

BEFORE THE BOARD OF COUNTY COMMISSIONERS  
FOR MULTNOMAH COUNTY, OREGON

**ORDINANCE NO. 1055**

Adopting New Provisions in Chapter 7 of the Multnomah County Code for the Review of Demands for Compensation under Oregon Revised Statutes Chapter 197 as Amended by Ballot Measure 37 Passed November 2, 2004, and Declaring an Emergency

**The Multnomah County Board of Commissioners Finds:**

- a. On November 2, 2004, the voters of the State of Oregon approved Ballot Measure 37 that amended Oregon Revised Statutes Chapter 197 to require governments to pay compensation to present owners of real property if land use regulations restrict the use of the property such that it reduces its fair market value or, in the alternative, forego enforcement of the regulation (waiver) which restricts the use beyond those restrictions in place on the property at the time the owner acquired the property.
- b. Ballot Measure 37 provides that in order to receive compensation or waiver of a land use regulation, a present owner of real property (claimant) must make a written "demand for compensation" (claim) to the government entity enacting or enforcing a land use regulation that allegedly restricts the use of their property in this manner.
- c. Ballot Measure 37 authorizes the county to adopt and apply procedures for processing compensation claims.
- d. It is in the interest of the citizens of Multnomah County to adopt such procedures to ensure fair and timely review of claims and to protect the public from the detrimental effects to the public health, safety, and welfare that would result from the granting of non-meritorious claims. The County wishes to do this by providing a process for the orderly review of claims; establishing a minimum amount of factual and analytical information a claimant must provide in order to file a claim; defining key terms and clarifying ambiguities in the text of the ballot measure; and establishing a fee to offset the cost to the general public of evaluating claims.
- e. Waiver or modification of land use regulations may negatively impact the fair market value of neighboring properties. It is in the public interest that the county provide notice of claims to these citizens and provide an avenue for protecting their reasonable investment-backed expectations where they have relied upon land use regulations in purchasing real property by allowing them to seek to recover from the claimant the amount of their damages through "Private Right of Action" in circuit court.
- f. Ballot Measure 37 is directed at a landowner's ability to establish a use on an existing property, not to create new properties. Accordingly, land division laws that set out the procedures necessary to create new conveyable pieces of real property are not subject to this measure. A division of land is not a use of land. To interpret otherwise harms the public, going beyond the voter mandate and creating circumstances where lots or parcels, created as a result of a modification or waiver of a land use regulation, cannot be built upon. New parcels or lots would be subject to land use laws in effect on the date they are formed because they would not have existed at the time the claim was filed. Further, a new owner is not entitled to a waiver or modification that might allow development because the measure provides that they are personal to the claimant. For these reasons the measure cannot be read to provide a right to divide land,

meaning that land division laws are subject to a claim only to the extent that they prevent the establishment of a use on an existing property.

**Multnomah County Ordains As Follows:**

**Section 1.** Chapter 7, Business and Community Services, of the Multnomah County Code is amended to add Section 7.500 *et. seq.* as follows:

**7.500 PURPOSE.**

The purpose of this subchapter is to implement Oregon Revised Statutes Chapter 197, as amended by Ballot Measure 37, passed November 2, 2004, and to:

- establish a procedure to process demands for compensation (claims) quickly, openly, thoroughly, and consistent with the law;
- enable present real property owners (claimants) making claims to have an adequate and fair opportunity to present their claims to the county's Board of County Commissioners (Board);
- provide the Board with the factual and analytical information necessary to adequately and fairly consider claims;
- ascertain county liability for compensation apart from State of Oregon (State) and Metropolitan Service District (Metro) liability;
- take appropriate action under the alternatives provided by law;
- to preserve and protect limited public funds;
- preserve and protect the interests of the community by providing for public input into the process of reviewing claims; and
- establish a record of decisions capable of withstanding legal review.

**7.505 DEFINITIONS.**

For purposes of this subchapter the following definitions shall apply:

***APPRAISAL.*** A written appraisal concluding to Fair Market Value of real property prepared by an appraiser licensed by the Appraiser Certification and Licensure Board of the State of Oregon pursuant to ORS Chapter 674 and meeting the appraisal requirements set forth in Uniform Standards of Professional Appraisal Practice (USPAP). In the case of commercial or industrial property, the term "appraisal" additionally means a written appraisal concluding to Fair Market Value prepared by an appraiser holding an MAI qualification (Member Appraisal Institute), as demonstrated by written certificate.

***CLAIM.*** The "written demand for compensation" required to be made by an "owner" of "real property" under Ballot Measure 37. Demands shall not be considered made under Ballot Measure 37 until

the county accepts the demand as complete, i.e. meeting the requirements for making a demand under this subchapter.

**CLAIMANT.** Present owner(s) of real property. See definition for “owner.”

**DEMAND.** “Claim” and “written demand for compensation” as defined herein.

**DIRECTOR.** The Planning Director for Multnomah County.

**EXEMPT LAND USE REGULATION.** Those land use regulations that are specifically listed as exempt from compensation or waiver requirements as set forth in Ballot Measure 37 and in MCC 7.510.

**FAMILY MEMBER.** The wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the real property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family members or the owner of the real property.

**LAND USE.** A physical improvement on real property related to use of the land or an activity which is conducted on real property (examples: residential use, commercial use, industrial use, community service use, farm use or forest use). A further division of real property is not a land use.

**LAND USE REGULATION.** Includes:

- (1) Any statute regulating the use of land or any interest therein;
- (2) Administrative rules and goals of the Land Conservation and Development Commission;
- (3) Multnomah County’s comprehensive plan, zoning ordinance, land division ordinance, or transportation ordinance of Multnomah County; and,
- (4) Metro’s regional framework plans, functional plans, planning goals and objectives.

**OWNER.** The present owner(s) of real property, or any interest therein, which is the subject of a claim. The owner is a person who is the sole fee simple owner of the real property or all joint owners whose interests add up to a fee simple interest in property, including all persons who represent all recorded interests in property, such as co-owners, holders of less than fee simple interests, leasehold owners, and security interest holders.

**PROPERTY.** Private real property, or interest therein, as described in a deed or other legal instrument, which existed on the date of the claim.

**REDUCTION IN VALUE.** The difference in the fair market value, if any, of the property with certain land use regulations enforced or applied; and the fair market value of the subject property without those land use regulations enforced or applied to the property.

**RESTRICTS THE USE.** A land use regulation that prohibits a land use or limits the manner in which it can be established on the property.

**VALID CLAIM.** A claim submitted by the owner of real property that is subject to a land use regulation enacted and/or enforced by Multnomah County that restricts the use of the private real property

in a manner that reduces the fair market value of the real property and meets all the requirements of MCC 7.500 *et. seq.*.

**WRITTEN DEMAND FOR COMPENSATION.** “Claim” or “demand” as defined herein.

#### **7.510 APPLICABILITY AND EXCEPTIONS.**

(A) An owner of private real property located within unincorporated Multnomah County may file a claim under this subchapter if the county enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of Ballot Measure 37, which amended Oregon Revised Statutes Chapter 197, and it restricts the use of private real property, or any interest therein, and has the effect of reducing the fair market value of the property, or any interest therein.

(B) This subchapter, in compliance with ORS Chapter 197, as amended by Ballot Measure 37, does not allow claims for certain categories of regulations which may reduce the fair market value of the property, or any interest therein. The categories of regulations that are exempt from claims for compensation include the following:

- (1) A regulation restricting or prohibiting activities commonly and historically recognized as public nuisances under common law and the criminal laws of Oregon and Multnomah County;
- (2) A regulation restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, pollution control regulations, including, but not limited to the following:
  - a) The County Hillside Development zoning overlay is necessary to protect public health and safety and minimize pollution, ensuring that earthwork on steep slopes or areas susceptible to sloughing or debris flows is undertaken such that it does not compromise slope stability or cause excessive erosion,
  - b) Grading and Erosion Control regulations are building codes necessary to protect public health and safety and minimize pollution by limiting soil erosion attributed to earthwork, and
  - c) Flood Hazard regulations are building codes necessary to protect health and safety to minimize loss due to flood conditions and allow property owners within the County to participate in the National Flood Insurance Program.
- (3) A county regulation required to comply with federal law; and specifically no claims will be accepted for those properties situated within the Columbia River Gorge National Scenic Act area. These properties are exempt from ORS 197, as amended by Ballot Measure 37. The county comprehensive plan and zoning code provisions applicable to these properties are regulations required to comply with federal law.
- (4) A regulation restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing; or
- (5) A regulation enacted prior to the date of acquisition of the real property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.
- (6) Land division regulations, except where they restrict the use of a property.

#### **7.515 SCOPE OF CLAIMS.**

(A) An owner of private real property located within unincorporated Multnomah County, or an owner of contiguous parcels purchased at the same time, who asserts a right to compensation under ORS 197, as amended by Ballot Measure 37, shall make a claim for compensation as provided in this subchapter. Owners of noncontiguous properties must file separate claims.

(B) A claim must be submitted for each land use regulation which the owner asserts restricts the use of a property and has the effect of reducing the fair market value of the property.

(C) If an owner wishes to assert that more than one regulation restricts use of the property, and has the effect of reducing the fair market value of the property, all claims regarding that property must be filed simultaneously and considered by the county simultaneously.

(D) Separate claims must be submitted for each parcel of real property.

(E) Claims based on regulations that contain discretionary criteria for approval of development on a property may only be filed after Multnomah County has enforced its regulations through approval or denial of a land use application. Such an approval or denial is necessary to establish whether a particular land use regulation "restricts the use" of a property.

#### **7.520 CONTENT OF WRITTEN CLAIM.**

(A) A Claim pursuant to MCC 7.510 shall only be submitted to and accepted for review by the Director, or the Director's designee, and shall include the following information:

(1) A description of the private real property for which the owner is claiming compensation, including the street address and either a legal description or a County Tax Assessor's description of the property, specifically identifying whether the claim relates to real property other than land or, to a portion of the ownership less than fee simple absolute;

(2) The name, address, and telephone number of all owners and anyone with an interest in the property, including lien holders, trustees, renters, and lessees, together with a description of the ownership interest of each;

(3) The date the claimant acquired ownership of or an interest in the private real property and a copy of the document which provides proof of first ownership;

(4) A title report, including title history, current within 30 days prior to the claim date, verifying the ownership or interests in the private real property;

(5) Copies of any land use decisions claimant believes are related to the claim.

(6) If the claim is based upon the date a family member acquired the property, then documentation sufficient to establish the familial relationship along with a chain of title showing continual ownership;

(7) Copies of any Covenants, Conditions and Restrictions (CCR's), leases, or other encumbrances applicable to the real property;

(8) Identification of the specific land use regulation which restricts the owner's use of the real property, and for which the owner is claiming compensation;

(9) A statement describing the manner in which, and the extent to which, the regulation restricts the use of the private real property and has the effect of reducing the fair market value of the property for which the owner is claiming compensation;

(10) The amount of the claim, based upon the alleged reduction in value, supported by an appraisal of the private real property for which the owner is asserting a claim. If the value of the claim exceeds \$10,000, then copies of two appraisals, prepared by different appraisers, must be included;

(11) A statement of the relief sought by the owner, such as a monetary payment in a specific amount; waiver of the applicable regulation; or modification of the applicable regulation. If a modification of the regulation is sought, then a description of the desired modification must be included;

(12) Payment of any required claim processing fee; and

(13) The signature of the claimant.

(B) The Director shall conduct a completeness review within 30 days after submittal of the claim and shall advise the owner, in writing, of any material remaining to be submitted. Once all of the required materials for a complete claim are received, the Director shall declare the claim complete and send the notice required by MCC 7.530(A) and (B).

(C) Commencement of the 180-day period allowed for local government claim procedures prior to any cause of action being authorized for the owner in circuit court as specified in Oregon Revised Statutes Chapter 197 starts on the date the Director deems the claim complete and accepts it for filing.

#### **7.525 CLAIM PROCESSING FEES.**

(A) The Claim Processing Fees shall cover the actual administrative costs to county for processing a claim. An owner shall pay a retainer of \$1500 at the time they submit a claim to the Director. Following final action by the county on the claim, the Director shall provide an accounting of the actual administrative costs, including staff and legal costs, that the county incurred in reviewing and acting on the claim. County shall refund any excess funds from the retainer to the owner within 30 days after the final decision, or shall bill for additional costs not covered by the retainer.

(B) A billing for the amount of the unpaid administrative costs for processing the claim shall be forwarded by certified or registered mail, return receipt requested, to the owner. Payment shall be made to the Director within 30 days from the billing date set out on the bill.

(C) If the property owner does not pay the amount due within 30 days of the billing date, county may pursue collection, including filing a lien on the property. The lien is perfected by filing it with the County Recorder's Office in the deed records indicating the amount of the lien, the basis for the lien and the property to which the lien attaches.

(D) The lien provided for in subsection (C) shall be given priority over all liens except those for taxes and assessments and shall include interest at 0.5% per month accruing from the date the billing is sent to the owner of the property.

(E) The lien provided for in subsection (C) shall be foreclosed in the manner prescribed by state law for the enforcement of liens and collection of assessments.

(F) In compliance with MCC 37.0560, no permits will be approved on properties with a lien for unpaid processing fees required by this subsection.

(G) County shall collect reasonable attorney's fees and costs for collection of the debt, which may be made part of the lien and the debt.

#### **7.530 CLAIM REVIEW PROCESS.**

(A) After a claim for compensation is declared complete pursuant to MCC 7.520(B), the Director shall mail notice of the claim to the claimant, other owners of record of the property, and all owners of property within 750 feet of the subject property. Additional mail notice shall be sent to any public entities with land use regulatory authority over the property and other organizations or persons as the Director may designate.

(B) The Director's notice under subsection (A) shall:

- (1) Indicate the date that the claim was filed;
- (2) State the basis of the claim, the amount of the compensation or waiver sought and the land use regulation that the owner asserts gives rise to a claim;
- (3) Identify the property by the street address or other easily understood geographical reference;
- (4) State that persons noticed may provide written comments on the claim, and provide the date written comments are due;
- (5) Indicate a timeframe within which the Board will take action on the claim and identify how interested persons can learn of the specific date the Board will meet on the matter, once a meeting date is set;
- (6) Provide the name and phone number of a county representative who can be contacted for additional information; and
- (7) State that a copy of the claim and the supporting documents submitted by the owner are available for inspection at no cost, or that copies will be provided at reasonable cost.

(C) Written comments regarding a demand may be submitted to the Director by any interested person. Comments must be received by the Director within 14 days from the date of the notice required under subsections (A) and (B) above. The owner shall have an additional 7 days after the deadline set out above to respond to any written comments received by the Director. It is the duty of the owner to determine if comments have been received by the Director.

(D) The Director shall prepare a draft staff report within 30 days after the comment period has ended. The report shall apply the standards of Oregon Revised Statutes Chapter 197, as implemented through this subchapter, to the claim.

(E) After the Director has completed a draft staff report, the Director shall send a copy of it to Assessment and Taxation for review of the appraisal(s) submitted by the owner and shall send a copy of it to the County Attorney's Office for review. Assessment and Taxation and the County Attorney's Office will have 30 days for review.

(F) After the Director receives the comments from Assessment and Taxation and the County Attorney's Office, the Director will prepare a final staff report and make it available to the public at least 10 days prior to the Board meeting. The final staff report shall include options for Board action.

(G) The Board shall conduct a public hearing before taking final action on the claim. The procedures for the hearing must include, but are not limited to staff presentation and public testimony, followed by deliberation and a decision by the Board.

(H) The Board's options for its decision include, but are not limited to the following:

(1) Find the claim invalid and issue a Board Order to deny the claim based on one or more of the following findings:

(a) The land use regulation does not restrict the use of the private real property;

(b) The fair market value of the property is not reduced by the enactment, enforcement or application of the land use regulation;

(c) The demand was not timely filed;

(d) The owner failed to comply with the requirements for making a demand as set forth in this subchapter;

(e) The owner is not the present property owner, or the property was not owned by a family member or the claimant was not the property owner at the time the land use regulation was enacted, enforced or applied;

(f) The land use regulation is an exempt regulation as defined in Oregon Revised Statutes Chapter 197, as amended by Ballot Measure 37, passed November 2, 2004;

(g) The land use regulation in question is not an enactment of the county;

(h) The county has not taken final action to enact, or enforce the land use regulation to the property;

(i) The owner is not entitled to compensation under Oregon Revised Statutes Chapter 197, as amended by Ballot Measure 37, passed November 2, 2004, for a reason other than those provided herein.

(2) Find the claim valid and issue a Board Order to award compensation, either in the amount requested, or in some other amount supported by the evidence in the record, subject to the availability and appropriation of funds for that purpose;



(3) Find the claim valid and issue a Board Order to modify the regulation which restricts the use beyond those restrictions in place on the property at the time the owner acquired the property; or

(4) Find the claim valid and issue a Board Order to waive the regulation which restricts the use beyond those restrictions in place on the property at the time the owner acquired the property.

(I) If the Board modifies or waives the challenged county land use regulation in response to a claim by owner, the modification or waiver is valid only as to the owner during owner's ownership of the property for those regulations listed in the claim which were found by the Board to be valid; all other current regulations remain in effect. The Board may, at its discretion, reinstate any or all of the land use regulations in effect at the time the owner acquired the property. A Board waiver is not a waiver of any state law or Metro Code provision.

(J) The final decision on a claim shall be made by the Board. After review the Board shall, under the standards of Oregon Revised Statutes Chapter 197, as amended by Ballot Measure 37 determine whether compensation is granted, the amount of compensation if any, whether any exceptions to the requirement for compensation apply or whether the regulation should be modified, removed or deemed not to apply to the property. A copy of the Board Order shall be sent by mail to the owner and to each individual or entity that participated in the Director or Board process, provided a mailing address was provided to the Director as part of the claim process.

(K) Waiver of a county land use regulation does not constitute a waiver of any corresponding state statutes.

(L) A decision by the Board to waive or modify a land use regulation shall be personal to the owner, and if not acted upon, shall automatically become invalid and void upon transfer of any ownership interest in the subject property. Upon transfer of any ownership interest in the subject property, any use of the property that is not consistent with regulations in effect at the time of transfer, shall be deemed to be a nonconforming use and all state laws, rules and county code provisions relating to nonconforming uses shall be applicable.

(M) If the Board issues an Order finding that an owner has a valid claim and granting compensation or a modification or a waiver, the owner shall record a copy of the Order in the Recorder's Office of Multnomah County. The Order must include a legal description of the subject property.

(N) This subchapter shall be interpreted in a manner consistent with Oregon Revised Statutes Chapter 197, as amended by Ballot Measure 37, Passed November 2, 2004, and other implementing statutes or regulations and as interpreted by Oregon appellate courts.

#### **7.535 CONDITIONS OF APPROVAL, REVOCATION OF DECISION.**

(A) The Board may establish any relevant conditions of approval for compensation, should compensation be granted, or for any other action taken under MCC 7.530 of this subchapter.

(B) Failure to comply with any condition of approval is grounds for revocation of the approval of the claim, grounds for recovering any compensation paid and grounds for revocation of any other action taken under this subchapter.

(C) In the event the owner, or the owner's successor in interest, fails to fully comply with all conditions of approval or otherwise does not comply fully with the conditions of approval, the Director may institute a revocation or modification proceeding before the Board under the same process for Board review of a claim under this subchapter.

#### **7.540 EX PARTE CONTACTS, CONFLICT OF INTEREST AND BIAS.**

The following rules govern any challenges to Board participation in the review or hearings regarding compensation claims:

(A) Any factual information obtained by a member of the Board outside the information provided by Director or county staff, or outside of the formal written comments process or hearing will be deemed an *ex parte* contact. A member of the Board that has obtained any material factual information through an *ex parte* contact must declare the content of that contact, and allow any interested party to rebut the substance of that contact. This rule does not apply to contacts between county staff and a member of the Board.

(B) Whenever a member of the Board, or any member of their immediate family or household, has a financial interest in the outcome of a particular demand or lives within the area entitled to notice of the demand, that member of the Board shall not participate in the deliberation or decision on that application.

(C) All decisions on demands must be fair, impartial and based on the applicable review standards and the evidence in the record. Any member of the Board who is unable to render a decision on this basis must refrain from participating in the deliberation or decision on that matter.

#### **7.545 ATTORNEY FEES ON DELAYED COMPENSATION.**

(A) If a demand under Oregon Revised Statutes Chapter 197 and MCC 7.500 *et. seq.* is denied or not fully paid within 180 days of the date of filing a completed demand, the owner's reasonable attorney fees and expenses necessary to collect compensation will be added as additional compensation provided compensation is awarded to the owner. If such demand is denied, not fully paid, or other action taken under Oregon Revised Statutes Chapter 197, within 180 days of the date of filing a completed demand, and the owner commences suit or action to collect compensation, if county is the prevailing party in such action, then county shall be entitled to any sum which a court, including any appellate court, may adjudge reasonable as attorney's fees.

(B) In the event county is the prevailing party and is represented by "in-house" counsel, the prevailing party shall nevertheless be entitled to recover reasonable attorney fees based upon the reasonable time incurred and the attorney fee rates and charges reasonably and generally charged and paid in Multnomah County, Oregon for the type of legal services performed.

#### **7.550 AVAILABILITY OF FUNDS TO PAY CLAIMS.**

Compensation can only be paid based on the availability and appropriation of funds for this purpose.

#### **7.555 PRIVATE RIGHT OF ACTION.**

If the Board's approval of a claim by removing or modifying a land use regulation causes a reduction in value of other property located in Multnomah County, the affected party shall have a cause of

action in state circuit court to recover from the claimant the amount of the reduction, and shall also be entitled to attorney's fees.

#### **7.560 APPLICABLE STATE LAW.**

For all demands filed, the applicable state laws are those portions of Oregon Revised Statutes Chapter 197 added or made a part of said Chapter by Ballot Measure 37, passed on November 2, 2004 and/or as amended, modified or clarified by subsequent amendments or regulations adopted by the Oregon State Legislature, Oregon State Administrative Agencies or MCC 7.500 *et. seq.* Any demand that has not been processed completely under this subchapter shall be subject to any such amendments, modifications, clarifications or other actions taken at the state level and this subchapter shall be read in a manner so as not to conflict with such amendments, modifications, clarifications or other actions taken at the state level.


**Section 2.** An emergency is declared in that it is necessary for the health, safety and general welfare of the people of Multnomah County for this ordinance to take effect concurrent with the effective

date of ORS Chapter 197, as amended by Ballot Measure 37, passed November 2, 2004 and effective December 2, 2004, and it is essential to have a process in place for reviewing demands under the law on the effective date of Ballot Measure 37 therefore, this Ordinance is effective on December 2, 2004.

FIRST READING AND ADOPTION: December 2, 2004



BOARD OF COUNTY COMMISSIONERS,  
FOR MULTNOMAH COUNTY, OREGON

  
Diane M. Linn, Chair

REVIEWED:

AGNES SOWLE, COUNTY ATTORNEY  
FOR MULTNOMAH COUNTY, OREGON

By   
Sandra N. Duffy, Assistant County Attorney