplied. The real Property Statement indicates the current total real market value of the property is \$387,480.

## **Conclusions**

As explained in Section V.(1) of this report, the current owners are Robert and Shirley Noteboom who acquired the property on October 13, 1960. Under Ballot Measure 37, the Notebooms are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value.

Without an appraisal based on the proposed use of the subject property or other explanation, it is not possible to substantiate the specific dollar amount the claimants demand 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 an extensive list of state land use statutes and rules that restrict the use of the property relative to what would have been allowed in 1960 when the property was acquired by Robert and Shirley Noteboom. These include: parts of ORS 92, 197, 215, 227 and OAR 660. With the exception of provisions of ORS 92 in effect on October 13, 1960, none of these laws are exempt under Section 3(E) of Ballot Measure 37. Provisions of ORS 92 adopted before October 13, 1960, are exempt under Section 3(E) of the Measure, which exempts laws in effect when the claimant acquired 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 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.

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 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. 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 division of the claimants' 40-acre property into one 14-acre parcel and two 13-acre parcels and the development of a dwelling on each parcel. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$928,000. 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 Robert and Shirley Noteboom to use the subject property for a use permitted at the time they acquired the property on October 13, 1960.

### **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 Robert and Shirley Notebooms' division of the property into three parcels and the development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3, ORS chapter 215, and OAR 660, division 33, enacted after October 13, 1960. These land use regulations will not apply to Mr. and Ms. Notebooms' use of their property only to the extent necessary to allow them a use permitted at the time they acquired the property on October 13, 1960.
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 October 13, 1960.

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 26, 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.