

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

June 6, 2005

**STATE CLAIM NUMBER:** M118921

**NAME OF CLAIMANT:** Sid J. Prowell

**MAILING ADDRESS:** 20701 Prowell Lane  
Baker City, Oregon 97814

**IDENTIFICATION OF PROPERTY:** Township 8S, Range 40E, Section 24  
Tax lot 300, Baker County

**OTHER INTEREST IN PROPERTY:** James C. Schwarzhoff  
Boise, Idaho 83704

**DATE RECEIVED BY DAS:** December 9, 2004

**180-DAY DEADLINE:** June 7, 2005

**I. CLAIM**

Sid J. Prowell, the claimant, seeks compensation in the amount of \$803,120 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 claimant desires compensation or the right to divide the property for sale. The property includes 154.64 acres of land located on the south side of Medical Springs Highway (State Highway 203) approximately two miles east of Interstate-84 in Baker 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 the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of certain state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, specifically Statewide Planning Goal 3 (Agricultural Lands) and OAR 660, Division 33, not apply to the subject property to the extent necessary to allow Mr. Prowell a use of the property permitted at the time he acquired it on August 19, 1983. (See Section VI. of this report for the complete recommendation.)

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

#### **Comments Received**

On February 10 and 17, 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, there were no written comments, evidence or information 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
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**

The claim was submitted to DAS on December 9, 2004 for processing under OAR 125, Division 145. The claim identifies ORS 92 and 215, and OAR 660, Division 33 that restrict the use of property as the basis for this claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

#### **Conclusions**

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulations enacted 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**

Sid J. Prowell states that he is the owner of a 154.64-acre parcel located in Baker County. Mr. Prowell states that he inherited the property from his father, Virgil C. Prowell, who acquired the property on April 19, 1956. The subject property was transferred to Sid Prowell through probate discharge on August 19, 1983.

To substantiate the claim, Mr. Prowell has included: (a) a deed showing transfer of the property from Martha Elizabeth Bond to Virgil C. Prowell, dated April 19, 1956; (b) a probate discharge transferring partial ownership of the property from Virgil C. Prowell to Sid. J. Prowell, dated August 19, 1983;<sup>1</sup> (c) a bargain and land sale deed from Claudine Jane Prowell to Sid Prowell, dated February 15, 1999, transferring Ms. Prowell’s interest in the property; (d) a bargain and land sale deed from Jeffery Robert Prowell to Sid Prowell, dated February 12, 1999, transferring Jeffery’s interest in the property; and (e) a parcel record from Baker County Assessor’s Office showing the last recorded transaction on the property as June 14, 1999 with Sid Prowell listed as the owner. The Baker County Planning Department provided the department with a copy of the 2004 tax statement on April 14, 2005, showing Sid Prowell as the current owner of the subject property.

### **Conclusions**

Virgil C. Prowell is a “family member” and the claimant, Sid J. Prowell, is an “owner” of the subject property or an interest in the property as of August 19, 1983 as those terms are defined in Section 11 of Measure 37.

### **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 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 family member acquired the property.

### **Findings of Fact**

The claim states “all of” ORS 92 and 215 and OAR Chapter 660, Division 33 “prohibit development.” Each of these state regulations is described bellow:

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<sup>1</sup> The Petition and Decree of Final Distribution order was not included in the claim but obtained by the department from the Baker County Planning Department on April 21, 2005.

**ORS 92, Subdivision and Partitions:** ORS 92, Plats and Subdivisions, was codified into the Oregon Revised Statutes in 1953 (See, Oregon Revised Statutes, Legislative History, Reviser's Notes and Annotations (1953 Edition). Many of the laws in what was codified as ORS 92 in 1953 date from between 1909 and 1947. Major amendments to these laws were made in 1973 under SB 487 (Or Laws 1973, Vol. 1, Ch. 696) and in 1983 under SB 670 (Or. Laws, Vol. 2, Ch. 570). The claimant does not specify what provisions he alleges "prohibit development." However, the provisions of ORS 92 prohibiting the sale of land without the prior approval of a partition or subdivision plat, date from prior to 1956, when the claimant's family acquired the property. See, Or Laws 1955 Ch. 756, sections 6 and 7.

**ORS 215, County Planning, Zoning and Housing Codes:** On September 9, 1963, ORS 215, the statutory foundation for EFU zoning, was enacted (Or Laws 1963, Ch. 577, Section 2 and Ch. 619, Section 1). These Acts included as part of the definition of "farm use" allowed in an exclusive farm use zone, "the construction and use of dwellings and other buildings customarily provided in conjunction with farm use." ORS 215 has been amended numerous times since its enactment.

**OAR 660, Division 33, Agricultural Lands:** In 1992, the Commission adopted OAR 660, Division 33 to implement the requirements of Statewide Planning Goal 3 (Agricultural Lands). The rules include the requirement for an 80-acre minimum parcel size for land zoned exclusive farm use (EFU) and 160 acres for land designated rangeland (OAR 660-033-0100(1). This division was amended in 1994, 1996, 1998, 2000, 2002 and 2004.

Statewide Planning Goal 3 (Agricultural Lands) (OAR 660-015-0000(3)) and the provisions applicable to land zoned for exclusive farm use under ORS 215 and OAR 660, Division 33, restrict the zoning, use and partition of the subject property. Goal 3 became effective on January 25, 1975 and required agricultural land as defined by the Goal to be zoned EFU pursuant to ORS 215. (See citations to statutory and rule history under OAR 660-015-0000(3)). ORS 215.780 became effective on November 4, 1993 (Chapter 792, Or Laws 1993).

The claimant's property is "agricultural land" as defined under Statewide Planning Goal 3 because it is composed predominately of NRCS Class III and IV soils. (See Soil Survey of Baker County Area, Oregon, property located on Sheet #31, and Table 5 for 159A-Stanflow-Umapine silt loams, 0 to 2 percent slopes, pp. 175, 176 and 337, 1987.)

Specifically, ORS 215.780(1) and OAR 660-033-0100(1) establish an 80-acre minimum size for the creation of a new parcel in an EFU zone and a 160-acre minimum for rangeland. Other provisions of state law, generally cited by the claimant, establish the standards for the approval of dwellings on land zoned EFU. These include ORS 215.283, 215.284 and 215.705.

OAR 660-033-0135, applicable to farm dwellings, became effective on March 1, 1994 and interprets the statutory standard for a primary dwelling in an exclusive farm use zone under

ORS 215.283(1)(f). OAR 660-033-130(4), applicable to non-farm dwellings, became effective on August 7, 1993 and was amended to comply with ORS 215.284(4) on March 1, 1994. (See citations of administrative rule history for OAR 660-033-0130 and 0135(7)).

### **Conclusions**

The minimum lot size and dwelling standards established by Statewide Planning Goal 3, ORS 215, OAR 660, Division 33 were all adopted after the claimant's father acquired the property in 1956 and do not allow the division of the property into parcels less than 80 acres, 160 acres in rangeland. They also restrict the approval of dwellings. Except for the provisions of ORS 92, which generally were in effect when the claimant's father acquired the property in 1956, land use laws adopted since 1956 restrict the use of the property relative to the uses allowed when the property was acquired in 1956.

### **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**

According to the claimant, state regulations applicable to the property under EFU zoning result in a fair market value reduction of \$802,120. The claimant determined this reduction by applying a land price of \$6,000 per acre to the subject 154.64-acre parcel to determine a fair market value before the regulations of \$927,840. The claimant then subtracted \$125,720, the estimated current value of his property based on a recent tax bill, to estimate the reduction in fair market value. The information provided does not include any explanation for how the \$6,000 per acre value was derived in estimating the value of the subject property prior to enactment of the EFU zoning.

### **Conclusions**

As explained in section V.(1) of this report, the current owner is Sid J. Prowell who acquired the property on August 19, 1983 from his father, Virgil C. Prowell, a "family member" who acquired the property in 1956.

Without an appraisal based on the value of the property without EFU zoning restrictions or other explanation, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some restriction of the use of the property and 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 identifies as the basis of the claim, “all of” ORS 92 and 215, and OAR 660, Division 33. Most laws that qualify as “land use regulations” under the Measure were adopted after 1956, with the exception of some subdivision and partitioning laws in what is now ORS 92.

#### **Conclusions**

Without a specific listing of laws that are the basis for the claim or a description of a specific use of the property, it is impossible for the department to determine what laws may restrict the 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 and rule restrictions on residential development and use of the claimant’s agriculturally zoned land apply to the claimant’s anticipated use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37, Section 3. The restrictions in ORS 92 on the sale of land prior to the approval and filing of a plat, generally predate 1956, and so are exempt under the terms of Measure 37, Section 3, and will continue to apply to the property. There may be other specific laws that are exempt and continue to apply under one or more of the exemptions in the Measure or because they are laws that are not covered by the Measure to begin with.

### **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 a law to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines that a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated 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 and the use of the property for residential purposes. These laws more likely than not have reduced the fair market value of the property to some extent. The claim asserts this amount to be \$802,120.00. However, because the claim does not provide a specific explanation for how the specified restrictions reduce the fair market value of the property from what the claimant could have done under the regulations in place at the time he acquired the property in 1983, a specific amount of compensation cannot be determined. Nevertheless, based on the current

record for this claim, the department finds that the laws on which the claim is based more likely than not 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 one or more land use regulations to allow Mr. Prowell to use the subject property for a use permitted at the time he acquired the property on August 19, 1983.

### **Conclusions**

Based on the record before the department, the claimant, Sid J. Prowell has established that he is entitled to relief. Therefore, department staff recommends that, in lieu of compensation, and except for those requirements of ORS 92 that were in effect on or before April 19, 1956, the requirements of applicable state laws enforced by the Commission or the department, specifically, ORS chapter 215, Statewide Planning Goal 3 (Agricultural Lands) and provisions in OAR 660, Division 33, not apply to the subject property to the extent necessary to allow Mr. Prowell a use of the property permitted at the time he acquired it.

Sid Prowell acquired the subject property on August 19, 1983, when it was zoned Exclusive Farm Use (EFU) by Baker County. However, at that time, the County's EFU zone was not acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged Baker County's comprehensive plan and land use regulations, including the EFU zone, certain site-specific Goal provisions, including Statewide Planning Goal 3, applied directly to the property when Mr. Prowell acquired it on August 19, 1983.

Statewide Planning Goal 3 became effective on January 25, 1975 and was applicable to legislative land use decisions and some quasi-judicial land use decisions, on a site-specific basis, prior to the Commission's acknowledgment of local plans.<sup>2</sup> Baker County's EFU zone was acknowledged on April 4, 1986. Until the County's land use regulations were acknowledged by the Commission, the use of the subject property was subject to both the County's ordinances and the applicable statewide planning goals.<sup>3</sup>

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<sup>2</sup> See *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, rev. denied, 290 Or 137 (1980) and *Perkins v City of Rajneeshpuram*, 300 Or 1, (1985). After the County's plan and land use regulations were acknowledged by the Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions (See *Byrd v. Stringer*, 295 Or 311 (1983)). However, the applicable statutes continue to apply and insofar as the local implementing provisions are materially the same as the rules, the local provisions must be interpreted consistent with the substance of the rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

<sup>3</sup> Baker County's Exclusive Farm Use (EFU) zone went through four reviews by the Commission between 1982 and 1984 before the fifth amendment to the zone adopted on April 5, 1985 (Baker County Ordinance 85-3) was acknowledged by the Commission on April 4, 1986 (LCDC Acknowledgement Order 86-ACK-038, dated May 16, 1986).

On August 19, 1983, the property was subject to Statewide Goal 3 and the minimum lot size standard specified therein and OAR 660-05-015 and 020 (effective July 21, 1982, both repealed August 7, 1993).<sup>4</sup> Therefore, the staff recommends that the department not apply OAR 660-033-100 which precludes the division of the subject property into parcels less than 80 acres and 160 acres in rangeland so as to authorize Mr. Prowell to apply to Baker County for the division of the subject property pursuant to the provisions of the Goal 3 minimum lot size standard applicable to the property on August 19, 1983. These earlier provisions require that the resulting parcels be either: (1) “appropriate for the continuation of the existing commercial agricultural enterprise in the area;” or (2) shown to comply with the standards for the creation of non-farm parcels under ORS 215.263 (1981 Edition).

Any use of the property by the claimant remains subject to the following laws: (a) those laws not specified in this claim to the State of Oregon, dated December 9, 2004 or identified in this report; (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.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on May 16, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant’s 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.

### **Endnotes**

i. In response to the Commission’s 1985 continuance order, Baker County amended Agricultural Policy 3 to read as follows (County Ordinance 85-2, pp. 2-3):

“Recognizing that current Goal 3 language deals with ‘existing commercial agricultural practices’ Baker County is determined to allow for changing technology in agricultural enterprises of the future. Toward that objective, the county shall provide for a minimum parcel size that affordably allows for innovative, smaller-scale, commercial agricultural operations. For purposes of agricultural land policies, ‘commercial agriculture’ shall be defined as consisting of farm or ranch operations which will:

- a. contribute in a substantial way to the area’s existing agricultural economy; and
- b. help maintain agricultural processors and established farm markets; and
- c. when determining whether a farm is part of the commercial agricultural enterprise, not only what is produced but how much and how it is marketed shall be considered.”

The County’s EFU Zone (Section 301(H)) was amended in 1985 to include the following definition of “commercial agriculture” consistent with OAR 660-05-005(2) (County Ordinance 85-3):

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<sup>4</sup> An indication of how the Goal 3 standard applied to the property when it was acquired is the land division standards in the County’s later-acknowledged EFU zone, which provided for the creation of new farm parcels on a case by case basis. (See endnote i.)

“H. Minimum Lot Sizes: In the EFU zone, partitioned may be allowed after findings have been reached that each of the parcels resulting from the proposed partition:

1. Generally:

- a. Is appropriate for the continuation of the existing commercial agricultural enterprises in the area.
- b. Complies with the purpose and intent of the Oregon Agricultural Land Use Policy (OSR 215.243).
- c. Is not detrimental to the parent farm or ranch.

2. Specifically:

- a. Partitions lands fully covered by adjudicated water rights into no less than 40 acres or a sixteenth of a Section, whichever is smaller. See also Section 502 of this Ordinance for roads and survey adjustments.
- b. Partitions dry land into parcels no less than 160 acres.
- c. Partitions dry lands containing less than 40 acres of adjudicated irrigation water rights by requiring four acres for each dry acre less than 40 acres; for example: 30 acres of irrigated land would require a minimum parcel size of 70 acres.
- d. Partitions land with non-adjudicated water resources into parcels of no less than 40 acres when said water resources are judged to be sufficient to meet the commercial farm test on a case-by-case basis. The criteria are as follows. The applicant can demonstrate to the satisfaction of the Planning Commission:
  - 1) That sufficient water is available during a typical year from any one or a combination of the following sources: Moisture in the form of rainfall and/or snowpack; existing wells and ponds on which no filing has been made (giving consideration to the depth of the well and to lift on pumps for both wells and ponds); land that subirrigate;
  - 2) That the soil, growing season, and energy are adequate and available for the planned farm use;
  - 3) That markets for the farm products are available; and
  - 4) That the proposal is found to be commercial.
- e. Partitions land for outright uses permitted under Subsection A.3 and 5 of Section 301 with no minimum parcel size required.
- f. For all Conditional Uses: Partitions lots not specifically established elsewhere by the Ordinance into:
  - 1) The minimum amount of land determined by the governing body or its designate to be necessary for the proposed use; and
  - 2) Parcels large enough to comply with state and local standards and the criteria set forth in this Ordinance.”

The above provisions were acknowledged by the Commission on April 4, 1986 as complying with Statewide Planning Goal 3 and OAR 660-05-005(2).