

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

June 16, 2005

**STATE CLAIM NUMBER:** M119057

**NAME OF CLAIMANT:** Harry Family Revocable Living Trust, Julius Harry, Trustee

**MAILING ADDRESS:** c/o Coke Miller  
P.O. Box 911  
Redmond, Oregon 97756

**IDENTIFICATION OF PROPERTY:** 5170 SW Wickiup Avenue  
Township 15S, Range 12E, Section 25  
Tax lot 100, Deschutes County

**OTHER CONTACT** Edward P. Fitch, Attorney at law

**INFORMATION FOR CLAIMANT:** Emerson & Fitch  
888 SW Evergreen Avenue  
P.O. Box 457  
Redmond, Oregon 97756-0103

**DATE RECEIVED BY DAS:** December 23, 2004

**180-DAY DEADLINE:** June 21, 2005

**I. CLAIM**

The Harry Family Revocable Living Trust, Julius Harry, Trustee, the claimant, seeks compensation in the amount of \$700,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 79.08-acre lot into one 40-acre lot and four ten-acre lots for residential development. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions below, the Department of Land Conservation and Development (the department) has determined that this claim is valid. Department staff

recommends, in lieu of compensation, not applying certain land use regulations enforced by the Land Conservation and Development Commission (the Commission) or the department since July 31, 2003 to the extent necessary to allow the claimant a use of the property permitted at the time the trustee acquired it. The department acknowledges that the relief recommended in this report will not allow the claimant to use his property in the manner set forth in his claim. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS RECEIVED**

On February 15, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments, 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 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 23, 2004 for processing under OAR 125, Division 145. The claim identifies as its basis, “all laws and rules enacted by the State of Oregon and/or Deschutes County since 1968 that restrict use of the property.” Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37 restrict the use of the property and are the basis for the claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

#### **Conclusions**

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulations adopted prior to December 2, 2004, and is therefore timely filed.

## V. ANALYSIS OF CLAIM

### **1. Ownership**

Ballot Measure 37 provides for payment of compensation or relief from specific laws for “owners,” as that term is defined in the Measure. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

### **Findings of Fact**

It appears that the Harry family acquired ownership some time prior to November 20, 1936, but the claim does not document ownership before that date. On November 20, 1936, Chris Harry conveyed the subject property to his wife, Elizabeth Harry. (See claim.) On November 7, 1971, Elizabeth Harry conveyed the subject property (and additional property) to her children, Alice Harry, Theodore Harry, John Harry, Marie Harry, Rosa Harry, and Laura Harry. The claimant’s attorney represents that the Harry Family Revocable Living Trust was established on July 31, 2003, with Julius Harry as the sole trustee of the Trust. The surviving children, Alice Harry, Marie Harry, Rosa Harry, and Laura Harry, conveyed the property to the Trust on the date the trust was established. (See the department’s claim file.)

### **Conclusions**

The claimant, Julius Harry, the trustee of the Harry Family Revocable Living Trust, is an “owner” of the subject property as that term is defined by Section 11(C) of Ballot Measure 37 and has held an ownership interest in the property since July 31, 2003, when the Harry Family Revocable Living Trust was established. The department also finds that the claim sufficiently demonstrates ownership by Harry family members since at least November 20, 1936.

### **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 a family member acquired the property.

### **Findings of Fact**

The claim states as its basis: “All laws and rules enacted by the State of Oregon and/or Deschutes County since 1968 that restrict use of the property.” The claimant’s attorney states, in a March 30, 2005 letter to the department, that the 1968 date was chosen because no zoning applied before that time.

Based on the claimant's desired use of the property and the current restrictions that apply through the Deschutes County Exclusive Farm Use (EFU) zoning, the following state laws apply to this claim: Statewide Planning Goal 3 (Agricultural Lands), (OAR 660-015-0000(3)) and provisions of ORS 215 and OAR 660, Division 33 applicable to land zoned exclusive farm use (EFU).

The subject property was not zoned when acquired by the Harry family on or before November 20, 1936. Statewide Planning Goal 3 became effective on January 25, 1975 and required agricultural land, as defined by the Goal, be zoned EFU pursuant to ORS 215 (see OAR 660-015-0000(3)). The claimant's property is "agricultural land" as defined by Deschutes County and as required under Goal 3. ORS 215.780 established an 80-acre minimum lot size for the creation of new lots and parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). (See also, OAR 660-033-0100(1) – Minimum Parcel Size Requirements.)

### **Conclusions**

The minimum lot size, restrictions on land divisions and dwelling standards established by Statewide Planning Goal 3 and applicable provisions of OAR 660, Division 33 and ORS 215, were all adopted after the claimant's family acquired the property on or before November 20, 1936 and do not allow the division of the property into parcels less than 80 acres in size or the approval of dwellings on the proposed 40-acre and 10-acre parcels. Land use laws adopted since 1936 restrict the use of the property relative to the uses allowed when the Harry family acquired the property on or before November 20, 1936.

### **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 states that the current fair market value of the subject property under current law is approximately \$400,000.<sup>1</sup> The claim states that loss of ability to divide the subject 79.08-acre property for residential development has reduced the subject property's fair market value by \$700,000. According to the claim, the claimant recently received a tentative offer to buy the western 40 acres of the subject property for \$300,000. It also states that local realtors have advised the claimant that four 10-acre lots would each have a value of approximately \$200,000. The fair market value of the property without restrictions is estimated based on the value of the western 40 acres (\$300,000) plus the value of the remaining acreage divided into four 10-acre lots valued at \$200,000 per lot (\$800,000). The claim nets the current value (\$400,000) from the projected value

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<sup>1</sup> According to the Deschutes County Tax Assessor's website, the 2004 real market value of the property was \$299,080.

without restrictions (\$1,100,000) to calculate a reduction in fair market value of \$700,000. The claim includes no appraisal to substantiate these amounts.

### **Conclusions**

As explained in Section V.(1) of this report, the Harry Family Revocable Living Trust, Julius Harry, trustee, is the current owner of the subject property. The Trust was formed by Alice Harry, Marie Harry, Laura Harry, and Rosa Harry, who acquired the property in 1971 from their mother, Elizabeth Harry. Elizabeth Harry acquired the property in 1936, and her husband appears to have acquired it some time prior to that. Thus, under Ballot Measure 37, the claimant, the Harry Family Revocable Living Trust, is due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value. The claim states that the reduction in fair market value is \$700,000

Without an appraisal based on the value of one 40-acre lot and four 10-acre lots 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 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 laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

### **Findings of Fact**

The claim is based on any state land use regulations that restrict the use of the property relative to what would have been allowed in 1936 when the property was acquired. The regulations are implemented through the Deschutes County exclusive farm use zone as required by Statewide Planning Goal 3 “Agricultural Lands.” Most laws that qualify as “land use regulations” under the Measure were adopted after 1936. None of the laws identified in the claim appear to be exempt, either on their face or as applied to the subject property, under Section 3 of Ballot Measure 37.

### **Conclusions**

Without a specific listing of laws that are the basis for the claim, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that the general statutory, goal and rule restrictions on residential development and use of agricultural land apply to the owner’s anticipated use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37. There may be other specific laws that continue to apply under one or more

of the exemptions in the Measure, because they were not raised in this claim, or because they are laws that are not covered by the Measure to begin with.

## **VI. FORM OF RELIEF**

Section 1 of Measure 37 requires payment of compensation to an owner of private real property if the Commission or 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 present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, that 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 and lots and the use of the property for residential purposes. The claimant cannot create the desired 40-acre lots and four 10-acre parcels out of the subject 79.08-acre property, and sell or develop those lots for residential use. The laws enforced by the Commission or department reduce the fair market value of the 79.08-acre parcel to some extent. The claim asserts this amount to be \$700,000. However, because the claim does not provide a specific explanation for how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the current 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 just compensation, Ballot Measure 37 authorizes the department to modify, remove, or not apply part or all of the relevant state regulations to allow the trustee of the Harry Family Revocable Living Trust to use the subject property for a use permitted at the time the trustee of the trust acquired the property on July 31, 2003.

### **Conclusions**

Based on the record before the department, Julius Harry, the trustee of the Harry Family Revocable Living Trust has established that he acquired the property on July 31, 2003. Therefore, department staff recommends not applying land use regulations enforced by the Commission or the department since July 31, 2003 to the extent necessary to allow the claimant a use of the property permitted at the time the trust acquired it. The department acknowledges that the relief recommended in this report will not allow the claimant to use his property in the manner set forth in his claim.

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 23, 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 24, 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.