

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

August 26, 2005

**STATE CLAIM NUMBER:** M120127

**NAME OF CLAIMANTS:** Gayleen D. Weiler and Joleeta K. Perkins

**MAILING ADDRESS:** 4306 Botticelli  
Lake Oswego, Oregon 97035

**OTHER CONTACT INFORMATION:** E. Sean Donohue, Attorney at Law  
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**PROPERTY IDENTIFICATION:** Township 3S, Range 2E, Section 22  
Tax Lot 200  
Clackamas County

**DATE RECEIVED BY DAS:** March 10, 2005

**180-DAY DEADLINE:** September 6, 2005

**I. SUMMARY OF CLAIM**

The claimants, Gayleen D. Weiler and Joleeta K. Perkins, seek compensation in the amount of \$2,710,000 for a 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 29.30-acre property into ten parcels of approximately two- to five-acres each and to develop a dwelling on each parcel. The property is located southeast of Oregon City, in Clackamas 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 just compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Gayleen D. Weiler and Joleeta K. Perkins' division of the 29.30-acre

property into ten, approximately two- to five-acre parcels, and to the development of a dwelling on each parcel: Statewide Planning Goal 14 and OAR 660-004-0040, enacted after the claimants each acquired the subject property. These laws will not apply to the claimants only to the extent necessary to allow Gayleen D. Weiler and Joleeta K. Perkins a use of the subject property permitted at the time they acquired their interests on March 1, 1999, and October 30, 2000, respectively. The department acknowledges that the relief recommended in this report will not allow Gayleen D. Weiler and Joleeta K. Perkins to use the property in the manner set forth in this claim. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS RECEIVED**

On April 8, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to 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 criterion 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 criterion, whichever is later.

#### **Findings of Fact**

This claim was submitted to DAS on March 10, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's FF-10 and R-20 zoning and OAR 660-004-0040(8)(e) as the 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 regulation 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 of 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 Gayleen D. Weiler acquired interest in the subject property by Deed from her husband, John B. Weiler, on March 1, 1999. John Weiler had acquired the property from his parents, B. E. Weiler and Lois L. Weiler, by Deed on December 14, 1973. B. E. and Lois Weiler had acquired the property by Deed on May 11, 1960.

Claimant Joleeta K. Perkins acquired an interest in the subject property from her sister, claimant Gayleen Weiler, by Deed on October 30, 2000.

A February 10, 2005, Lot Book Service shows that Gayleen D. Weiler and Joleeta K. Perkins are the current owners of the subject property.

### **Conclusions**

Claimant Gayleen D. Weiler is an “owner” of the subject property as that term is defined in Section 11(C) of Ballot Measure 37, as of March 1, 1999. Joleeta K. Perkins, is an “owner” of the subject property as that term is defined in Section 11(C) of Ballot Measure 37, as of October 30, 2000. B. E. Weiler, Lois L. Weiler, John B. Weiler, and Gayleen Weiler are “family members” as that term is defined in Section 11(A) of Measure 37 because John Weiler is Gayleen Weiler’s husband, B.E. Weiler and Lois Weiler were John Weiler’s parents, and Gayleen Weiler is Joleeta Perkins’ sister.

### **2. The Laws that are the Basis for the 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 states: “The original zoning, R-20, was adopted December 14, 1967, and restricted the development of the property to one (1) home site. On June 19, 1980, the property was zoned FF-10 (Farm-Forest 10-acres). This zoning expanded the R-20 development restrictions to two (2) home sites. On October 4, 2000, OAR 660-004-0040(8)(e) was adopted. This Rule restricted the development of the Property to one (1) home site.”

The property has been zoned Farm-Forest 10-Acre (FF-10) by Clackamas County since June 19, 1980. This rural-residential zone permits one detached single family dwelling on a lot or parcel at least 10-acres in size.<sup>1</sup> The subject property is 29.30-acres in size and could be divided into two parcels in the FF-10 zone, subject to the requirements of OAR 660-004-0040.

Statewide Planning Goal 14 (Urbanization) was effective January 25, 1975, and required that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use.<sup>2</sup> In 2000, as a result of a 1986 Oregon Supreme Court decision,<sup>3</sup> the Commission amended Goal 14 and adopted OAR 660-004-0040 *Application of Goal 14 (Urbanization) to Rural Residential Areas*, which was effective October 4, 2000. The rule provides that after October 4, 2000, an exception to Goal 14 is required to create a lot or parcel in a rural residential zone that is smaller than the county's minimum lot size standard. For rural residential land within one mile of the Portland metropolitan area urban growth boundary (UGB), that minimum lot size is 20-acres (OAR 660-004-0040(8)(e)). This standard applies to the subject property because it is located within one mile of the UGB, and the standard does not allow the subject 29.30-acre property to be divided without a Goal 14 exception. (See OAR 660-004-0040(7) and (8).)

Current land use regulations, particularly Goal 14 and OAR 660-004-0040, do not allow the subject property to be divided into lots or parcels smaller than 20-acres without a Goal 14 exception.

The claimants' family acquired the subject property in May 1960, prior to the imposition of local zoning, and prior to the adoption of the Statewide Planning Goals and their implementing regulations.

### **Conclusions**

Lot size standards for rural residential lots or parcels established by Statewide Planning Goal 14 and OAR 660-004-0040 and adopted since the claimants' family acquired the property in 1960, prohibit division of the property into smaller lots or parcels for residential development. Land use laws adopted since 1960 restrict the use of the property from what could have been done when the claimants' family acquired the property 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

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<sup>1</sup> Clackamas County Zoning Ordinance, Chapter 310, Section 310.03A and B.

<sup>2</sup> Prior to 2000, Goal 14 was held to prohibit residential development outside UGBs at densities of one to five-acres per lot or parcel. (See *DLCD v. Klamath County*, 38 OR LUBA 769 (2000).)

<sup>3</sup> *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or App 447 (1986).

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 laws 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 estimates that the property is worth \$10,000 per-acre “based on current zoning that restricts development” (a total value of \$293,000 for the subject 29.30-acre parcel.)<sup>4</sup> Claimants estimate that each of the ten desired lots “that would be planned to complement the adjacent golf club . . . would be worth at least \$300,000, based on comparable sale of similar parcels in the area” (a total value of \$3,000,000). The claim estimates that the fair market value of the subject property has been reduced by the difference between these two values, \$2,707,000, plus \$3,000, for a total of \$2,710,000, as a result of land use laws enacted after the claimants’ family acquired the property in 1960. There is no certified appraisal to substantiate the claimed values either before or with state land use regulations.

#### **Conclusions**

As explained in section V. (1) of this report, the current owners are Gayleen D. Weiler and Joleeta K. Perkins, who acquired the property on March 1, 1999 and October 30, 2000, respectively. Their family acquired ownership on May 11, 1960. Under Ballot Measure 37, the claimants 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 V.(2) of this report, laws adopted since the claimants’ family acquired the property in 1960 restrict the division of the subject property.

Without an appraisal based on the value of ten (10) lots of approximately two (2) to five (5)-acres each or other substantiating documentation, it is not possible to substantiate the specific dollar amount that 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.

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<sup>4</sup> The Clackamas County Assessor estimates the current real market value as \$307,312. Also see the Western American Property Research Lot Book Service report in the department’s claim file.

## **Findings of Fact**

The claim is based on Clackamas County's FF-10 zone and related provisions of state law, Statewide Planning Goal 14 and OAR 660-004-00040, which restrict the use of the property relative to what would have been allowed in 1960 when the Weiler family acquired the property. None of these laws appear to be exempt under Section 3(E) of Ballot Measure 37.

## **Conclusions**

Goal 14 and its implementing rules at OAR 660-004-00040, were enacted after the claimants' family acquired the subject property and are not exempt under Section 3(E) of the Measure.

Laws in effect when the claimants' family acquired the property are exempt under subsection 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. 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 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 their use for residential purposes. The claimants cannot create the desired two- to five-acre lots out of the subject property or develop those lots for residential use because laws enacted after the claimants' family acquired the property prohibit lots that small. The claim asserts that the laws

enforced by the Commission or department reduce the fair market value of the subject property by \$2,710,000. However, because the claim does not provide an appraisal or other specific 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, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow Gayleen Weiler and Joleeta Perkins to use the subject property for a use permitted at the time they acquired the property on March 1, 1999, and October 30, 2000, respectively.

When Gayleen Weiler acquired the property in 1999, Clackamas County's Farm Forest 10-acre zone was in place. This zone required a minimum lot size of 10-acres, as does the current Clackamas County law. When Joleeta Perkins acquired the property in October, 2000, the Goal 14 rule, OAR 660-004-0040 also applied to the property. Under OAR 660-004-0040, the property cannot be divided into parcels smaller than 20-acres each without taking an exception to Goal 14.

## **Conclusions**

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 Gayleen Weiler's and Joleeta Perkins' division of the 29.30-acre property or to the establishment of a single family dwelling on each lot or parcel created: applicable provisions of Statewide Planning Goal 14 and OAR 660-004-0040 enacted after each claimant acquired the property. As a result, these land use regulations will not apply to Gayleen Weiler's use of the property only to the extent necessary to allow Ms. Weiler a use of the property permitted when she acquired the property on March 1, 1999; and will not apply to Joleeta Perkins' use of the property only to the extent necessary to allow Ms. Perkins a use of the property permitted when she acquired the property on October 30, 2000. The department acknowledges that the relief recommended in this report will not allow the claimants to use the property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to Ms. Weiler to use the property subject to the standards in effect on March 1, 1999, and to Ms. Perkins to use the property subject to the standards in effect on October 30, 2000.
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 final 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 Clackamas County or other jurisdiction 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 Clackamas County or other 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 2, 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.