

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

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

August 19, 2005

STATE CLAIM NUMBER: M119988

NAME OF CLAIMANTS: Duane L. Olson and S. David Olson

MAILING ADDRESS: 6984 Lakeside Drive NE
Salem Oregon 97305

PROPERTY IDENTIFICATION: Township 9S, Range 2W, Section 1C
Tax Lot 600
Marion County

OTHER CONTACT INFORMATION: Wallace W. Lien, PC
1775 32nd Place NE
Suite A
Salem Oregon 97303-1674

DATE RECEIVED BY DAS: March 1, 2005

180-DAY DEADLINE: August 28, 2005

I. CLAIM

The claimants, S. David Olson and Duane L. Olson, seek compensation in the amount of \$23,480 for a reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to construct a new dwelling or to or restore an existing non-farm dwelling on farmland¹. The property is located at 9700 Block of West Stayton Road, near Aumsville, in Marion County. (See claim.)

¹ The claimants' request is not clear. On page 1 of the claim, claimants request to "either construct a new non-farm dwelling or restore the existing non-farm dwelling." At page 2 of the claimants' statement of proposed use, Section III, claimants also assert that "Claimants do not propose to build any *additional* dwellings on the subject property." From that statement, it is not clear if Claimants are requesting to construct a "replacement" dwelling whereby the existing dwelling would be removed or whether they are requesting construction of a new dwelling *in addition* to the existing dwelling currently on site. As ORS 215.283(1)(s) currently allows for the alternation, restoration or replacement of a lawfully established dwelling that meets certain criteria, it is assumed in this report that the replacement or restoration of the current dwelling would not be allowed under ORS 215.283(1)(s) or that claimants are requesting to construct a new dwelling in addition to the existing dwelling currently on site.

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 to claimant Duane Olson and that it is not valid as to S. David Olson. Claimant S. David Olson transferred all interest in the property to his son, claimant Duane Olson on March 1, 2004 and is no longer an “owner” of the subject property, as that term is defined in Section 11(C) of Ballot Measure 37.

Department staff recommends, that in lieu of compensation, the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimant, Duane Olson, to allow him to construct a non-farm dwelling or restore an existing non-farm dwelling on his 5.05 acre parcel: Statewide Planning Goal 3 and applicable provisions of ORS chapter 215.263, ORS 215.284 and ORS 215.780, and OAR 660, division 33, enacted after March 1, 2004. These laws will not apply to Duane Olson only to the extent necessary to allow Duane L. Olson a use of the subject property permitted at the time he acquired it on March 1, 2004. The department acknowledges that the relief recommended in this report will not allow the claimant to use his property in the manner assumed in his claim. (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 March 1, 2005, for processing under OAR chapter 125, division 145. The claim identifies Marion County’s Exclusive Farm Use (EFU) zoning and state

laws that restrict the use of the property to construct a new non farm dwelling or to restore a non-farm dwelling 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 of 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

Claimant S. David Olson acquired the property by Warranty Deed on September 21, 1964. On March 1, 2004, S. David Olson conveyed fee simple interest in the property to his son, claimant Duane L. Olson. S. David Olson does not currently have any ownership interest in the subject property. The claim includes a current Marion County Tax Statement showing Duane L. Olson as the current owner.

Conclusions

The claimant, Duane L. Olson is an “owner” of the subject property as that term is defined in Section 11 (C) of Ballot Measure 37, as of March 1, 2004. The claimant, Mr. S. David Olson did not retain an interest in the subject property when he conveyed it to his son, Duane L. Olson, on that date, and is therefore not an “owner” of the subject property, as that term is defined in Section 11(C) of Ballot Measure 37. S. David Olson is a family member as to Duane Olson, having acquired the property on September 21, 1964.

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:

“When David Olson purchased the property it had no zoning designation, and no restrictions were in place that affected the use of the subject property. Subsequent to purchasing the subject property, the state and county zoned it EFU. This significantly restricted claimant’s ability to use the subject property by prohibiting non-farm [uses].”

The claim identifies EFU zoning and state land use regulations that require such zoning² and restrict the use of the property as the basis for the claim. The claimant Duane Olson’s property is zoned EFU as required by Goal 3 in accord with OAR 660, division 33 and ORS chapter 215 because the claimants’ property is “Agricultural Land” as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU pursuant to ORS chapter 215.

Current land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660 division 33 as applied by Goal 3, establish standards for allowing the existing or any proposed parcel(s) to have farm or non-farm dwellings on them.

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.)

ORS 215.283(1)(t) became effective on November 4, 1993 (it was subsequently renumbered (1) (s)).³ This statute allows the following uses in an EFU zone:

Alteration, restoration or replacement of a lawfully established dwelling that:

- (A) Has intact exterior walls and roof structure;
- (B) Has indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;
- (C) Has interior wiring for interior lights;
- (D) Has a heating system; and

² Earlier, the claimant sought land use verification from Marion County to determine the allowed uses of the subject property. Marion County found that the land was zoned EFU (Exclusive Farm Use) and County ordinance did not allow the placement of new farm dwellings and non-farm dwellings on the subject property. It is not evident from that request whether the claimants asked if they could restore an existing dwelling or replace an existing dwelling which is the subject of this claim.

³ ORS 215.283 (1) (s) has subsequently been amended but not in a manner affecting this claim.

(E) In the case of replacement, is removed, demolished or converted to an allowable nonresidential use within three months of the completion of the replacement dwelling.

OAR 660-033-0120 also lists a replacement dwelling as a use authorized in an EFU zone.

The family acquired the subject property on September 21, 1964. At that time the property was not zoned by Marion County. Provisions of ORS 215 were adopted in 1963 and may have applied to the subject dwelling.

Conclusions

Lot size and dwelling standards established by Statewide Planning Goal 3, ORS chapter 215, and OAR 660, division 33, have been adopted since the claimant Duane Olson's family acquired the property in 1964. The approval of new non-farm dwellings on farm land may have been possible in 1964. Land use laws adopted since 1964 restrict the use of the property from what could have been done when Duane Olson's family acquired the property 1964.

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 claimants have 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 \$23,480 as a result of land use laws enacted after the family acquired the property in 1964. This amount is based on an informal estimate. There is no certified appraisal to substantiate the claimed values either before or with state land use regulations.

Conclusions

As explained in section V. (1) of this report, Duane L. Olson is the current owner of the subject property as of March 1, 2004. The property has been owned by a family member since 1964. Thus, under Ballot Measure 37, Duane L. Olson 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,

Duane Olson's family acquired the property restrict building a dwelling on the subject property. The claim asserts the reduction in value due to the restriction to be \$23,480. 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 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 Marion County's EFU zone and the related provisions of state law that have restricted use of the property and reduced its fair market value. These are Statewide Planning Goal 3, (Agricultural Lands), and applicable provisions of ORS chapter 215 and OAR 660, division 33. All of these laws were enacted after the claimant's family acquired the property in 1964, with the exception of provisions of ORS 215 adopted in 1963, and do restrict the use of the property in a manner that likely reduces its fair market value. With the exception of those provisions of ORS 215 in effect when the claimant Duane Olson's family acquired the property, the laws identified in the claim are not exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when a claimant's family acquired the property.

Conclusions

It appears that the general statutory, goal and rule restrictions on residential development and use of Agricultural Land apply to the owner, Duane Olson'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 Duane Olson's family acquired the property, including provisions of ORS 215 adopted in 1963, 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 claimant Duane Olson 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 claimants 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 owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions in this report, laws enforced by the Commission or the department prohibit the development of a dwelling on the subject property. The claim asserts these restrictions reduce the fair market value of the subject property by \$23,480. No appraisal or other documentation was submitted and it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the information in the record, the department acknowledges that state land use laws may 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 just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow Duane L. Olson to use the subject property for a use permitted at the time he acquired the property on March 1, 2004. On that date, the laws currently in effect, as explained in Section V. (2) applied to the property.

Conclusions

Based on the record currently before the department, the department recommends that the claim be denied as to S. David Olson, on the basis that S. David Olson is not an owner of the property. The department recommends that the claim be approved as to Duane L. Olson, 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 Duane L. Olson's establishment of a single family dwelling on the 5.05 acre subject property: applicable provisions of Statewide Planning Goal 3, ORS 215.263, and 215.284, and OAR 660, division 33 enacted after March 1, 2004. These land use regulations will not apply to Duane L. Olson'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 March 1, 2004. The department acknowledges that the relief recommended in this report will not allow the claimant Duane Olson to construct a new dwelling or restore the existing dwelling on his 5.05 acre property in a manner that was apparent in his claim.
2. The action by the State of Oregon provides the state's authorization to the claimant Duane Olson to use the property subject to the standards in effect on March 1, 2004. On that date, the

property was subject to Statewide Goal 3 and applicable provisions of ORS chapter 215 and applicable provisions of OAR 660, division 33, currently 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 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 Duane Olson 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 Duane Olson 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 August 2, 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.