

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

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

September 27, 2005

STATE CLAIM NUMBER:	M120484
NAME OF CLAIMANT:	Rick A. Muller ¹
MAILING ADDRESS:	15752 Salt Creek Road Dallas, Oregon 97338
PROPERTY IDENTIFICATION:	Township 7S, Range 6W, Section 1 Tax Lot 801 Polk County
OTHER INTEREST IN PROPERTY:	Pacific Power & Light Company (right-of-way easement)
DATE RECEIVED BY DAS:	April 6, 2005
180-DAY DEADLINE:	October 3, 2005

I. SUMMARY OF CLAIM

The claimant, Rick A. Muller, seeks compensation in the amount of \$800,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 28-acre property into ten or more lots or parcels and to develop a dwelling on each lot or parcel. The property is located at 15752 Salt Creek Road, northwest of Dallas, in Polk 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 Rick A. Muller's division of the property for residential

¹ Also known as Rick Muller and Ricky Alan Muller.

development: Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands) and applicable provisions of ORS 215 and OAR 660, divisions 6 and 33 enacted after April 23, 1982. These laws will not apply to the claimant only to the extent necessary to allow Rick Muller a use of the property permitted at the time he acquired it in 1982. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On April 15, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, three written comments were 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 letters 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 criterion 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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on April 6, 2005, for processing under OAR 125, division 145. The claim identifies "land use system laws," Senate Bill 100, Statewide Planning Goal 3, HB 3661, ORS 192.640, ORS 197.015, ORS 215.515, OAR 660-006-0027, OAR 660-006-0050, and OAR 660, division 33 as laws that restrict the use of the property and are 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 claimant, Rick A. Muller, acquired the subject property by Deed from his parents, Chris S. Muller and Lois V. Muller, on April 23, 1982. Chris and Lois Muller acquired ownership by Deed on January 19, 1969.

Conclusions

The claimant, Rick A. Muller, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of April 23, 1982. Chris and Lois Muller are “family members” as that term is defined by Section 11(A) of Ballot Measure 37, as of January 19, 1969.

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 identifies “land use system laws,” Senate Bill 100, Statewide Planning Goal 3, HB 3661, ORS 192.640, ORS 197.015, ORS 215.515, OAR 660-006-0027, OAR 660-006-0050, and OAR 660, division 33 as laws that restrict the use of the property as the basis for the claim. The claim states: “The Claimant intends to divide the 29-acre parcel into three separate parcels, later it can be divided more to support at least 10 dwellings...”²

² ORS 192 addresses Records, Public Reports, and Meetings. ORS 197 addresses procedural requirements, including those regarding creation, enforcement, and review of land use regulations and land use applications. The claimant does not establish how either of these statutes restrict the use of his property in a manner that reduces its fair market value. On their face, neither ORS 192 nor 197 in themselves restrict the use of claimant’s property.

The claim is based generally on Polk County's current Farm Forest (F/F) zone, a mixed farm and forest zone, adopted to comply with Statewide Planning Goal 4 (Forest Lands) and the implementing provisions of OAR 660-006-0050, effective February 5, 1990, and subsequently amended on March 1, 1994, to comply with the provisions of HB 3661 (Chapter 792, Oregon Laws 1993). In the F/F zone, the minimum size for the creation of new farm or forest lots and parcels is 40-acres, and the siting of dwellings and other allowable uses is based on a determination of the predominant use of the tract as either farm or forest land as of January 1, 1993.³

Under OAR 660-006-0050, all the uses permitted under Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands) are allowed. For dwellings, either the Goal 3 or 4 standards are applicable, based on the predominant use of the tract on January 1, 1993. No information was provided to the department regarding the predominant use of the property on January 1, 1993. Depending on the predominant use on January 1, 1993, the property will be subject to either the requirements for dwellings applicable under Exclusive Farm Use (EFU) zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the 80-acre minimum lot size specified in ORS 215.780. The claimant's property is 28-acres with one dwelling. Under OAR 660-005-055, the claimant's property cannot be divided, as may have been possible under the County's F/F zone on April 23, 1982. No analysis of whether the subject property can be divided for non-farm dwellings under ORS 215.263(4)(b) has been provided.

The claimant's family acquired the subject property on January 19, 1969, before the adoption of SB 100 (Chapter 80, Oregon Laws 1973, effective October 5, 1973), the statewide planning goals (effective January 25, 1975), or their implementing regulations. In 1969, the property may have been subject to applicable provisions of ORS 215, enacted in 1963, depending on the local zoning at that time.

Conclusions

The current provisions applicable to lands zoned Farm Forest (F/F) under OAR 660-006-0050 to 0055 relating to land divisions and dwelling standards adopted since the claimant's family acquired the subject property on January 19, 1969, restrict the use of the property relative to uses allowed when the claimant's family acquired the property in 1969. Under these current provisions, the claimant is restricted from dividing or developing the property as his family could have done when they acquired it. Additional land use regulations in Goal 3 (Agricultural Lands), ORS 215, and OAR 660, divisions 6 and 33, were adopted after the claimant's family acquired the subject property in 1969, and also restrict the use of the property relative to uses allowed when the family acquired it.

³ See Polk County Zoning Ordinance, Chapter 138.

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."

Findings of Fact

The claim includes an informal estimate of \$800,000 as the reduction in the property's fair market value due to current regulations. According to the claim, this estimate is based on the County's market valuation of \$259,940⁴ and an informal estimate of the property's fair market value in the absence of current regulations of \$1,059,940, based on multiple listing sale information in the area. The difference between these two estimates is the demanded compensation of \$800,000. The record includes no appraisal to substantiate these amounts.

Conclusions

As explained in Section V. (1) of this report, the current owner is Rick A. Muller, who acquired the property on April 23, 1982, and whose family acquired the property on January 19, 1969. Under Ballot Measure 37, Rick A. Muller 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), laws adopted since 1969 restrict the claimant's ability to divide the property. The claim estimates the reduction in value due to the restrictions to be \$800,000.

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 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.

⁴ Polk County Assessor records show a current real market value of \$259,940 for 29 acres with a double-wide manufactured home. (See copy in department's claim file.)

Findings of Fact

The claim is based on Polk County's Farm/Forest (F/F) zone and related provisions of state law that have restricted use of the property and reduced its fair market value, including applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and OAR 660, divisions 6 and 33. With the exception of provisions of ORS 215, that may have been applicable on January 17, 1969, none of the laws identified in the claim are exempt under Section 3(E) of Ballot Measure 37. Applicable provisions of ORS 215 enacted before January 17, 1969 are exempt under Section 3(E) of the Measure, which exempts laws in effect on the date the claimant's family acquired the property.

To the extent that they may be applicable under OAR 660-006-0050, the siting standards for dwellings in forest zones under ORS 215.730 and in the Goal 4 implementing rules (OAR 660, division 6), are exempt under Section (3)(B) of Measure 37. These provisions include fire protection standards for dwellings and for surrounding forest lands. Section 3(B) of Measure 37 specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes ..."

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 division and use of mixed farm and forest 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. If applicable, provisions of ORS 215, in effect when the Muller family acquired the property in 1969, are exempt under Section 3(E) of the Measure and will continue to apply to the property. In addition, the siting standards for dwellings in forest zones under ORS 215.730 and in the Goal 4 implementing rules in OAR 660, division 6 are exempt under Section 3(B).

Other laws in effect when the claimant's family acquired the property, are also 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 division of the subject property into ten parcels and the development of those parcels. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$800,000. However, because the claim does not provide an appraisal or other 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 Rick A. Muller to use the subject property for a use permitted at the time he acquired the property on April 23, 1982.

When the claimant acquired the subject property on April 23, 1982, it was zoned Farm/Forest (F/F), the current Polk County zoning with a 40-acre minimum lot size.⁵ However, the County's F/F 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 Polk County comprehensive plan and land use regulations as complying with the Statewide Planning Goals in 1988. Since the Commission had not acknowledged Polk County's comprehensive plan and land use regulations, including the EFU zone, when Rick A. Muller acquired the property on April 23, 1982, Statewide Planning Goal 3 applied directly to the property on the date of

⁵ See August 15, 2005, Memorandum from Polk County Community Development Department to Polk County Board of Commissioners. (See copy in the department's claim file.)

acquisition.⁶ In 1982, 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).

Thus, the opportunity to divide the property when Rick A. Muller acquired it in 1982 was limited to land divisions done consistent with Goal 3, which 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 endnote.¹)

No information has been provided showing that the claimant’s request for a ten-lot subdivision complies with the Goal 3 standard for lot size for farm parcels. Thus, it is unclear whether the claimant’s requested level of development complies with the standards for land division under Goal 3 in effect when he acquired the property in April 1982.

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 Rick A. Muller’s division and development of the 28-acre property: Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands) and applicable provisions of ORS 215 and OAR 660, divisions 6 and 33 enacted after April 23, 1982. These land use regulations will not apply to Rick A. Muller’s use of his property only to the extent necessary to allow him a use permitted at the time he acquired the property on April 23, 1982.
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 23, 1982. On that date, the property was subject to applicable provisions of Statewide Planning Goals 3 and 4 and ORS 215 then in effect. It is unclear whether the claimant’s requested level of development complies with the standards for land division in effect when he acquired the property.
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

⁶ 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 prior to the Commission’s acknowledgment of the County’s Goal 3 program in 1988 (*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 the 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).

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 him to obtain a decision under Measure 37 from Polk County or other jurisdiction 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 9, 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.

ⁱ 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 lot 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 (1079), *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 0015 and 0020, 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), and *rev den* 300 Or 322 (1985); and OAR 660-05-015 and 020 as amended to incorporate the holdings of these cases (effective June 7, 1986, and repealed effective August 7, 1993).