

**BALLOT MEASURE 37 (2004, CHAPER 1 OREGON LAWS 2005)  
CLAIM FOR COMPENSATION**

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

July 6, 2005

**STATE CLAIM NUMBER:** M119316

**NAME OF CLAIMANTS:** Juanita Schaffer and  
T.J. Schaffer

**MAILING ADDRESS:** P.O. Box 457  
Turner, Oregon 97392

**IDENTIFICATION OF PROPERTY:** Township 8S, Range 2W, Section 28D  
Tax Lot 1400  
Marion County

**DATE RECEIVED BY DAS:** January 14, 2005

**180-DAY DEADLINE:** July 13, 2005

**I. CLAIM**

Juanita and T.J. Schaffer, the claimants, seek compensation in the amount of \$1,044,600 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the property into two-acre parcels and establish a small business office. The property is 7.67-acres located 250 west of Pine Tree Lane SE and 1500 feet north of Mill Creek Road SE in Marion County (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid as to Juanita Schaffer and is not valid as to T.J. Schaffer. Department staff recommends, that in lieu of compensation, the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to Juanita Schaffer in order to allow her to divide the property into two-acre parcels and establish a small business office, to the extent that those uses were permitted when she acquired the property on May 12, 2004: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, Division 33. The department acknowledges that the relief recommended in this report

will not allow Ms. Schaffer to use her property in a manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On February 22, 2005, pursuant to OAR 125-145-0080, the Department of Administrative Services (DAS) provided notice to the owners of surrounding properties. According to DAS, there were no written comments, evidence or information received by DAS in response to the 10-day notice.

### **IV. TIMELINESS OF CLAIM**

#### **Requirement**

Ballot Measure 37 (2004), 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 January 14, 2005 for processing under OAR 125, Division 145. The claim identifies the Special Agricultural Zones and “post acquisition land use restriction and zoning” that restrict the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37 (2004) 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 (2004), 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 (2004) provides payment of compensation or relief from specific laws to “owners” as that term is defined in the measure. Ballot Measure 37 (2004), Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

### **Findings of Fact**

T.J. Schaffer acquired the subject property on November 24, 1976 (Marion County Deed Records, Reel 63, pages 1152 and 1153). A copy of a marriage certificate between T.J. and Juanita Schaffer, dated March 28, 1978, is included in the claim. T.J. Schaffer transferred fee title to the property to Juanita Schaffer on May 12, 2004 (Marion County Deed Records, Reel 2318, and page 405). The Marion County Tax Statement for 2005-2006 shows Juanita K. Schaffer as the current and sole owner of the subject property.

### **Conclusions**

Claimant Juanita Schaffer is an “owner” of the subject property as, that term is defined by Section 1 of Ballot Measure 37. T.J. Schaffer is a “family member” as defined in Section 11(A) of the Measure, but he is not an “owner” under Section 11(C). T.J. Schaffer’s ownership interest in the property terminated on May 12, 2004 when he transferred the property to Juanita Schaffer.

### **2. The Laws that are the Basis for this 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 that: “antecedent law allowed 1 residence for each two acres” and “allowed small business office with ten or fewer employees.”

The claim specifically identifies Marion County’s Special Agriculture (SA) Zone, Chapter 137, which restricts the use of the claimants’ property to divide it and develop it with residences.

The property is zoned SA in compliance with ORS 215.283. The SA zone precludes dwellings and subdivisions, stating, “Subdivisions and planned developments, however, are not consistent with the purpose of this zone and are prohibited”.

OAR 660 Division 33 establishes standards for the approval of farm and non-farm dwellings. Specifically, OAR 660-033-0135 requires that for the approval of a dwelling “customarily

provided in conjunction with farm use,” the owner demonstrate, in part, that the owner’s farm operation produced a certain gross farm annual income from the sale of farm products in the last two or three of the last five years. For a non-farm dwelling, ORS 215.284(4) as applied by OAR 660-033-0130(4) requires, in part, that a non-farm dwelling may only be established on a parcel predominately composed of Class IV to VIII soils. The subject property is predominantly composed of Class I to IV soils in accordance with the description of the county’s Special Agriculture Zone and is therefore not eligible for a non-farm dwelling.

As provided in ORS 215.448, ORS 215.283(2)(i), provides for home occupations on lands zoned EFU where such uses satisfy ORS 215.296 and OAR 660-006-0130(5), and the additional provision under OAR 660-033-0130(14). The claim states that current regulations would not allow a “small business with ten or fewer employees.” Oregon Laws 1983, Chapter 743 (HB 2625 (1983)) amended ORS 21.213 and 215.214, to add Section (2) into ORS 215 (codified into ORS 215.448). These laws were enacted in 1983, and require that home occupations not employ more than five full or part time persons (ORS 215.488(1) (b)).

The claimant and current owner, Juanita Schaffer, acquired the subject property on May 12, 2004. 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 EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(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**

Statewide Planning Goal 3, ORS 215 and OAR 660-033-0100, amended and adopted since the property was acquired by family member T.J. Schaffer in 1976, restricts the use of the property relative to the uses allowed when he acquired the property on November 24, 1976. The statutory and rule provisions for farm and non-farm dwellings in ORS 215 and OAR 660, Division 33, clearly do not allow a single family dwelling to be approved on the subject property whereas it is possible that a dwelling could be approved under the more general provisions of ORS 215.213(1) (f) or ORS 215.213(3) (1975 edition) in effect on November 24, 1976.

The statutory and rule provisions for home occupations clearly do not allow home occupations to employ more than five full or part time persons, whereas it is possible that a home occupation without that limit could be approved under the more general provisions for home occupation under ORS 215.213(2)(h) (1975 edition) that were in effect on November 24, 1976, until they were amended in 1983, to include the current statutory limit on the number of employees.

### **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 includes the following amounts and basis of the Fair Market Value Reduction (FMVR) that are alleged to be caused by each of the cited regulations:

<u>FMVR:</u>	<u>Law or Rule:</u>	<u>Basis of Evaluation:</u>
\$60,000	MC 137.010 – 090 rules	RMV \$137,390 less unrecognized diminution of value \$77,390, subject to litigation, in account R 30768 due to Measure 37 – 37 facts.
\$300,000	Post acquisition land rules	Anticipated fair value of constructed Residences that could not be developed in compliance with post acquisition rules.
\$9,600	Post acquisition revenue loss	\$9,600 (185 * 4 acres * 26 years/2) Excess collection of property tax, each of 26 years.
\$625,000	Post acquisition loss	\$625,000 Rental value loss (two residences in 26 years).
\$50,000	Administrative resistance at Marion County	Anticipated cost to move Marion County to honor valid claim.

---

\$1,044,600 TOTAL

No other information or explanation is provided that substantiates the reduction in fair market value being alleged by the claimants.

## **Conclusions**

As explained in section V. (1) of this report, Juanita Schaffer is the current owner of the subject property. She acquired the property on May 12, 2004, from her husband, T.J. Schaffer. T.J. Schaffer is a “family member” as defined in Section 11(A) of Measure 37 who acquired the property on November 24, 1976. The claimants are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value.

Without an appraisal or other substantiating documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, the department has determined 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 laws enacted or enforced by the Commission or the department.

#### **4. Exemptions under Section 3 of Measure 37**

Ballot Measure 37 (2004) 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 includes a general reference to the county (SA) Zone and “post acquisition land use restriction and zoning” that restrict the use of the property relative to what would have been allowed when the property was acquired. These provisions include Statewide Planning Goal 3, “Agricultural Lands,” ORS 215, specifically ORS 215.203 (specifically ORS 215.780), and OAR 660, Division 33, which Marion County has implemented through applying its SA Zone to the property. None of these laws appear to be exempt, either on their face or as applied to the subject property, under Section 3 of Measure 37.

#### **Conclusions**

Without a more specific listing of laws that are the basis for the claim, it is not possible for the department to determine what 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 home occupations 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, 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 department has enacted or 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 owner to carry out a use of the property allowed at the time the owner acquired the property. The Commission has by rule directed that if the department determines a claim is valid, the Director must provide 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, claimant T.J. Schaffer is not an owner of an interest in the property and, therefore, the department is not authorized to provide any relief to him under Ballot Measure 37. As to claimant Juanita Schaffer, laws enacted or enforced by the Commission or the department restrict division of the property into parcels or lots and certain small businesses that are not home occupations. The claimant cannot create the desired two-acre lot development and establish a small business office with more than five full or part time employees on this 7.6-acre parcel. The laws enacted or enforced by the Commission or the department reduce the fair market value of the property. The claim asserts this amount to be \$1,044,600. Although the claim included some information as to how the claimants arrived at

this amount, no specific explanation was provided as the method they employed for establishing the reduction in the fair market value. No appraisal or other substantiating documentation was provided to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Juanita Schaffer to use the subject property for a use permitted at the time she acquired the property on May 12, 2004.

### **Conclusion**

Based on the record, the department recommends that the claim be denied as to T.J. Schaffer on the basis that he is not an owner of an interest in the property as defined in Ballot Measure 37, Section 11(C). The department further recommends that the claim be approved as to claimant Juanita Schaffer, subject to the following terms:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Juanita Schaffer's use of the property to divide it into two-acre parcels and establish a small business office: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, Division 33, enacted since May 12, 2004, to the extent necessary to allow Ms. Schaffer a use of the property permitted at the time she acquired the subject property. The department acknowledges that the relief recommended in this report will not allow the claimant to use the property in the manner set forth in the claim.
2. The relief granted by this order does not authorize the claimant, Juanita Schaffer, to use the property for a use that was not permitted when she acquired the property on May 12, 2004.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, this order does not authorize the use of the property unless the claimants first obtain that permit, license, or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.412 or ORS 227.160, other permits or authorizations from local state or federal agencies, and restrictions on the use of the property imposed by private parties.
4. Any use of the property by the claimants remains subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under section (3) of the Measure.
5. Without limiting the generality of the foregoing terms, in order for the claimant to use the property, it may be necessary for the claimant to obtain a decision under Measure 37 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to

the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under Measure 37 from a local public entity that has jurisdiction to enforce land use regulation applicable to a use of the property by the claimant.

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

The department issued its draft staff report on this claim on June 21, 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.