

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

September 15, 2005

**STATE CLAIM NUMBER:** M120265

**NAME OF CLAIMANT:** Richard Slaby

**MAILING ADDRESS:** 13265 S. Leland Road  
Oregon City, Oregon 97045

**IDENTIFICATION OF PROPERTY:** Township 3S, Range 2E, Section 20  
Tax Lot 807  
Clackamas County

**DATE RECEIVED BY DAS:** March 23, 2005

**180-DAY DEADLINE:** September 19, 2005

**I. CLAIM**

The claimant, Richard Slaby, seeks compensation in the amount of \$156,500 for 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 build a home on his 4.86-acre property. The property is located in Clackamas County, Oregon. (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 build a single-family dwelling: Statewide Planning Goal 3, and applicable provisions of ORS 215 and OAR 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow him a use of the subject property permitted at the time he acquired the property on October 9, 1973. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS RECEIVED**

On March 31, 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 23, 2005, for processing under OAR 125, division 145. The claim identifies the Clackamas County Exclusive Farm Use (EFU) zone 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. (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**

The claimant, Richard Slaby, states that he acquired the subject property on October 9, 1973. No deed or contract was submitted to confirm this date of acquisition. Rather, a deed dated March 10, 1982 is included. However, a staff report prepared by Clackamas County dated March 9, 2005, for a County Measure 37 claim filed by the claimant, and information from the County Assessor's office, both note that the County's Deed Records show the claimant acquired the property in October, 1973. A Tax Statement from the Clackamas County Assessors' office shows Mr. Slaby as the current owner of the property. (See Deed and other information in the department's claim file.)

## **Conclusions**

The claimant, Richard Slaby, is an "owner" of the subject property, as that term is defined in Section 11(C) of Ballot Measure 37, as of October 9, 1973.

## **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 lists County zoning restrictions for land divisions and dwellings in EFU zones as the laws that restrict the use of the property. A staff report prepared by Clackamas County dated March 9, 2005, for a County Measure 37 claim filed by the claimant, indicates that the claimant is asking to develop one residence on the property.

The claim is based on Clackamas County's EFU Zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU 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. Goal 3 became effective on January 25, 1975, and required Agricultural Land defined by the Goal to be zoned EFU. Land that is zoned EFU also is subject to restrictions based on certain provisions of ORS 215. Current land use regulations, particularly ORS 215.263, 215.283, 215.284 and 215.780, along with Goal 3 and OAR 660, division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80-acres and establish standards for farm or non-farm dwellings.

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.)

The claimant acquired the property on October 9, 1973, when it was zoned by Clackamas County as Agricultural Single Family Residential (RA-1) with a one-acre minimum lot size. Under the RA-1 zone, single-family dwellings were permitted with a one-acre minimum parcel size for the creation of new lots or parcels. However, 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 develop a single-family dwelling on the subject property. If the claimant had sought to create that use in 1973, as a matter of law, the use would have been subject to the Interim Planning Goals at ORS 215.515. (See endnote <sup>1</sup>.)

No information has been provided showing that the approval of a single-family residence 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 1973.

### **Conclusions**

Dwelling standards established by Statewide Planning Goal 3, amendments to ORS 215, and OAR 660, division 33, adopted since the claimant acquired the property in 1973, do not allow the approval of a dwelling on the property as may have been possible in 1973. The County’s EFU zone is based on the standards required by Goal 3, ORS 215 and OAR 660, division 33. Although it is not clear that approval of a dwelling would be possible under the Interim Goals in effect in 1973, establishment of a dwelling is not allowed currently. Therefore, land use laws enforced since the claimant acquired the property more likely than not have restricted the use of the property relative to uses permitted when the claimant acquired the property on October 9, 1973.

### **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 \$156,500 as a result of land use laws enacted after it was acquired in 1973. The claim states that the reduction in value is based on information in a “Land Appraisal Report” prepared by a real estate appraiser. The Report notes that it was “prepared, in conformity with the Uniform Standards of Professional Appraisal Practice,” and was based on comparable sales of similar sized parcels sold for farm use and those sold for building sites. The report states:

“In accordance with your email, I have personally inspected the above property. I have rendered two opinions of value for the subject property. Both values are as of December 17, 2004.

- 1) The first estimate of value is based on the ‘hypothetical condition’ that the subject property is a legal ‘buildable’ home site.
- 2) The second estimate of value is the ‘as is’ ‘value’ of the site based on the current EFU Zone. (Exclusive Farm Use – 80 Acres.)

It is my opinion that the ‘as is’ value of the subject property is \$42,500.

The ‘subject to’ value of \$199,000 is based on the ‘hypothetical conditions’ that the subject property is a legal buildable site.”

The reduction in value claimed is the difference between these two values: \$199,000 - \$42,500 = \$156,500.

## **Conclusions**

As explained in Section V.(1) of this report, Richard Slaby is the owner of the subject property under Section (11) of Measure 37. The claimant acquired the property on October 9, 1973. Thus, under Ballot Measure 37, the claimant 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, Statewide Planning Goal 3, (Agricultural Lands), ORS 215 and OAR 660, division 33, restrict the use of the subject property so that the claimant cannot establish a dwelling on the 4.86 acre parcel as was allowed when it was acquired in 1973; although it is not clear that approval of a dwelling would be possible under the Interim Goals in effect in 1973. The claim asserts these restrictions reduce the fair market value of the subject property by \$156,500. Based on the submitted information, including the “Land Appraisal Report,” the department determines that it is more likely than not that there has been a 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 Clackamas 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), ORS 215 and OAR 660, division 33. All of these regulations, except provisions of ORS 215 already in effect at that time, were enacted after the claimant acquired the property in 1973. None of the laws, except provisions of ORS 215 adopted prior to October 9, 1973, are exempt under Section 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 Measure 37. It does appear that the general statutory, goal and rule restrictions on residential development and use of farm 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. Provisions of ORS 215, including the Interim Planning Goals, already in effect when the claimant acquired the property in 1973, are exempt under Section 3(E) of the Measure and will continue to apply to the property.

Other laws already in effect when the claimant 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 use 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 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 approval of a dwelling on the subject property. Specifically, Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, restrict use of the subject 4.86-acre property so that a dwelling cannot be established on it. The claim asserts these restrictions reduce the fair market value of the subject property by \$156,500. Although it is not clear that the requested development would be allowed under the laws already in effect when the claimant acquired the property, the department acknowledges that it is more likely than not that state land use laws 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 the claimant to use the subject property for a use permitted at the time Richard Slaby acquired the property on October 9, 1973. As discussed in Section V.(2), at that time it was zoned RA-1 by Clackamas County and was subject to the state Interim Planning Goals.

### **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 the Mr. Slaby's establishment of a single-family dwelling on the subject property: those provisions of ORS 215 as applied by Statewide Planning Goal 3 and OAR 660, division 33, enacted after October 9, 1973, that relate to the establishment of dwellings.
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 October 9, 1973. On that date, the property was subject to the Interim Planning Goals set forth in ORS 215.515 (1973 edition).
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 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 August 25, 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.)