

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

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

September 9, 2005

**STATE CLAIM NUMBER:** M120220

**NAME OF CLAIMANT:** Choon K. Amore

**MAILING ADDRESS:** Army Education Center  
APO AP 96258 (Korea)  
AmoreR@korea.army.mil

**PROPERTY IDENTIFICATION:** Township 3S, Range 7E, Section 4 b  
Tax Lot 5900  
Clackamas County

**DATE RECEIVED BY DAS:** March 18, 2005

**180-DAY DEADLINE:** September 14, 2005

**I. SUMMARY OF CLAIM**

The claimant, Choon K. Amore, seeks compensation in the amount of \$100,000 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 subdivide the 5.5-acre property for residential development as allowed by Clackamas County at the time the property was acquired in 1974. The property is located on Routledge Lane in Welches, in Clackamas 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 not valid because the land use regulations that are the basis for the claim are exempt under Sections 3(B) and 3(C) of Measure 37. Or, in the alternative, because neither the Land Conservation and Development Commission (Commission) nor the department have enforced laws that restrict the claimant's use of private real property relative to uses permitted at the time the claimant acquired the property. Based on this determination, the department does not make any further evaluation or determination on the merits or substance of the claim. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On March 31 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, one written comment was received in response to the 10-day notice.

The comment does not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. The commenter requests to be kept informed regarding this claim because their adjacent property is “also affected by the wetland situation.” (See letter 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 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 18, 2005, for processing under OAR 125, division 145. The claim identifies the “Clackamas County Wetland Rezoning,” presumably adopted under Statewide Planning Goal 5, from about “1985 or sooner” that restricts 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.

#### **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, Choon K. Amore, originally acquired the subject property some time prior to March 1, 1974. The claim includes a Deed conveying the subject property from the claimant to one Charles Sperr on March 1, 1974. Also included with the claim is letter from the “Title Insurance Company of Oregon” dated August 9, 1974 for the subject property with respect to “Escrow No. 418543 Sperr – Amore.” Ms. Amore evidently reacquired the subject property prior to August 1974. The Clackamas County Assessor’s office has confirmed that the claimant, Choon K. Amore, is the current owner of the property and that she acquired it in 1974.

### **Conclusions**

The claimant, Choon K. Amore, is an “owner” of the subject property as that term is defined by Section 11(C) of Ballot Measure 37, as of some time between March and August, 1974, when she reacquired the property from Mr. Sperr.<sup>1</sup>

### **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 the “Clackamas County Wetland Rezoning” (adopted under Statewide Planning Goal 5) from about “1985 or sooner” as the law that restricts the use of the property as the basis for the claim. The property is zoned Mountain Recreational Resort District (MRR) which allows a variety of residential and lodging facilities. This zone prohibits residential development in “restricted areas,” i.e., in a floodplain district and wetlands. Further, a single-family dwelling is allowed in a restricted area on a lot created prior to the adoption of the zone, subject to compliance with the applicable criteria of the MRR zone. According to the County,

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<sup>1</sup> Although the exact date of ownership is not known, it is clear that the claimant sold the property to Mr. Sperr on March 1, 1974, and evidently reacquired it prior to August, 1974. Based on the corroborating information from Clackamas County, Ms. Amore remains the owner at this time.

the property is within the “Resource Protection Open Space” designation of its comprehensive plan and identified in the comprehensive plan under Map X-MH-2 (see plan description and map in the department’s claim file). This map shows most of the property as within the wetland designation and a portion of the property is within the floodplain. A different map submitted with the claim identifies a wetland area for the property “that may require Section 404 permit.”

The “Water Resources” Section of the County’s comprehensive plan includes acknowledged policies regarding the protection of wetlands under Goals 5 (Natural Resources) and (Air, Water & Land Resource Quality). Overall, the County’s “Water Resource” policies are intended, in part, to “improve water quality,” “maintain and improve the quality ... of groundwater” and to “protect and enhance wetlands as a valuable source of groundwater recharge, wildlife habitat and storm water drainage control.” Specific “wetland” policies are also included in Section 19 of the “Water Resource” portion of the County plan. These policies require the protection of wetlands identified as “Open Space” on the plan map and require that individual site development of inventoried lands will be reviewed for compliance with wetland policies. The “Open Space and Parks” zone applies to wetlands and floodplains identified on the County plan Open Space map, and Section 1011.04 D.1, and require that the alteration of all identified wetlands must be approved by the U.S. Army Corps of Engineers and the Oregon Department of State Lands.

Section 1001 of the County Code establishes “general” development standards that apply, in part, to “rivers and stream corridors, under subsection 1002.05” and “distinctive resource areas, under subsection 1002.06.” Subsection 1002.05 limits development subject to “hazards of flooding” and prohibits “subsurface sewage disposal fields within 100 feet of any perennial water-course.” Subsection 1002.06 requires that wetlands, not identified as urban in the comprehensive plan, are subject to the requirements of the U.S. Army Corp of Engineers and the Oregon Department of State Lands and in areas shown as Resource Protection Open Space on the plan maps X-MH-1 to 3 (which includes the subject wetland), development is also limited to protect water resources.

According to the Oregon Department of State Lands (DSL), the identified wetland on the property is shown on the National Wetlands Inventory map, and there are a number of specific studies and reports regarding this wetland. DSL also notes that the wetland is most likely subject to permit requirements of the Clean Water Act (that is, it is unlikely to be considered “isolated” and thus exempt from federal requirements) and it is likely that a federal permit will be required even if a state permit is not, due to the 50 cubic yard exemption in the state law.

The County’s wetland and floodplain regulations implement Statewide Planning Goals 5, 6 and 7. Goal 5 requires that significant open space, scenic and historic, and natural areas be inventoried and decisions made whether to protect such areas. Goal 6 requires that discharges from future development not violate applicable state or federal environmental laws, or degrade water or land resources. Goal 6 applies to discharges of material into wetlands. Goal 7 requires measure to protect life and property from natural hazards.

The claimant acquired the subject property on or about March 1, 1974, when it was zoned Recreational Residential (RR) by Clackamas County. The RR zone allowed new dwellings on one-acre parcels when not served by water and sewer facilities and down to 15,000 square feet if served by such public facilities. The County requires that any density greater than 15,000 square feet per dwelling also requires public facilities and must be clustered.<sup>2</sup>

Ms. Amore acquired the subject property in 1974. During the period between October 5, 1973, when SB 100 became effective, and January 25, 1975, when the Statewide Planning Goals became effective, ORS 197.175(1) and 197.280 (1973 edition) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities (including implementation of their comprehensive plan) in accordance with the “Interim” land use Goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); see also, *Meeker v. Board of Comm’rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the Goals); *State Housing Council v. Lake Oswego*, 48 Or App 525 (1981) (Land use planning responsibility is not defined in ORS 197). The Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* and *partition approvals*.” (Emphasis added)). The use proposed here is to subdivide the land. As a result, if the claimant had sought to create that use in 1974, as a matter of law the use would have been subject to the Interim Planning Goals at ORS 215.515. (See endnote<sup>i</sup>.)

The following Interim Goals are directly applicable to this claim: (a) “To preserve the quality of the air, water and land resources of the state,” (b) “To conserve open space and protect natural and scenic resources,” (f) “To protect life and property in areas subject to floods, landslides and other natural disasters,” and (j) “To ensure that development of properties within the state is commensurate with the character and the physical limitations of the land.” (ORS 215.515, 1973 edition).

No information has been provided showing that the subdivision of the 5.5-acre property for residential development requested by the claimant complies with the Interim Planning Goals set forth in ORS 215.515 (1973 edition) in effect at the time the claimant first acquired the property in 1974. In large part, Statewide Planning Goals 5, 6 and 7 mirror the text of these Interim Goals.

## **Conclusions**

The requirements of Statewide Planning Goals 5, 6 and 7 pertaining to wetlands and floodplain areas, as reflected in the County’s wetland designation in its local comprehensive plan designation “Resource Protection Open Space,” various local code provisions and the MRR zone were all enacted after Choon K. Amore acquired ownership of the subject property in March 1974, and do not allow the division of the property. However, in 1974, when the property was acquired by Ms. Choon, the property was subject to the requirements of the Interim Planning Goals set forth in ORS 215.515 (1973 edition), as well as to any federal or state wetland laws that were then in effect. The subject property could not be divided for residential use under the “Interim” land use Goals applicable in 1974, nor can it be divided for residential use based on

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<sup>2</sup> Clackamas County Court Order No. 71-514 dated June 17, 1971, Section 22.4: Dimensional Standards.

current law because of the County's wetland designation and local code provisions based on state and federal law. Based on the facts of this claim, dividing the 5.5-acre property into smaller parcels for residential use does not "preserve the quality of the . . . water . . . resources of the state" or "protect life and property in areas subject to floods, as required by the Interim Goal" ORS 215.515 (1973 edition). Thus, the department determines that the current land use regulations applicable to the subject property do not restrict its use relative to the uses allowed when the claimant acquired the property in 1974.

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**

Based on the findings in Section V. (2) of this report, the department finds that no state land use regulation administered by the department or Commission restricts the use of the property relative to what was allowed when the claimant acquired it. The claimant has submitted information concerning the market value of other properties near the subject property, but has not explained how state laws enacted or enforced after the date the claimant acquired the property have reduced the value of the property.

### **Conclusions**

Based on the record for this claim, the department concludes that there is no evidence showing that a state law administered by the department or Commission that was enacted after the date the claimant acquired the property has reduced the value of the property.

### **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**

As explained in Section V. (2) of this report, the claim identifies the “Clackamas County Wetland Rezoning” (under Statewide Planning Goal 5) from about “1985 or sooner” that restricts the use of the property as the basis for the claim.” The protection of wetlands under Statewide Planning Goals 5 and 6, are in part, to respond to requirements of Section 404 of the Clean Water Act of 1973, and therefore are exempt from claims under Section 3(B) as land use regulation “restricting or prohibiting activities for the protection of public health and safety, such as ... pollution control regulations” and Section 3(C) as land use regulations “required to comply with federal law.” Furthermore, designation of part of the property as floodplain and restrictions on floodplain development are also exempt under Section (3)(B) of the Measure as restrictions “for the protection of public health and safety.”

## **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 restrictions relating to the subject property were adopted prior to the claimant’s acquisition in 1974.

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. Specifically, restrictions to protect wetlands adopted in accord with Goal 5 or Goal 6 were adopted, in part, to meet requirements of the Federal Clean Water Act and are exempt under subsection 3(C) of Measure 37. Restrictions related to floodplain development and wetland protection related to protecting water quality are exempt under subsection 3(B) of Measure 37 because they were adopted to protect public health and safety.

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 she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her 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.

Based on the record, the claimant is not entitled to relief under Ballot Measure 37. Department staff recommends that this claim be denied because the land use regulations that are the basis for the claim are exempt under Sections 3(B) and 3(C) of Measure 37, and because neither the Commission nor the department have enforced laws that were enacted after the claimant acquired the property that restrict the claimant's use of the private real property that is the subject of this claim relative to uses that were allowed when the claimant acquired the property. Based on this determination, the department does not make any further evaluation or determination on the merits of the claim.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on August 24, 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.

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<sup>i</sup> The "Interim" land use Goals are set forth in ORS 215.515(a) to (j) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state," and (j) "To ensure that development of properties within the state is commensurate with the character and the physical limitations of the land." (ORS 215.515, 1973 edition).