

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

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

September 21, 2005

STATE CLAIM NUMBER: M120395
Report B

NAME OF CLAIMANT: Dwayne Heikes

MAILING ADDRESS: 10715 NW Shearer Hill Road
Forest Grove, Oregon 97116

PROPERTY IDENTIFICATION: Township 1N, Range 3W, Section 9
Tax Lot 700
Washington County

OTHER CONTACT INFORMATION: Thomas A. Sherwood, Esq.
12402 SW Chandler Drive
Tigard, Oregon 97224

OTHER INTEREST IN PROPERTY: Brad Heikes
36565 NW Harrington Road
Cornelius, Oregon 97113

Terry Peters
3225 Oakcrest Drive
Forest Grove, Oregon 97116

Portland General Electric Co.
121 SW Salmon Street
Portland, Oregon 97204

Tualatin Valley Irrigation District
230 Elm Street
Forest Grove, Oregon 97116

DATE RECEIVED BY DAS: March 31, 2005

180-DAY DEADLINE: September 27, 2005

I. SUMMARY OF CLAIM

The claimant, Dwayne Heikes, seeks compensation in the amount of \$436,350 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 partition the 79.73-acre property into two, 38-acre parcels for residential use and one 3.73-acre parcel with the existing dwelling and accessory buildings eligible for replacement. The property is located at 36565 NW Harrington Road in Washington 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. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to Dwayne Heikes partition and development of the 79.73-acre property: Statewide Planning Goal 3 (Agricultural Lands), ORS 215.213, 215.263, 215.780 and the applicable provisions of OAR 660, division 33, enacted after April 1, 1975. These laws will not apply to the claimant only to the extent necessary to allow Dwayne Heikes a use of the property permitted at the time he acquired it in 1975. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 27, 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

This claim was submitted to DAS on March 31, 2005, for processing under OAR 125, division 145. The claim lists a number of statutes and administrative rules as laws that restrict the use of the property and are the basis for the claim (see Section V.(2)). 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 claimant, Dwayne Heikes and Glenda Heikes, husband and wife, acquired the subject property from Dwayne Heikes’ parents (Everett and Violet Heikes) on April 1, 1975, as reflected by a Warranty Deed included with the claim. Dwayne Heikes’ parents acquired the subject property on July 1, 1944. Mr. and Ms. Heikes conveyed the subject property to Dwayne Heikes and Glenda Heikes, Trustees under the Dwayne Heikes and Glenda Heikes Trust on July 23, 1992. Transfer of the property into a revocable trust does not constitute a change in ownership for purposes of this Measure 37 claim.¹ (See Deeds and other information in claim file.)

Conclusions

The claimant, Dwayne Heikes, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of April 1, 1975. His parents, Everett and Violet Heikes, are “family members” as that term is defined by Section 11(A) of Ballot Measure 37 as of July 1, 1944.

¹ Dwayne Heikes acquired full ownership through a divorce decree dated June 21, 1995.

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 lists a large number of statutes, rules and local County land use regulations as the land use regulations that restrict the use of the property. These include all editions of ORS 197 and 215 and amendments thereto enacted since July 1, 1944, OAR 660, divisions 1, 2, 3, 4, 5, 6, 8, 11, 12, 15, 18, 21, 23, 25, 26, 30, 33, 45 and 125² and all amendments thereof adopted at any time following May 29, 1973 (the signing date for SB 100³), and all Washington County land use regulations within the meaning of Measure 37 adopted or enforced since July 1, 1944⁴. The claim does not establish how each of these cited regulations restricts the use of the subject property. The department's report is based on those statutes and rules that directly restrict the use of the subject property.⁵

The claim is based generally on Washington County's current Exclusive Farm Use (EFU Zone) and the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU as required by Statewide Planning Goal 3 in accord with OAR 660, division 33 and ORS 215 because the claimant's property is "Agricultural Land" as defined by Goal 3.⁶ 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 215.213, 215.263, 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.

² OAR 125 is a rule of the Department of Administrative Services and not the Commission. The rule relates to administration of Measure 37 claims. The Commission does not administer an OAR 660 division 125.

³ SB 100 became effective on October 5, 1973.

⁴ The State of Oregon and the department do not have the authority to waive local land use regulations under Measure 37.

⁵ The claimant summarily cites ORS 197 as restricting the use of the property. That chapter establishes land use procedures. Claimant has not established how any provision of that chapter restricts the claimant's use of the subject property. On its face, ORS 197 does not in itself restrict the use of the subject property. The claimant also summarily cites several divisions of OAR 660 that do not, on their face, appear to restrict the use of the property. In the absence of any explanation by the claimant as to how those regulations restrict the use of the subject property, this report does not address those regulations.

⁶ The claimant's property is "Agricultural Land" because it is predominantly composed of NRCS (Natural Resources Conservation Service) Class I-IV Soils (see NRCS Web Soil Survey (<http://websoilsurvey.nrcs.usda.gov>))

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 660-033-135(7) (applicable to farm dwellings on high-value farmland) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling on high-value farmland in an EFU zone in a marginal lands County under ORS 215.213.⁷ ORS 215.213(3) became effective on October 5, 1973, (SB 101, Chapter 503, Or Laws 1973) and was amended to limit non-farm dwellings on NRCS Class I-III soils in 1983 (Chapter 826 Or Laws 1983) effective October 15, 1983. OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993. (See citations of Oregon revised statutes and administrative rule history.)

The claimant's family first acquired the subject property on July 1, 1944, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules and prior to the application of any zoning by Washington County.

Conclusions

The current zoning requirements, lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted after Dwayne Heikes' parents acquired ownership of the subject property in July 1, 1944 and do not allow the partition of the 79.73-acre property into two 38-acre parcels for residential use and one 3.73-acre parcel with the existing dwelling and accessory buildings eligible for replacement, thereby restricting the use of the property relative to the uses allowed when the property was acquired by Dwayne Heikes' parents in 1944. In 1944, the property was not subject to state or local land use regulations.

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and that may continue to apply to the claimant's 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 claimant seeks 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."

⁷ The claimant's property is "high-value farmland" as defined under ORS 215.710 (see NRCS Web Soil Survey (<http://websoilsurvey.nrcs.usda.gov>)).

Findings of Fact

The claim includes an estimate of \$436,350 for the reduction in the property's fair market value, as a result of current regulations. This estimate is based on the "claimant's research; comparable transactions and consultation provided by Mr. Brad Young, Listing Broker for the Property, Windemere/Baldwin Properties, LLC, in Hillsboro." The basis for this estimate is a determination that the property would be worth \$985,000 if the 79.73-acre property could be partitioned into two 38-acre parcels for residential use and one 3.73-acre parcel with the existing dwelling and accessory buildings eligible for replacement, and that its current value is only \$548,650 ($\$985,000 - \$548,560 = \$436,350$). The research and comparable sales analysis was not submitted with the claim.

Conclusions

As explained in Section V. (1) of this report, the claimant's family first acquired the property on July 1, 1944. Under Ballot Measure 37, Dwayne Heikes is due compensation for land use regulations 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 claimant's family acquired the property restrict the approval of a single-family dwelling on the subject property. The claimant estimates the reduction in value due to the restrictions to be \$436,350.

Without an appraisal or other documentation, 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 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 references many state land use regulations that allegedly restrict the use of the property relative to what would have been allowed in 1944 when the property was acquired by the claimant's parents. Those provisions that restrict the use of the property include Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33, which Washington County has implemented through its EFU zone. None of these laws appear to be 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 claimant's 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 claimant acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's 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 claimant seeks 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 claimant has 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 claimant should be aware that the less information he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his 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 set forth in this report, laws enforced by the Commission or the department restrict the partition of the 79.73-acre property into two 38-acre parcels for residential use and one 3.73-acre parcel with the existing dwelling and accessory buildings eligible for replacement. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$436,350. However, because the claim does not provide an appraisal or other specific documentation to establish 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 Dwayne Heikes to use the subject property for a use permitted at the time he acquired the property on April 1, 1975.

The claimant acquired the property on April 1, 1975, when it was zoned GFU-38, a qualified EFU zone under ORS 215. Under the GFU-38 zone, single-family dwellings were permitted on existing lots of record. However, the County's GFU-38 zone that applied to the property at that time 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 Washington County Comprehensive Plan, and land use regulations as complying with the Statewide Planning Goals on July 30, 1984 (Acknowledgment Order 84-ACK-103). Since the Commission had not acknowledged Washington County's comprehensive plan and land use regulations, including the GFU-38 zone, when the claimant acquired the property on April 1, 1975, Statewide Planning Goal 3 applied directly to property on the date of acquisition.⁸

In 1975, 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 (1973 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). In 1973, ORS 215.263 did not provide for the creation of a small parcel for a non-farm dwelling separate from the provisions just noted.⁹

Thus, the opportunity to divide the property when Dwayne Heikes acquired it in 1975, was limited to land divisions done consistent with Goal 3, that required the resulting farm or non-farm 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 endnote¹.)

⁸ Statewide Planning Goal 3 was applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the County's Goal 3 program on July 30, 1984. (*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).

⁹ Compare ORS 215.263 (1973 edition with the current version of ORS 215.263.)

As for dwellings allowed in an EFU zone, in 1975, ORS 215 and EFU zoning required by Goal 3, allowed farm dwellings if determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1973 edition).¹⁰ Before a farm dwelling could be established on Agricultural Land, the farm use to which the dwelling relates must “be existing.”¹¹ Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use. ORS 215.213(3) (1973 edition) authorized a non-farm dwelling only where the dwelling was compatible with farm uses, consistent with the intent of ORS 215.243, did not interfere seriously with accepted farming practices on adjacent lands, did not materially alter the stability of the land use pattern for the area, and was situated on land generally unsuitable for production of farm crops and livestock.¹²

No information has been provided showing that the claimant’s request for a dwelling complies with either of the applicable partition or dwelling standards under Goal 3 or ORS 215.213 (1973 edition) in effect at the time Dwayne Heikes purchased the property in 1975.

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 Dwayne Heike’s partition and development of the 79.73-acre subject property: applicable provisions of Statewide Planning Goal 3, ORS 215.213, 215.263, 215.780 and OAR 660, division 33, enacted after April 1, 1975. These land use regulations will not apply to Dwayne Heikes’ use of his property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property on April 1, 1975.
2. The action by the State of Oregon provides the state’s authorization to the claimant to use his property subject to the standards in effect on April 1, 1975. On that date, the property was subject to Statewide Planning Goal 3 and applicable provisions of ORS 215 (1973 edition) 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 claimant first obtains 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

¹⁰ Review and approval of a “dwelling customarily provided in conjunction with farm use” under ORS 215 is a land use decision that requires notice and an opportunity for a public hearing regardless of the terms of a local ordinance (see *Doughton v. Douglas County* 88 Or App 198 (1987)).

¹¹ *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) *affirmed without opinion*, 70 Or App 179 (1984) and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33 (1988).

¹² When determining whether land is “generally unsuitable for the production of farm crops and livestock” under ORS 215.213(3), the entire parcel or tract must be evaluated rather than a portion thereof. See *Smith v. Clackamas County*, 313 Or 519 (1992).

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 claimant 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 claimant to use the property, it may be necessary for his 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 a 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 September 1, 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.

ⁱ As noted, Goal 3 "Agricultural Lands" 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 apply prior to acknowledgement of a jurisdiction's comprehensive plan and land use regulations. After the local plan and land use regulations are acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly apply to such local land use decisions. However, after acknowledgment, interpretation of the local county code provisions must be consistent with the goal and rule standards with which they were acknowledged to be in compliance.

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."

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). Further interpretation of the Goal 3 minimum lot size standard can be found in *Meeker v. Clatsop County*, 287 Or 665 (1979), *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).

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).