

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT  
Final Staff Report and Recommendation**

August 23, 2005

**STATE CLAIM NUMBER:** M120039

**NAME OF CLAIMANTS:** Frederick and Wanda Stills

**MAILING ADDRESS:** 20275 Newcomb Road  
Bend, Oregon 97709

**PROPERTY IDENTIFICATION:** Township 16S, Range 12E  
Section 8  
Tax Lots 200 and 201  
Deschutes County

**OTHER CONTACT INFORMATION:** Bruce. W. White  
P.O. Box 1278  
Bend, Oregon 97701

**OTHER INTEREST IN PROPERTY:** Richard and Connie Uptain  
20275 Newcomb Road  
Bend, Oregon 97701

**DATE RECEIVED BY DAS:** March 7, 2005

**180-DAY DEADLINE:** September 3, 2005

**I. CLAIM**

The claimants, Frederick and Wanda Stills, seek compensation in the amount of \$353,274 for a 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 claimants desire compensation or the right to subdivide their 46-acre property into three parcels, including one 20-acre parcel and two 13-acre parcels, and to develop a single-family dwelling on each parcel. The property is located at 20275 Newcomb Road, near Bend in Deschutes 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, that the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimants to allow them to subdivide their property into one 20-acre parcel and two 13-acre parcels, and to develop each parcel with a residential dwelling: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands) ORS 215.263, 215.284 and 215.780, and OAR 660, division 33, enacted after January 1, 1970. These laws will not apply to the claimants only to the extent necessary to allow Frederick and Wanda Stills a use of the subject property permitted at the time they acquired it on January 1, 1970. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS RECEIVED**

On March 16, 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, no written comments, evidence or information were received by DAS 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 March 7, 2005, for processing under OAR 125, division 145. The claim identifies Statewide Planning Goal 3 and provisions of ORS 215 and OAR 660, division 33, 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) 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 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**

The claimants, Frederick and Wanda Stills, acquired the subject property on January 1, 1970, according to the Contract of Sale document they included with the claim.<sup>1</sup> They also submitted a copy of a fulfillment deed dated January 12, 1973, and a February 1, 2005, Title Report demonstrating their continued ownership of the property. (See the department’s claim file.)

### **Conclusions**

The claimants, Frederick and Wanda Stills are “owners” of the subject property as that term is defined in Section 11 (C) of Ballot Measure 37, as of January 1, 1970.

### **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 claimants state, as the basis of their claim “the restrictive zoning [EFU] that has limited their ability to divide their property and to place dwellings on the property.” They state that ORS 215.263 (1), 5 (b) (A, B, D), ORS 215.780, ORS 215.283, ORS 284, OAR-033-0100, and OAR-660-033-0130 restrict subdivision and building of single-family dwellings on their property.

The subject property is currently zoned Exclusive Farm Use (EFU) by Deschutes County, as required by Goal 3 in accord with OAR 660, division 33, and ORS 215, because the claimants’ property is “Agricultural Land” as defined by Goal 3. Goal 3 became effective on

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<sup>1</sup> The claimant’s attorney states that the claimants have owned the subject property since 1967, but that the original land sale contract is not available. Without any verification of the claimant’s acquisition in 1967, claimants have not established ownership as of that date.

January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660, division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80-acres and establish standards for allowing the existing or any proposed parcel(s) to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (chapter 792, Oregon Laws 1993). ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

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. Subsequent amendments to comply with HB 3326, (chapter 704, Oregon Laws 2001, and effective January 1, 2002) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

The claimants acquired the subject property on January 1, 1970, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. At that time, the property was not zoned by Deschutes County. Some provisions of ORS 215, adopted in 1963, were in effect at that time, but do not appear to have applied to the subject property when the claimants acquired it.

## **Conclusions**

The minimum lot size and dwelling standards established by Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, adopted since the claimants acquired the property in 1970, do not allow the subdivision of the property into parcels less than 80-acres in size or allow the approval of dwellings. Land use laws adopted since 1970 restrict the use of the property from what could have been done when the claimants acquired the property in 1970.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the use that the claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

### **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 an informal estimate of reduction in the property’s fair market value, based on assessed values of the subject property and similar adjacent properties. The assessed value of the property for Tax Year 2004-2005 is \$407,480, based on Deschutes County Tax Assessor records submitted with claim. The claim estimates the current value without the EFU land use regulation at \$760,754, based on assessed value of similar adjacent property. The result is a net estimated reduction of \$353,274. No appraisal or other substantiating documentation was submitted to support this estimate.

#### **Conclusions**

As explained in section V.(1) of this report, Frederick and Wanda Stills are current owners of the subject property as of January 1, 1970. Thus, under Ballot Measure 37, the Stills 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 based on other substantiating documentation, it is not possible to substantiate the specific dollar amount the claimants demand 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 enacted or 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 includes references to state land use regulations that restrict the use of the property relative to what would have been allowed in 1970 when the Stills acquired the property, including Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215, and OAR 660, division 33. With the exception of provisions of ORS 215 in effect in 1963, which do not appear to have applied to the property, none of these laws are exempt under Section 3(E) of Ballot Measure 37.

## **Conclusions**

Without a specific development proposal for the property, 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 farm land apply to the claimants' use of the property, and for the most part these laws are not exempt under Section 3(E) of Measure 37. Laws in effect when the claimants acquired the property in 1970 are exempt under section 3 (E) of the measure and will continue to apply to the property.

There may be other laws that continue to apply to the claimants' use of the property that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under section (3) of Measure 37 that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the property.

## **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 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, 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 claimants' division of the subject property into one 20-acre parcel and two 13-acre parcels, and development of those parcels with residential dwellings. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by \$353,274. However, because the claim does not provide an appraisal or other substantiating documentation 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 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, Ballot Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Frederick and Wanda Stills to use the subject property for a use permitted at the time they acquired the property on January 1, 1970.

### **Conclusion**

Based on the record, the department recommends that the claim be approved, subject to the following terms.

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Frederick and Wanda Stills' division of their property into one 20-acre parcel and two 13-acre parcels, or to the establishment of one dwelling on each resulting parcel: applicable provisions of Statewide Planning Goal 3, ORS 215.263, 215.284 and 215.780, and OAR 660, division 33, enacted after January 1, 1970. These land use laws will not apply to the Stills' use of their property only to the extent necessary to allow the claimants to a use permitted at the time they acquired the property on January 1, 1970.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property subject to the standards in effect on January 1, 1970. On that date, the property was subject to any applicable provisions of ORS 215 then in effect.
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, the order will 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 215.402 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 under the terms of the order will remain 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 and conditions, in order for the claimants to use the property, it may be necessary for them 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 relieves the claimants from the necessity of obtaining a decision under Measure 37 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimants.

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

The department issued its draft staff report on this claim on July 26, 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.