

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

August 11, 2005

**STATE CLAIM NUMBER:** M119870

**NAME OF CLAIMANT:** James Scheiper

**MAILING ADDRESS:** 129 Arbutus Avenue  
Staten Island, New York 10312

**IDENTIFICATION OF PROPERTY:** Township 4S, Range 4W, Section 24  
Tax Lot 2200  
Yamhill County

**DATE RECEIVED BY DAS:** February 22, 2005

**180-DAY DEADLINE:** August 21, 2005

**I. CLAIM**

The claimant, James Scheiper, seeks compensation in the amount of \$150,000 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 claimant desires compensation or the right to establish one single-family dwelling on the subject property. The 59.7-acre property is located at 11670 Southeast Loop Road, near the city of McMinnville, in Yamhill 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 just 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 claimant to allow him to establish one single-family dwelling on the subject property: applicable provisions of Statewide Planning Goal 3, ORS 215.284, and OAR 660, division 33, enacted after December 22, 1975. These laws will not apply to the claimant only to the extent necessary to allow James Scheiper a use of the subject property permitted at the time he acquired it on December 22, 1975. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS RECEIVED**

On March 3, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, no written comments, evidence or information were received 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 February 22, 2005, for processing under OAR 125, division 145. The claim identifies Yamhill County's Exclusive Farm Use zoning (EF-80) 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 regulation 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, James Scheiper, acquired the subject property on December 22, 1975. (See Bargain and Sale Deed included in the department's claim file.)

A 2004-2005 Yamhill County Tax Statement, included in the claim, and a staff report issued by Yamhill County in response to the claimant's Measure 37 compensation demand to the County, indicate that James Scheiper remains a current owner of the subject property.

## **Conclusions**

Based on the record currently before the department, the claimant is an "owner" of the subject property as that term is defined in Section 11(C) of Ballot Measure 37.

## **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 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 states that the county "zoning changed property zoned AF-5 to AF-20," which precluded him from establishing a single-family dwelling on his property. Other statements in the claim refer to House Bill 3661, ORS 215, OAR 660, division 33, income standards and EFU zoning.

The claim is based on Yamhill County's current EF-80 zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned EF-80 as required by Statewide Planning Goal 3 in accord with OAR 660, division 33, because the claimant's property is "Agricultural Land" as defined by Goal 3. Oregon's Statewide Planning Goals, including Goal 3, became effective on January 25, 1975. Goal 3 required that Agricultural Lands as defined by the Goal be zoned for Exclusive Farm Use (EFU). Land that is zoned for EFU farm use is also subject to restrictions based on certain provisions of ORS 215. Current regulations, particularly ORS 215.283 and 215.284, along with Goal 3 and OAR 660, division 33, establish standards for farm and non-farm dwellings.

ORS 215.283 contains standards for the creation of new parcels for farm and non-farm uses and for farm and non-farm dwellings allowed in an EFU zone and became effective on October 5, 1973. ORS 215.283 was amended in 2001 by HB 3326 to provide new standards for the creation of new parcels for non-farm dwellings as well as the non-farm dwellings themselves.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective

on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. Subsequent amendments to comply with HB 3326, (chapter 704, Oregon Laws 2001, and effective January 1, 2002) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

Mr. Scheiper acquired the property on December 22, 1975, when it was zoned “Agriculture” by Yamhill County, a qualified EFU zone under ORS 215. However, when the claimant acquired the property, the County’s Agriculture zone 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 rural portion of Yamhill County’s Comprehensive Plan and land use regulations as complying with the Statewide Planning Goals on June 5, 1980.

Since the Commission had not acknowledged the County’s comprehensive plan and land use regulations, including the Agriculture zone, when Mr. Scheiper acquired the property in 1975, Statewide Planning Goal 3 applied directly to the property on the date of acquisition.<sup>1</sup>

Under the state standards in effect on December 22, 1975 when the claimant acquired the property, farm dwellings were allowed if determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1975 edition). Before a farm dwelling could be established on Agricultural Land, the farm use to which the dwelling relates must “be existing.”<sup>2</sup> Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use. ORS 215.213(3) (1975 edition) authorized a non-farm dwelling only where the dwelling was compatible with farm uses, consistent with the intent of ORS 215.243, and 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 ORS 215.213(3) (1975 edition).

No information has been provided to establish that the claimant’s request for a single-family dwelling complies with state standards for farm or non-farm dwellings under Goal 3 and ORS 215 (1975 Edition) in effect when the claimant acquired the property.

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<sup>1</sup> 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 comprehensive plan and land use regulations. (*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. denied, 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).

<sup>2</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).

## **Conclusions**

Lot size and dwelling standards established by Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, adopted since the claimant acquired the property in 1975, do not allow the approval of a dwelling as may have been possible in 1975. The County's EF-80 zone is based on the standards established by Goal 3 and by ORS 215 and OAR 660, division 33. Land use laws adopted since 1975 restrict the use of the property from what could have been done when the property was acquired by the claimant in 1975. However, it is unclear whether the claimant's requested development complies with the standards in effect when he acquired the property on December 15, 1975.

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(s) 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 a 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 laws described in Section V.(2) of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

### **Findings of Fact**

The claim states that the fair market value of the subject property has been reduced by \$150,000 as a result of land use laws enacted after the claimant acquired the property in 1975. The claimant's estimate does not include an explanation for the alleged reduction in value and there is no certified appraisal to substantiate the claimed reduction in value.

## **Conclusions**

As explained in section V.(1) of this report, James Scheiper is a current owner of the subject property who initially acquired an ownership interest in the property on December 22, 1975. Thus, under Ballot Measure 37, Mr. Scheiper is 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 claimant acquired the property restrict residential development on the subject property.

The subject parcel cannot currently be developed with one single-family dwelling and the department acknowledges that laws adopted since 1975 restrict the use of the property. The claim asserts these restrictions reduce the fair market value of the subject property by \$150,000. However, without an appraisal or other substantiating documentation, and without verification of the uses allowed when the claimant acquired the property, 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 is based on Yamhill County's EF-80 zone and the related provisions of state law that have restricted use of the property and likely reduced its fair market value, including Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33. With the exception of provisions of Goal 3 and ORS 215 in effect when the claimant acquired the property in 1975, those specified laws are not exempt under subsection 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 Section 3 of Measure 37. It appears that the general statutory, goal and rule restrictions on the residential development and use of Agricultural Land apply to the claimant's use of the property, and to the extent they were enacted after the claimant acquired the property, for the most part these laws do not appear to come under any of the exemptions in Measure 37. Provisions of Goal 3 and ORS 215 in effect when the claimant acquired the property in 1975, are exempt under subsection 3(E) and will continue to apply to the property.

Laws in effect when the claimant acquired the property are exempt under subsection 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 use(s) 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. Claimants should be aware that the less information they have provided to the department in their claim, the

greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the property.

## **VI. FORM OF RELIEF**

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law to allow the present owners to carry out a use of the property permitted at the time the present 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 conclusions in this report, laws enforced by the Commission or the department prohibit the development of one single-family dwelling on the parcel, though it is unclear what level of development would be allowed under the laws in effect in 1975 when the claimant acquired the property. The claim asserts these restrictions reduce the fair market value of the subject property by \$150,000. Without an appraisal or other documentation to substantiate this amount, and without verification that the requested development would be allowed under the laws in effect in 1975 when the claimant acquired the property, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, the department acknowledges that state land use laws have likely 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 James Scheiper to use the subject property for a use permitted at the time he acquired it in 1975.

As explained in Section V.(2) of this report, the claimant acquired the property on December 22, 1975. At that time, the property was zoned Agriculture by Yamhill County and was subject to Statewide Planning Goal 3 and the applicable goal and statutory standards for new farm and non-farm dwellings as explained in that section.<sup>3</sup>

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<sup>3</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 (1975 edition) are the land division and dwelling standards in the County's acknowledged EF-80 zone. The acknowledged EF-80 zone for Yamhill County required that farm and non-farm dwellings comply with the applicable standards under ORS 215.213.

## **Conclusions**

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 James Scheiper's establishment of a single-family dwelling on the subject property: applicable provisions of Statewide Planning Goal 3, ORS 215.283 and 215.284 and OAR 660, division 33, enacted after December 22, 1975. These land use regulations will not apply to Mr. Scheiper's use of the property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property on December 22, 1975.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property subject to the standards in effect on December 22, 1975. On that date, the property was subject to Statewide Planning Goal 3 and applicable provisions of ORS 215 (1975 editions).
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 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 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 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 July 18, 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.