

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

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

September 22, 2005

**STATE CLAIM NUMBER:** M120462

**NAMES OF CLAIMANTS:** Eugena Mead  
Stephen J. Mead

**MAILING ADDRESS:** 25360 NW Pihl Road  
Banks, Oregon 97106

**PROPERTY IDENTIFICATION:** Township 3N, Range 4W, Section 35  
Tax Lot 5000  
Washington County

**DATE RECEIVED BY DAS:** April 5, 2005

**180-DAY DEADLINE:** October 2, 2005

**I. SUMMARY OF CLAIM**

The claimants, Eugena Mead and Stephen J. Mead, seek compensation in the amount of \$7,800,000, 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 divide the 204.87-acre property into 36 parcels. The claimants propose that 31 of the new parcels will be approximately one- to three- acres in size and developed with residential dwellings, one parcel will be unbuildable, and four parcels will be for timber production. The property is located on Pihl Road, Banks, in Washington County.<sup>1</sup> (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 laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimants to allow them to divide and develop their property for residential use: Statewide Planning Goals 4 (Forest Lands), Goal 14 (Urbanization), applicable provisions of

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<sup>1</sup> On August 16, 2005 the department received correspondence from the claimant's agent to amend the original claim to add new uses and new regulations. This request constitutes a new claim and will be analyzed in a separate staff report under another claim number to be assigned.

ORS 215 and OAR 660, division 6, enacted after they acquired their present interest in the property. These laws will not apply to the claimants' use of the subject property only to the extent necessary to allow Eugena Mead a use of the northern 115.56-acres permitted at the time she acquired it on March 15, 1955 and a use of the southern 89.31-acres permitted at the time she acquired it on April 29, 1998; and to allow Stephen J. Mead a use of the subject property permitted at the time he acquired it on April 29, 1998.<sup>2</sup> (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On May 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 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

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<sup>2</sup> The southern 89.31-acre portion of the property is described as follows:

A parcel of land lying in the North one-half of the South one-half of Section 35, Township 3 North, Range 4 West, of the Willamette Meridian, in the County of Washington and State of Oregon, and being a portion of the following described property:

That land described in deed to Ervin E. Mead, et ux, recorded in Book 657, Page 639, Washington County Deed Records, said portion being more particularly described as follows:

Beginning at a point on the Northwest corner of the Southeast one-quarter of said Section 35; thence East along the North line of the Southeast one-quarter, 1452 feet; thence South 1320 feet; thence West to the center of Pihl Road (County Road No. 384) as traveled; thence North on the centerline of said county road to a point on the North line of the Southwest one-quarter of Section 35; thence East along the North line of the Southwest one-quarter to the point of beginning.

Excepting there from that portion of land described in Deed to Donald R. Caudill, et ux, recorded April 14, 1992, Fee No. 92023512, Washington County Deed Records, and excepting there from that portion of land described in deed to Steve Mead, recorded Dec. 27, 1979, Fee No. 79052999 Washington County Deed Records, and further excepting that portion of land described in Deed to State of Oregon, recorded November 21, 1939, in Book 185, Page 313, Washington County Deed Records.

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 April 5, 2005, for processing under OAR 125, division 145. The claim identifies Statewide Planning Goal 4 (Forest Lands) and applicable provisions of ORS 215 and OAR 660, division 6, as restricting the use of the property. 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**

Claimant Eugena Mead acquired the subject property on March 15, 1955, as reflected by a Warranty Deed included with the claim. Eugena Mead conveyed her entire interest in 89.31 acres of the subject property to her son, Stephen J. Mead, on November 6, 1995, as reflected by a Statutory Bargain and Sale Deed included with the claim. The southern portion of the subject property is also referenced as tax lot 5008 in some of the instruments included with the claim. On April 29, 1998, Stephen J. Mead conveyed the southern 89.31-acres back to Eugena Mead, as reflected by a Bargain and Sale Deed included with the claim (Recording #98051559). On April 29, 1998, Eugena Mead merged tax lot 5008 with tax lot 5000, as reflected by a Bargain and Sale Deed included in the claim (Recording #98051560). Also on April 29, 1998, Eugena Mead conveyed the subject property to herself and Stephen J. Mead as tenants in common, as reflected by a Bargain and Sale Deed obtained from Washington County (Recording #98051561).

A copy of a Preliminary Title Report dated January 31, 2005, indicates that Eugena Mead and Stephen J. Mead are tenants in common of the subject property. The Preliminary Title Report also indicates the presence of a waterline easement on the subject property.

## **Conclusions**

The claimants, Eugena Mead and Stephen J. Mead, are “owner(s)” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. The family ownership date of the subject property is March 15, 1955. The acquisition date of the subject property for Stephen J. Mead is April 29, 1998. The acquisition date for Eugena Mead is March 15, 1955, for the northern 115.56-acres and April 29, 1998, for the southern 89.31-acres.

## **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 state law “...restricts ability to locate dwellings in forest zones; restricts ability to partition or subdivide subject site; and restricts ability to site dwellings on subject site.” In a July 11, 2005, letter from the Mead’s agent, Bruce Vincent, the intended use in the claim was amended to: “subdivide the 204.87-acres of TL 5000 into 36 lots, 31 of which will be approximately one to three acres in size for new homes, one will be un-buildable, and four parcels would be for timber production.”

Current Washington County zoning for the subject property is Exclusive Forest Conservation (EFC) zone, which precludes division of subject property to the extent that the claimants’ desire. The County’s EFC zone was adopted in 1983, to comply with Statewide Planning Goal 4, (Forest Lands), ORS 215, and OAR 660, division 6.

Statewide Planning Goal 4, (Forest Lands), 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 division and residential development of the subject property. Goal 4 became effective on January 25, 1975, and required forest land, as defined by the Goal, to be zoned for forest use. (See 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, Oregon Laws 1993) and were adopted into OAR 660-006-0026 and 0027 on March 1, 1994. (See 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.

Statewide Planning Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses. Goal 14 became effective on January 25, 1975.

The Mead family acquired the subject property on March 15, 1955, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. No County zoning applied to the property at the time Eugena Mead acquired the property in 1955.

### **Conclusions**

The minimum lot size and dwelling standards established by Statewide Planning Goal 4 and OAR 660-006-0026 and 0027, and by applicable provisions of ORS 215, were all adopted after Eugena Mead acquired the subject property in 1955, and do not allow the division of the property into parcels less than 80-acres in size or the approval of dwellings on one- to three-acre 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 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 \$7,800,000, as the reduction in the property's fair market value as a result of restricting regulations. This amount is based on the claimants' estimate of the market value of five-acre lots, less present value.<sup>3</sup> The claim does not include evidence to substantiate this estimate.

### **Conclusions**

As explained in Section V. (1) of this report, the current owners are Eugena Mead and Stephen J. Mead. The Mead family acquired the property on March 15, 1955. Under Ballot Measure 37, Eugena Mead and Stephen J. Mead 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' family acquired the property restrict division of and the ability to put dwellings on the subject property. The claimants estimate the reduction in value due to the restrictions to be \$7,800,000.

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<sup>3</sup> This estimate is based on the claimants' original claim form and does not reflect the intended use described in the July 11, 2005, correspondence from Bruce Vincent referenced in Section V. 2. The July 11, 2005, letter does not include a revised estimate of the fair market value reduction amount.

Without an appraisal based on other documentation, 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 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 Washington County's EFC zone and the related provisions of state law that have restricted the use of the subject property and reduced its fair market value, including Statewide Planning Goal 4 (Forest Lands), and relevant provisions of ORS 215, OAR 660, division 6. These laws were adopted after 1955, when Eugena Mead acquired the property and therefore are not exempt under Section 3(E) of Measure 37, which exempts laws enacted after the claimants' family acquired the property.

While not directly raised by the claimants, the department notes that ORS 215.730 and OAR 660, division 6 include standards for siting dwellings in forest zones. This provision includes fire protection standards for dwellings and for surrounding forest lands. Section 3(B) of Measure 37 specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes..." The department finds that siting standards for dwellings in forest zones in ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under Section (3) of Measure 37.

#### **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 in general, these laws are not exempt under Measure 37.

Laws in effect when the claimants' family acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. The restrictions in ORS 215.730 and provisions of OAR 660, division 6, that establish fire protection standards for dwellings in forest zones are exempt under Section 3(B) of the Measure and will continue to apply to the subject 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. 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 36 parcels, and the development of 31 of those parcels for residential dwellings. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$7,800,000. 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 Eugena Mead to use the northern portion of the subject property for a use permitted at the time she acquired the property on March 15, 1955, and to use the southern portion of the property for a use permitted at the time she acquired it on April 29, 1998; and to allow Stephen J. Mead a use of the property permitted at the time he acquired it on April 29, 1998.

On April 29, 1998, the property was subject to the laws described in Section V.(2) of this report as currently in effect. Specifically, provisions of Statewide Planning Goal 4, ORS 215.705 to 215.755 and ORS 215.780, OAR 660-006-0026 and 0027 apply to establish an 80-acre minimum lot size and also establish standards for dwellings in forest zones.

## **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 claimants' division and development the subject property: the applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215.705 to 215.755 and 215.780, and OAR 660 division 6, enacted after each claimant acquired their present interest in the property. These land use regulations will not apply to Eugena Mead's use of the northern 115.56 acres of the property only to the extent necessary to allow her a use of that northern portion of the property permitted at the time she acquired it on March 15, 1955; and will not apply to Eugena Mead's use of the southern 89.31 acres of the property only to the extent necessary to allow her a use of that portion of the property permitted at the time she acquired it on April 29, 1998. These laws will not apply to Stephen Mead's use of the subject property only to the extent necessary to allow him a use of the property permitted at the time he acquired it on April 29, 1998. The department acknowledges that the relief to which Stephen Mead is entitled under Measure 37, and the relief to which Eugena Mead is entitled under Measure 37 for the southern portion of the property will not allow them to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to Eugena Mead to use the northern 115.56 acres of the property subject to the standards in effect in March, 1955. The action by the State of Oregon provides the state's authorization to Stephen J. Mead to use the subject property and to Eugena Mead to use the southern 89.31 acres of the property subject to standards in effect on April 29, 1998. On that date, the property was subject to applicable provisions in Statewide Planning Goal 4, ORS 215, and OAR 660 division 6 then in effect.
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 September 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.