

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

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

September 7, 2005

**STATE CLAIM NUMBER:** M120221

**NAMES OF CLAIMANTS:** Jerry and Kathleen McCauley

**MAILING ADDRESS:** 16800 Jones Road  
White City, Oregon 97503

**OTHER CONTACT INFORMATION:** Mark S. Bartholomew  
717 Murphy Road  
Medford, Oregon 97504

**IDENTIFICATION OF PROPERTY:** Township 35S, Range 2W, Section 2  
Tax Lot 200  
Township 34S, Range 2W (no section)  
Tax Lot 13000  
Jackson County

**DATE RECEIVED BY DAS:** March 18, 2005

**180-DAY DEADLINE:** September 14, 2005

**I. SUMMARY OF CLAIM**

The claimants, Jerry and Kathleen McCauley, seek compensation in the amount of \$5,510,180 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 partition their 240-acre property into 48 parcels of five-acres each. The property is located at 16800 Jones Road, White City, in Jackson 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 this claim is valid. Department staff recommends, in lieu of compensation, that the requirements of 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 divide and develop their property for residential use: Statewide Planning Goal 3 and applicable provisions of ORS 215 and OAR 660, division 33, to

the extent necessary to allow Jerry and Kathleen McCauley a use of the subject property permitted at the time they acquired it on October 23, 1979. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On March 2, 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, one written comment was received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law. (See comment letter in the department's claim file.)

### **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**

This claim was submitted to DAS on March 18, 2005, for processing under OAR 25, division 145. The claim identifies Jackson County's Exclusive Farm Use (EFU) zoning and state laws 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, Jerry and Kathleen McCauley, acquired the subject property by Bargain and Sale Deed on October 23, 1979. The property was acquired by Jerry McCauley’s parents, Marshall and Dorothy McCauley, by Warranty Deed on June 9, 1978. The claim includes a current Jackson County Property Tax Statement for the subject tax lots that confirms that the claimants are the current owners of the property.

## **Conclusions**

The claimants, Jerry and Kathleen McCauley, are “owners” of the subject property as that term is defined in Section 11 (C) of Ballot Measure 37. Marshall and Dorothy McCauley are “family members” as that term is defined in Section 11 (A) of Ballot Measure 37.

### **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 claimants’ 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 claimants or a family member acquired the property.

### **Findings of Fact**

The claim states that state laws have restricted the property so that it cannot be subdivided into five-acre lots for future home sites. The claim cites provisions of ORS 215 and OAR 660, division 33, as well as other Statewide Planning Goals and statutes, and OAR 340.<sup>1</sup>

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<sup>1</sup> The claim cites Statewide Planning Goals 5, 11, and 14, and ORS 92, 195, and 197, but does not discuss or establish the manner in which those cited goals and statutes restrict the claimants’ 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. To the limited extent these laws were enacted after the claimants or their family acquired the property, the department concludes these Goals and statutes do not provide the claimants a basis for relief under Measure 37. OAR 340 establishes administrative rules for the Department of Environmental Quality and is not a subject of this report.

The claim is based, in part, on Jackson County's current EFU Zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU 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 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 parcels 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.

Family members of the claimants acquired the property on June 9, 1978, when it was zoned Open Space Development (OSD-5). Under the OSD-5 zone, there was a five-acre minimum parcel size for the creation of new lots or parcels. However, the County's OSD-5 zone that applied to the property in 1978 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. The Commission acknowledged the Jackson County Comprehensive Plan and land use regulations as complying with the Statewide Planning Goals on May 16, 1983. Since the Commission had not acknowledged Jackson County's comprehensive plan and land use regulations, including the OSD-5 zone, when the McCauley family acquired the property on June 9, 1978, Statewide Planning Goal 3 applied directly to property on the date of acquisition.<sup>2</sup> In 1978, the State standards for a land division involving property where the local zoning was not acknowledged were that the resulting parcels must be of a size that are "appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area" (Statewide Planning Goal 3). Further, ORS 215.263 (1975 edition) required that all divisions of land subject to the provisions for EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy).

Thus, the opportunity to divide the property when the McCauley family acquired it in 1978 was limited to land divisions done consistent with Goal 3 that required the resulting farm or non-farm

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<sup>2</sup> 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 where site specific goal provisions applied prior to the Commission's acknowledgment of the County's Goal 3 program on May 16, 1983 (*Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (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 den* 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 Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions, (*Byrd v. Stringer*, 295 Or 311 (1983)). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same in substance, the applicable rules must be interpreted and applied by the County in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

parcels to be: (1) “appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area;” and (2) shown to comply with the legislative intent set forth in ORS 215.243. (See endnote<sup>1</sup>.)

As for dwellings allowed under EFU zoning as required by Goal 3 on the date of family acquisition in 1978, farm dwellings were allowed if determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1975 edition) and ORS 215.213(3) (1975 edition) authorized a non-farm dwelling only where the dwelling is compatible with farm uses, consistent with the intent of ORS 215.243, does not interfere seriously with accepted farming practices on adjacent lands, does not materially alter the stability of the land use pattern for the area, and is situated on land that is generally unsuitable for production of farm crops and livestock. Before a farm dwelling could be established on Agricultural Land, the farm use to which the dwelling relates must “be existing.”<sup>3</sup> Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use.

No information has been provided showing that the claimants’ request for five-acre parcels complies with either the Goal 3 standard for lot size for farm parcels, or the standards for new parcels under ORS 215.263 (1975 Edition). Nor has any information been provided concerning whether additional dwellings comply with the approval standards for dwellings under ORS 215.213, in effect at the time the McCauley family purchased the property in 1978.

### **Conclusions**

The zoning requirements, minimum lot size and dwelling standards established by amendments to Statewide Planning Goal 3, amendments to ORS 215, and OAR 660, division 33, adopted since the claimants’ family acquired the property in 1978, do not allow the division of the property into parcels smaller than 80-acres in size or allow the approval of dwellings as may have been possible in 1978. The County’s EFU zone is based on the standards required by Goal 3, ORS 215 and OAR 660, division 33. Land use laws adopted since 1978 restrict the use of the property from what could have been done when the property was acquired by the claimants’ family in 1978. However, it is unclear whether the claimants’ requested level of development complies with the standards in effect when they acquired the property on June 9, 1978.

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. There may be other laws that currently apply to the claimants’ use of the property, and that may continue to

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<sup>3</sup> *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) *affirmed without opinion*, 70 Or App 179 (September 14, 1984) and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33 (November 23, 1988).

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 land use regulation 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 fair market value of the subject property has been reduced by \$5,510,180 as a result of land use laws enacted after the claimants' family acquired the property in 1978. The claimants have provided information regarding the value of the property based on what is allowed under current land use regulations as compared with the assumed value if developed into five-acre residential parcels under the County's former OSD-5 zoning. The claim includes a comparative market estimate to substantiate the claimed values both before and with state land use regulations.

#### **Conclusions**

As explained in Section V. (1) of this report, Jerry and Kathleen McCauley are the current owners of the subject property as of October 23, 1979. Family members have owned the property since June 9, 1978. Under Ballot Measure 37, the McCauleys are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V. (2) of this report, laws adopted since the claimants acquired the property restrict division of the subject property. The 239-acre parcel cannot be partitioned into five-acre parcels, as the claimants assert was allowed when the family acquired the property in 1978.

While it appears unlikely that the standards in effect when the claimants acquired the property would permit the claimants' requested level of development, the department acknowledges that the laws adopted since 1978, and currently in effect, restrict the use of the claimants' property to some extent. The claim asserts these restrictions reduce the value of the property by \$5,510,180. However, without an appraisal or verification of the uses allowed when the claimants acquired the property, 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 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 1978 when the property was acquired by family members of the McCauleys. These provisions include Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33, which Jackson County has implemented through its EFU zone. With the exception of provisions of Goal 3 and ORS 215 in effect on June 9, 1978, these laws do not appear to be exempt under Section 3(E) of Ballot Measure 37. Provisions of Goal 3 and ORS 215 adopted before June 9, 1978 are exempt under Section 3(E) of the Measure, which exempts laws enacted prior to the date the claimants' family acquired the property.

#### **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 appears that the general statutory, goal and rule restrictions on the division, residential development and use of Agricultural Land apply to the owners' use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37. Provisions of ORS 215 in effect when the claimants' family acquired the property in 1978 are exempt under Section 3(E) of the Measure and will continue to apply to the property.

Other laws in effect when the claimants acquired the property are also exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of 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 use 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 in order to allow the present owner to carry out a use of the property permitted at the time the current 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 in this report, laws enforced by the Commission or the department prohibit the division of the subject property into five-acre parcels with one dwelling on each parcel created. The claim asserts these restrictions reduce the fair market value of the subject property by \$5,510,180. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property based on the requested use, it does not include an appraisal, and does not establish what level of development would be allowed under the laws in effect in 1978 when the claimants' family acquired the property. Thus, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, the department acknowledges that state land use laws 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 state land use regulations to allow the McCauley's to use the subject property for a use permitted at the time they acquired the property in 1979.

As explained in Section V. (2) of this report, the claimants acquired the property on October 23, 1979. At that time, the use of the property was subject to the same laws that applied when the claimants' family acquired it. Specifically, the property was zoned OSD-5 and because the County's OSD-5 zone was not acknowledged by the Commission, use of the property was subject to Statewide Planning Goal 3 and the applicable goal and statutory standards for new farm and non-farm parcels and dwellings as explained in Section V. (2).<sup>4</sup>

### **Conclusion**

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

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<sup>4</sup> An indication of how these land division and dwelling standards applied to the property when it was acquired and that comply with the Goal 3 minimum lot size standard, ORS 215.263 and the farm and non-farm dwelling standards under ORS 215.213 are the land division and dwelling standards in the County's acknowledged EFU zone. The acknowledged EFU zone for Jackson County established an 80-acre minimum for new parcels and required that farm and non-farm dwellings comply with the applicable standards under ORS 215.213.

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Jerry and Kathleen McCauley's division of their property or to the establishment of a single family dwelling on each lot or parcel created: applicable provisions of Statewide Planning Goal, 3, ORS 215.263, 215.284 and 215.780, and OAR 660, division 33, enacted after October 23, 1979. These land use laws will not apply to Jerry and Kathleen McCauley's use of their property only to the extent necessary to allow them a use permitted at the time they acquired the property on October 23, 1979.
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 October 23, 1979. On that date, the property was subject to applicable provisions of ORS 215 then in effect, and to the direct application of Statewide Planning Goal 3 and applicable implementing regulations, as discussed in Section V. (2).
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 in this order 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 August 19, 2005. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' 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.

## Endnote

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<sup>i</sup> The Goal 3 standard for the review of land divisions or the establishment of a minimum lot size states:

“Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing Commercial Agricultural Enterprise within the area.”

Further interpretation of the Goal 3 minimum lot size standard can be found in *Meeker v Clatsop County*, *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, *rev den* 290 Or 137 (1980) and *Thede v. Polk County*, 3 Or LUBA 336 (1981).

On August 20, 1977, the Commission distributed a policy paper explaining the meaning of the Goal 3 minimum lots size standard (see “Common Questions about Goal #3; Agricultural Lands” August 30, 1977, as revised and added to July 12, 1979). In 1982, the policy paper and court decisions were incorporated into an administrative rule to guide the interpretation and application of the Goal 3 minimum lot size standard (see OAR 660, division 5, specifically rules 15 and 20 effective July 21, 1982).

For further guidance on the interpretation and application of this standard and rule see *Kenagy v. Benton County*, 6 Or LUBA 93 (1982); *Goracke v. Benton County*, 8 Or LUBA 128 (1983), 68 Or App 83 (1984); 12 Or LUBA 128 (1984); 13 Or LUBA 146 (1985); 74 Or App 453 (1985), *rev den* 300 Or 322 (1985); and OAR 660-05-015 and 020 as amended effective June 7, 1986 (repealed effective August 7, 1993).

The 1982 administrative rule (OAR 660-05-015 and 020) was further amended to incorporate the holdings of these cases (effective June 7, 1986, and repealed effective August 7, 1993).