

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

July 6, 2005

**STATE CLAIM NUMBER:** M119281

**NAME OF CLAIMANTS:** James R. Brown, Kelly Ann Brown, and  
Cecil Irene Perry

**MAILING ADDRESS:** 4691 Southwest Helmholtz Way  
Redmond, Oregon 97556

**IDENTIFICATION OF PROPERTY:** Township 15S, Range 12E, Section 25,  
Tax Lot 2300  
Deschutes County

**OTHER CONTACT INFORMATION:** Edward P. Fitch, Attorney at law  
Bryant, Emerson & Fitch  
888 West Evergreen Avenue  
P.O. Box 457  
Redmond, Oregon 97556-0103

**OTHER INTERESTS IN PROPERTY:** Easement on the south 30 feet of the  
property in favor of Pacific Power for  
electric transmission and distribution

**DATE RECEIVED BY DAS:** January 12, 2005

**180-DAY DEADLINE:** July 11, 2005

**I. CLAIM**

The claimants, James R. Brown, Kelly Ann Brown, and Cecil Irene Perry, seek compensation in the amount of \$400,000 for reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of private real property. The claimants desire compensation or the right to divide their property into three-acre lots or parcels. The property is located at 4691 SW Helmholtz Way, Redmond, 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 that the claim is valid as to James R. Brown and Kelly Ann Brown, and is not valid as to Cecil Irene Perry. Department staff recommend that, in lieu of compensation, the requirements of the following laws enforced by the department not apply to James R. Brown and Kelly Ann Brown's use of the property: Statewide Planning Goal 3, ORS 215, and OAR 660, Division 33, to the extent necessary to allow the Browns a use of the property allowed at the time they acquired the property that is the subject of this claim in 2000. The department acknowledges that the relief recommended in this report will not allow the Browns to use their property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

## **III. COMMENTS RECEIVED**

On February 18, 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 January 12, 2005, for processing under OAR 125, Division 145. The claim identifies designation of the subject property as Exclusive Farm Use (EFU) as the restriction on the use of the property that is 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 was 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 to “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**

Claimant Cecil Irene Perry and her husband, James R. Perry, Jr., acquired the subject property on January 19, 1966. On April 7, 2000, Cecil Irene Perry conveyed the property by bargain and sale deed to her grandson, claimant James R. Brown, and his wife, claimant Kelly Ann Brown, reserving a life estate for herself. Ms. Perry conveyed the remainder of her interest in the property by bargain and sale deed to claimants James and Kelly Brown on January 16, 2002.

### **Conclusions**

James R. Brown and Kelly Ann Brown are “owners” of the subject property, as that term is defined by Section 11 (C) of Ballot Measure 37. They first acquired an interest in the property on April 7, 2000. They acquired the remaining interest in the property on January 16, 2002. Cecil Irene Perry is a “family member” as defined in Section 11(A) of the measure, but she is not an “owner” under Section 11(C) because her interest in the property terminated on January 16, 2002 when she transferred her life estate interest in the property to the Browns.

### **2. The Laws That Are the Basis for the Claim**

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that the 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 claimants or a family member acquired the property.

### **Findings of Fact**

The claim generally cites “EFU and agricultural zoning regulations [restrict] division of land and construction of residences on the lot.”

The EFU zoning referred to in the claim is based on Statewide Planning Goal 3, (Agricultural Lands) (OAR 660-015-0000(3)), and provisions of state laws applicable to land zoned for agricultural use in ORS 215 and OAR 660, division 33, which restrict the zoning, use and

division of the subject property. Goal 3 became effective on January 25, 1975, and required agricultural land as defined by Goal 3 to be zoned for agricultural use (see citations to statutory and rule history under OAR 660-0000(3)). The farm use provisions of ORS 215 were first enacted and became effective in 1963. However, ORS 215.780 became effective November 4, 1993 (Chapter 792, Or Laws 1993). The agricultural land administrative rule, OAR 660, Division 33, became effective August 7, 1993. OAR 660-033-0100 and ORS 215.780 established an 80-acre minimum lot size for the creation of a new parcel in an agricultural zone.

The claimants' property is "agricultural land" as defined by Deschutes County and Goal 3. In 1972, Deschutes County designated the property Exclusive Agriculture (A-1) under ORS 215.203 (1963). The County redesignated the property EFU in 1979 pursuant to Statewide Planning Goal 3. The current zoning is EFU – Tumalo/Redmond/Bend (EFU-TRB).

### **Conclusions**

The EFU designations applied to the subject property by Deschutes County, and the limits on lot sizes adopted by Deschutes County, in response to Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, were all adopted after 1966 when a family member acquired the property and do not allow division of the property into three-acre lots or parcels. Land use laws adopted since 1966 restrict the use of the property relative to the uses allowed when a family member acquired it.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that the current land use regulations described in Section V.(2) of this report "has the effect of reducing the fair market value of the property, or any interest therein."

### **Findings of Fact**

The claim estimates that the subject property would sell for \$430,000 under current land use regulations, and that it would sell for \$800,000 without those restrictions, minus development costs for each parcel of approximately \$20,000 each.<sup>1</sup> The compensation demanded, \$400,000, is the difference between these two amounts (\$370,000) plus \$30,000. The claim includes no appraisal or other documentation to substantiate these amounts.

### **Conclusions**

As explained in section V.(1) of this report, the current owners are James R. Brown and Kelly Ann Brown, whose family acquired the property in 1966. Thus, under Ballot Measure 37, James R. Brown and Kelly Ann Brown are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value.

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<sup>1</sup> According to Deschutes County Assessor records, the current real market value of the subject property is \$365,870. (See department's claim file.)

The claim provides some evidence to demonstrate the reduction in fair market value of the property due to restrictions relating to state and county laws. However, without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determined that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

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

Under Section 3 of Ballot Measure 37, the measure does not apply to certain types of laws.

#### **Findings of Fact**

The provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, that are applicable to the division of property and to the establishment of dwellings on agricultural land apply to this claim. All of these land use regulations, with the exception of some provisions of ORS 215, were enacted after 1966. ORS 215.203 and ORS 215.213, which establish standards for dwellings on lands within farm use zones, were enacted in 1963. These laws are exempt under section 3(E) of the measure. None of the other laws appear on their face to be exempt under Section 3 of Measure 37.

#### **Conclusions**

Without a specific proposed use or a complete listing of laws that are the basis for the claim, it is impossible 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 related to the subject property's EFU designation and to restrictions on the division of the property and to the establishment of dwellings on agricultural land apply to the owners' anticipated use of the property. With the exception of ORS 215.203 and 215.213, these restrictions do not appear to come under any of the exemptions in Measure 37. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure, or because they are laws that are not covered by the Measure.

### **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 owners to carry out a use of the property permitted at the time the owners 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 conclusion set forth in this report, claimant Cecil Irene Perry is not an owner of an interest in the property and, therefore the department is not authorized to provide any relief to her under Ballot Measure 37. As to claimants James and Kelly Brown, laws enforced by the Commission or the department restrict the division of the subject property into three-acre lots or parcels for residential development. The owners cannot create the desired residential lots or parcels out of the subject property. The laws enforced by the Commission or the department reduce the fair market value of the property to some extent. The claim asserts this amount to be \$400,000. However, because the claim does not provide a specific explanation for how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, the department acknowledges that the laws on which the claim is based 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 James R. Brown and Kelly Ann Brown to use the subject property for a use permitted at the time they acquired the property on April 7, 2000.

## **Conclusions**

Based on the record, the department recommends that the claim be denied as to Cecil Irene Perry on the basis that she is not an owner of an interest in the property, as defined in Ballot Measure 37, Section 11(C). The department further recommends that the claim be approved as to claimants James and Kelly Brown, subject to the following terms:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to the Browns' division of the property into lots or parcels or to the establishment of a one or more dwellings on each lot or parcel: those provisions of Statewide Planning Goal 3, ORS 215 (other than ORS 215.203 or ORS 215.213) and OAR 660 division 033 enacted after January 16, 2000. The department acknowledges that the relief recommended in this report will not allow the claimants to use their property in the manner set forth in their claim.
2. The relief granted by this order does not authorize the Browns to use the property for a use that was not permitted when they acquired their rights to occupy and use the property in 2002.
3. To the extent that any law, order, deed, agreement or other legally-enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, this order does not authorize the use of the property unless the claimants first obtain that permit, license, or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.412 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the claimants under the terms of this order remains subject to the following laws: (a) those laws not specified in (1), above; (b) any laws enacted or enforced by a public entity other than the department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under section (3) of Measure 37.

5. Without limiting the generality of the foregoing terms, in order for the claimants to use the property, it may be necessary for the claimants 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 June 17, 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.