

ORDINANCE 2004-017

AN ORDINANCE RELATING TO MEASURE 37 REAL PROPERTY COMPENSATION CLAIMS, AND DECLARING AN EMERGENCY.

The City finds:

- A. On November 2, 2004, the voters of the State of Oregon approved Ballot Measure 37. The Measure amends ORS Chapter 197 to require, under certain circumstances, payment of compensation to owners of real property if government land use regulations reduce fair market property value; and
- B. Ballot Measure 37 provides that to receive compensation, an owner of real property must make a "written claim for compensation" to the government entity enacting, enforcing or applying a land use regulation that allegedly restricts the use of their property and has the effect of reducing its fair market value; and
- C. Ballot Measure 37 authorizes the City to adopt and apply claims procedures with certain limitations; and
- D. Ballot Measure 37 requires payment of just compensation for any reduction in fair market value of real property, or in the alternative allows cities to modify, remove, or not apply the land use regulation allegedly reducing a property's fair market value; and
- E. Ballot Measure 37 imposes a duty on the City to review claims for compensation and make decisions on those claims. A determination to waive or modify a land use regulation, or compensate a property owner must be based on substantial factual information and analysis. Necessary information must be provided by a real property owner when making a written claim for compensation; and
- F. It is in the public interest to establish procedures to assess a claim in a timely manner and to require factual and analytical information as part of the claim so the City will have a rational basis for its decision on claim.

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THE CITY OF SHERWOOD ORDAINS AS FOLLOWS:

Section 1. The Sherwood Municipal Code is amended to add Title 3as follows:

[Title 3.10] MEASURE 37 CLAIMS PROCEDURE.

3.10.010 Purpose

The purpose of this Title is to accomplish the following regarding claims for compensation under ORS Chapter 197, as amended by Ballot Measure 37, adopted November 2, 2004:

Process claims for compensation quickly, openly, thoroughly, and consistently with the law; enable present real property owners making claims for compensation to have an adequate and fair opportunity to present their claims to the City; provide the City with the factual and analytical information necessary to adequately and fairly consider claims for compensation, and take appropriate action under the alternatives provided by law; 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.

3.10.020 Definitions

For purposes of this chapter the following definitions apply:

- (1) Appraisal. Means a written statement prepared by an appraiser licensed by the Appraiser Certification and Licensure Board of the State of Oregon under ORS Chapter 674. For commercial or industrial property, the term "appraisal" also means a written statement prepared by an appraiser holding the MAI qualification and evidenced by written certificate.
- (2) Ballot Measure 37. Means the provisions added to ORS Chapter 197 by Ballot Measure 37 as approved by Oregon voters on November 2, 2004.
- (3) Claim. Means the written demand for compensation made by an owner of real property in accordance with Ballot Measure 37 and this chapter.
- (4) Exceptions to land use regulation. The following land use regulations are excluded from the application of this chapter:
 - (a) A regulation restricting or prohibiting activities commonly and historically recognized as public nuisances under common law, and the criminal laws of Oregon and the City; SEE APPENDIX A.

- (b) 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, and pollution control regulations;
 - (c) A regulation required for compliance with federal law;
 - (d) A regulation restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing; or
 - (e) 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.
- (5) **Family member.** Means 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.
- (6) **Land use regulation.** Means any City comprehensive plan, zoning ordinance, land division ordinance or transportation ordinance. A land use regulation does not include any land use regulation excepted from this chapter, any City system development charge, or any other City development fees or charges.
- (7) **City Manager.** Means the City Manager or designee.
- (8) **Owner.** Means the present owner of real property that is the subject of the claim for compensation, or any interest therein. The owner must be 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.
- (9) **Property.** Means any private real property or interest therein. It includes only a single parcel or contiguous parcels in single ownership. It does not include any parcels that are under different ownerships, regardless of contiguity.
- (10) **Reduction in Value.** Means the difference in the fair market value of the property before and after enactment, enforcement or application of a land use regulation as defined in this chapter.

3.10.030 Pre-filing Conference

SEE APPENDIX A.

3.10.040 Claim Requirements

(1) Form, Completeness and Review.

(a) A claim must be submitted and accepted for filing only using the forms provided by the City Manager. A claim must consist of all materials required by this Chapter. A claim will not be considered filed under Ballot Measure 37 until the City accepts the claim after the requirements of this chapter are fulfilled by the owner of real property.

(b) The City Manager will conduct a completeness review within 15 days after submittal of the claim and will advise the owner in writing of any material remaining to be submitted. The owner must submit the material needed for completeness within 30 days of the written notice that additional material is required. If the owner fails to provide the additional materials within the 30 day period, the claim will not be accepted for filing.

(c) The 180-day period required before accrual of a cause of action for compensation in circuit court under Ballot Measure 37 begins on the date the City Manager deems the claim complete, and accepts it for filing. The City Manager will mark the date of completeness and filing on the claim form and provide a copy to the claimant.

(d) The owner may request an extension for filing a complete claim. A request for an extension or continuance will be deemed a waiver of the beginning of the 180-day period required before accrual of a cause of action for compensation.

(2) Claim Requirements. A claim will not be accepted for filing without all of the following information:

(a) Fee. An application fee must be paid in advance of acceptance for filing to cover the costs of completeness review and claim processing. This fee will be established by city council resolution.

(b) Claim Form. A completed claim on a form provided by the City Manager.

(c) Identification of Owner and Other Interest Holders. The name(s), address(es) and telephone number(s) of all owners, and anyone with any interest in the property, including lien holders, trustees, renters, lessees, and a description of the ownership interest of each.

(d) Property Description. The address, tax lot number, and legal description of the real property that is the subject of the claim.

- (e) Nearby Property Owner Information. The names and addresses of all owners of property within 300 feet of the property, as listed on the most recent property tax assessment roll where such property is located.
- (f) Listing of Nearby Owned Property. Identification of any other property owned by the owner within 300 feet of the boundary of the claim property.
- (g) Title Report. A title report demonstrating the title history, the date the owner acquired ownership of the property, and the ownership interests of all owners. The title report must also specify any restrictions on use of the property unrelated to the land use regulation including, but not limited to, any restrictions established by covenants, conditions and restrictions (CC&Rs), other private restrictions, or other regulations, easements or contracts.
- (h) Copy of Existing Regulation. A copy of the land use regulation that the owner making the claim believes restricts the use of the property, or interest therein, and that the owner believes has had the effect of reducing the fair market value of the property, including the date the owner claims the land use regulation was first enacted, enforced, or applied to the property.
- (i) Copy of Prior Regulations. A copy of the land use regulation in existence, and applicable to the property, when the owner became the owner of the property, and a copy of the land use regulation in existence immediately before the regulation that was enacted or enforced or applied to the property, that the owner claims restricts the use of the property and, the owner claims, caused a reduction in fair market value due to the regulation described in item (h) above being more restrictive.
- (j) Appraisals. A written appraisal by an appraiser, qualified as such in the State of Oregon, stating the amount of the alleged reduction in the fair market value of the property by showing the difference in the fair market value of the property before and after enactment, enforcement or application of the land use regulation described in item (h) above, and explaining the rationale and factors leading to that conclusion. If the claim is for more than \$10,000, copies of two appraisals by different appraisers must be included.
- (k) Narrative. SEE APPENDIX A.
- (l) Statement Regarding Exceptions. SEE APPENDIX A.
- (m) Owner Statement. A statement by the owner explaining the effect a modification, removal or non-application of the land use regulation would have on the potential development of the property, and stating the most extensive development the owner believes would be permitted on the property if the identified land use regulation were modified, removed or not applied.

(n) Copies of Documents. Copies of any land use actions, development applications or other applications for permits previously filed in connection with the property and the action taken. City "enforcement" or "application" of the land use regulation is a prerequisite to making a Measure 37 claim must be described and identified by the claimant.

(o) Site Plan and Drawings. A copy of the site plan and drawings in a legible 8 ½ by 11-inch format that relate to the proposed use of the property if the land use regulation is modified, removed or not applied.

(p) Statement of Relief Sought. A statement of the relief sought by the owner.

3.10.050 Claim Review Process

(1) The City Manager will assess any claim for compensation and make a recommendation to the city council on the disposition of the claim. The recommendation will state that the claim be:

(a) Denied,

(b) Investigated further,

(c) Declared valid, in which case the recommendation will further state whether the land use regulation at issue should be removed, waived or modified, or that the claimant should be compensated, or

(d) Evaluated in another manner not inconsistent with this chapter or Ballot Measure 37, including possible City condemnation of the property.

(2) The city council will conduct a public hearing before taking final action on a recommendation from the City Manager.

(3) Notice of the public hearing will be provided to the claimant and to all record owners of the subject property, and to all owners of property within 300 feet of the subject property. Additional notice may be sent to the Oregon Department of Land Conservation and Development, Metro and such others as the City may designate.

(4) The notice will state the date, time and location of the hearing and will be sent no later than 10 days before the hearing. The notice will describe the hearing process, and will state how evidence may be submitted.

(5) After the conclusion of the public hearing, and no later than 180 days from the date the claim was filed, the city council will:

(a) Determine that the claim does not meet the requirements of this chapter and Ballot Measure 37, and deny the claim; or

- (b) Adopt an order with appropriate findings that supports a determination that the claim is valid and directs that the claimant be compensated in an amount set forth in the order, or remove, waive or modify the challenged land use regulation as applied to the subject property.
- (6) The city council's decision to remove, waive or modify a land use regulation or to compensate the claimant will be based on whether the public interest would be better served by compensating the owner, or by removing, waiving or modifying a land use regulation with respect to the subject property; or any other factors deemed relevant by the city council.
- (7) If the city council removes, waives or modifies a land use regulation, it may apply the land use regulations in effect at the time the claimant acquired the property.
- (8) The owner will bear the burden of proof relating to the claim, the devaluation of the owner's property and the owner's entitlement to just compensation. The standard of proof will be by a preponderance of the evidence.
- (9) A copy of the city council order will be sent by mail to the owner and to each individual or entity that participated in the city council review process if the City was provided with a mailing address.
- (10) The city council may establish by resolution additional procedures related to the processing of Ballot Measure 37 claims.

3.10.060 Conditions, Revocation and Transfer

- (1) The city council may establish any relevant conditions of approval for compensation, should compensation be granted, or for any other action taken under this chapter.
- (2) Failure to comply with any condition of approval is grounds for revocation of the approval of the compensation for the claim, grounds for recovering any compensation paid and grounds for revocation of any other action taken under this chapter.
- (3) If the owner, or the owner's successor in interest, fails to fully comply with all conditions of approval, the City may institute a revocation or modification proceeding before the city council under the same process for city council review of a claim under this chapter.
- (4) Unless otherwise stated in the City's decision, any action taken under this chapter runs with the property and is transferred with ownership of the property. All conditions, time limits or other restrictions imposed with approval of a claim will bind all subsequent owners of the subject property.
- (5) A land use regulation waived under this chapter will create a Measure 37 nonconforming use, or a nonconforming structure, as appropriate, on the property

benefiting from the waiver, which is defined separately from any non-conforming uses in Title 16. All valid claims and subsequent waivers shall be recorded with the property.

3.10.070 Waiver of Claims

SEE APPENDIX A.

3.10.080 Costs and Attorney Fees

If an owner commences an action to collect compensation and the City prevails, the City is entitled to all fees and costs it incurred, as well as any sum that a court, including any appellate court, may deem reasonable as attorney's fees.

3.10.090 Availability of Funds to Pay Claims

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

3.10.100 Review of a Decision

A writ of review under ORS 34.010 to 34.102 is the exclusive means to contest a final decision of the city council under 3.10.050, and must be filed within 60 days of the notice provided under 3.10.050. The owner of the real property that is the subject of the claim under this chapter is a necessary party in such a proceeding.

3.10.110 Private Cause of Action

SEE APPENDIX A.

3.10.120 Compensation by Other

An individual or entity other than the City may compensate the claimant for any diminution in value established under this chapter, in lieu of the City removing, modifying or waiving the land use regulation causing the diminution. A contract between the City, the claimant, and the individual or entity providing the compensation is a condition precedent to compensating a claimant under this subsection, and must be approved by the city attorney.

3.10.130 Severability

If any phrase, clause, or other part or parts of this chapter are found invalid by a court of competent jurisdiction, the remaining phrases, clauses and other part or parts will remain in full force and effect.

3.10.140 Applicable State Law, No Independent Rights

**APPENDIX A
MEASURE 37 CLAIMS ORDINANCE
POSSIBLE ADDITIONS**

The following provisions are identified as provisions the City Council may wish to consider adding to its Claims Ordinance.

They are identified in the proposed ordinance as "SEE APPENDIX A."

1. 3.10.020(4)(a) – Definition of Nuisances

As written, this provision is consistent with Measure 37's exception for regulations prohibiting common law nuisances. Additional language could include a reference to any city nuisance ordinances. The risk is that some city ordinances may arguably classify as nuisance activities beyond those deemed nuisances under the common law. The ordinance provision could be re-written to state:

A regulation restricting or prohibiting activities commonly and historically recognized as public nuisances under common law, including Sherwood Municipal Code chapter 9.44, as amended from time to time, and the criminal laws of Oregon and the City.

2. 3.10.030 – Pre-filing Conference

The following language would require a pre-filing conference, unless exempted by the City Administrator. This is akin to a pre-application conference in the land use context.

(1) Before submitting a claim for compensation, the owner must schedule and attend a pre-filing conference with the manager to discuss the claim. The pre-filing conference will follow the procedure set forth by the manager and may include a filing fee and notice to neighbors, other organizations and agencies. The filing fee will be set by city council resolution.

(2) To schedule a pre-filing conference, the owner must contact the manager and pay the appropriate conference fee. The pre-filing conference is for the owner to provide a summary of the owner's claim to the manager, and for the manager to provide information to the owner about regulations that may affect the claim. The manager may provide the owner with a written summary of the pre-filing conference within 10 days after it is held.

(3) The manager is not authorized to settle any claim at a pre-filing conference. Any omission or failure by staff to recite to an owner all relevant applicable regulations will not constitute a waiver or admission by the City.

(4) A pre-filing conference is valid for six months from the date it is held. If no claim is filed within six months of the conference, the owner must schedule and attend another conference before the City will accept a claim for filing. The manager may waive the pre-filing requirements if, in the manager opinion, a pre-filing conference would serve no purpose.

3. 3.10.040 – Claim Requirements

The following subsections would require the claimant to submit with the claim a narrative regarding the property's history and would require the claimant to explain why the challenged land use regulation is exempt under Measure 37.

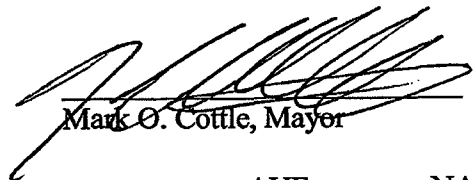
(i) Narrative. The owner must provide a narrative describing the history of the owner and any family member's ownership of the property, the history of land use regulations applicable to the claim, and how the enactment, enforcement or application of the land use regulation restricts the use of the property, or any interest therein, and has the effect of reducing the fair market value of the property, or any interest therein.

(j) Statement Regarding Exceptions. A statement by the owner making the claim of why the following Ballot Measure 37 exceptions do not apply:

1. Commonly and historically recognized public nuisances under common law;
2. Protection of public health and safety;
3. Regulations required under federal law;
4. Use of property for the purpose of selling pornography or performing nude dancing; or
5. The subject land use regulation was enacted prior to the date of the acquisition of the property by the owner, or prior to acquisition by a family member of the owner who owned the subject property prior to the acquisition or inheritance by the owner [if "family member" status is claimed it must also be addressed in the title report required by item (h) above].

For all claims filed the applicable state law is those portions of ORS Chapter 197 added by Ballot Measure 37, or as amended, modified or clarified by subsequent amendments or rules adopted by the Oregon Legislature or Oregon administrative agencies. Any claim that has not been processed completely under this chapter will be subject to any such amendments, modifications, clarifications or other state actions. This chapter is adopted solely to address claims filed under the ORS Chapter 197 provisions added by Ballot Measure 37. This chapter does not create any rights independent of those provisions.

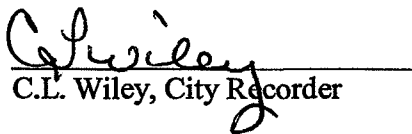
Section 2. Emergency Clause and Effective Date. The effective date for the provisions added to ORS Chapter 197 is December 2, 2004. For the City to be able to implement those provisions, the city council declares it necessary for the preservation of the public health, welfare and safety for this Ordinance to take effect immediately upon its passage, and is to be applied as of December 2, 2004 to all Measure 37 claims.



Mark O. Cottle, Mayor

| | AYE | NAY |
|------------|-------------------------------------|-------|
| Weislogel | <input checked="" type="checkbox"/> | _____ |
| Grant | <input checked="" type="checkbox"/> | _____ |
| Heironimus | <input checked="" type="checkbox"/> | _____ |
| Durrell | <input checked="" type="checkbox"/> | _____ |
| Mays | <input checked="" type="checkbox"/> | _____ |
| Fox | <input checked="" type="checkbox"/> | _____ |
| Cottle | <input checked="" type="checkbox"/> | _____ |

ATTEST:



C.L. Wiley, City Recorder