

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES, THE DEPARTMENT  
OF LAND CONSERVATION AND DEVELOPMENT OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM ) FINAL ORDER  
FOR COMPENSATION UNDER ) CLAIM NO. M 118325  
BALLOT MEASURE 37 (CHAPTER 1, )  
OREGON LAWS 2005) OF )  
Duane and Carol Qualey, CLAIMANTS )

Claimants: Duane and Carol Qualey (the Claimants)

Property: Tax Lot 400, T.4S, R.5W, Section 13, W.M., Yamhill County

Claim: The demand for compensation and any supporting information received from the Claimant by the State of Oregon (the Claim).

Claimants submitted the Claim to the State of Oregon under Ballot Measure 37 (2004) (Oregon Laws 2005, Chapter 1) (hereafter, Measure 37). Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and 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 claimants' division and development of the 77.95 acre property: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33 enacted after each claimant acquired an ownership interest in the subject property. These land use regulations will not apply to Carol Qualey's use of the property only to the extent necessary to allow her a use permitted at the time she acquired the property on April 16, 1968. These land use regulations will not apply to Duane Qualey's use of the property only to the extent necessary to allow him a use permitted at the time he acquired the property on April 14, 1969.
2. The action by the State of Oregon provides the state's authorization to Carol Qualey to use the property subject to the standards in effect on April 16, 1968, and provides the state's authorization to Duane Qualey to use the property subject to the standards in effect on April 14, 1969. These standards include the provisions of ORS 215 then 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 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 215.402 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 claimants 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 claimants to use the property, it may be necessary for them 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.

This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under Measure 37, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under Measure 37, OAR 125, division 145 and ORS 293.

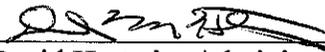
FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:

Lane Shetterly, Director

  
\_\_\_\_\_  
George Naughton, Deputy Director  
DLCD

Dated this 6<sup>th</sup> day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
\_\_\_\_\_  
David Hartwig, Administrator  
DAS, State Services Division

Dated this 6<sup>th</sup> day of October, 2005.

## **NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF**

You are entitled, or may be entitled, to the following judicial remedies:

1. Judicial review under ORS 293.316: Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County and the Circuit Court in the county in which you reside.
3. A cause of action under Oregon Laws 2005, chapter 1 (Measure 37 (2004)): A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

### **FOR INFORMATION ONLY**

The Oregon Department of Justice has advised the Department of Land Conservation and Development that “[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost.”

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

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

October 6, 2005

**STATE CLAIM NUMBER:** M118325

**NAMES OF CLAIMANTS:** Duane A. and Carol J. Qualey

**MAILING ADDRESS:** 13425 SW Baker Road  
McMinnville, Oregon 97128

**PROPERTY IDENTIFICATION:** Township 4S, Range 5W, Section 13  
Tax Lot 400  
Yamhill County

**OTHER INTEREST IN PROPERTY:** Duane A. Qualey and Carol J. Qualey  
Family Trust

Kaver Farms  
7325 SE Amity-Dayton Highway  
Amity, Oregon 97101

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

**180-DAY DEADLINE:** October 15, 2005

**I. SUMMARY OF CLAIM**

The claimants, Duane A. and Carol J. Qualey, seek compensation of \$1,800,000 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 claimants desire compensation or the right to divide the 77.95-acre property into nine parcels, including one 37.95-acre parcel and eight five-acre parcels, and to develop dwellings on each of the parcels. The property is located at 12425 SW Baker Creek Road, near 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 the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department

not apply to the Duane and Carol Qualey's division of the property for residential development: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow claimant Carol Qualey a use of the property permitted at the time she acquired it on April 16, 1968. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On May 10, 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 April 18, 2005, for processing under OAR 125, division 145. The claim identifies a list of state statutes and administrative rules as 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 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, Carol Qualey, acquired the subject property on April 16, 1968, as reflected by a Bargain and Sale Deed included with the claim. Claimant, Duane Qualey, acquired an interest in the property on April 14, 1969, as shown by Warranty Deed included with the Claim. On November 27, 1991, the claimants established a revocable family trust, with themselves as Trustees. On January 30, 2002, Duane Qualey and Carol Qualey transferred the subject property into the Qualey Family Trust by Bargain and Sale Deed, also included with the claim.

A copy of a Yamhill County 2004-2005 real property Tax Statement indicates that Duane and Carol Qualey are the current owners of the subject property through the Duane A. Qualey and Carol J. Qualey Family Trust.

### **Conclusions**

The claimants, Duane and Carol Qualey, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37.

### **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 asserts that land use regulations enacted after 1968 and 1969, prevent them from dividing their property or developing their property as desired. The claimants explain that they initially wish to divide the property into two tax lots, one 37.95-acre parcel, on which an existing dwelling and outbuildings are located, and a one 40-acre parcel. On the 37.95-acre parcel, they desire to develop a garage with a “second floor apartment.” They also wish to partition the 40-acre parcel into eight, five-acre buildable parcels.

The claimants have listed the following land use regulations as those that restrict the use of property compared to uses permitted when they acquired the property: ORS 92, 94, 105, 183, 195, and 227; ORS 197 in its entirety (except Measure 37); ORS 215 in its entirety; OAR 660 in its entirety, and OAR 661. ORS 94, ORS 105, ORS 183, and OAR 661 are not enforced by the

department or the Commission, and the claimants have not established how they constitute land use regulations that restrict the use of the subject property. ORS 92 establishes procedures for partitioning and subdividing property. ORS 195 and 197 establish procedures for coordination of local comprehensive plans and ORS 227 establishes procedures for city comprehensive plans. The claim states that these laws, or portions of them, “place restrictions on use of private property” or “restrict free use of private property as allowed per Measure 37-2004.” The claim does not, however, establish how any of these laws restrict the use of their property. None of these statutes or rules, on their face, restrict the use of the property. Absent an explanation by the claimants as to how these laws restrict the use of the subject property in a manner that reduces the fair market value of the property, these laws are not discussed further in this report.

The claim is based, generally, on Yamhill County’s current Exclusive Farm Use (EFU) zone, EF-80, and the applicable provisions of state law that require such zoning. The claimants’ property is zoned EFU as required by Statewide Planning Goal 3 in accord with OAR 660, division 33 and ORS 215 because the claimants’ property is “Agricultural Land” as defined by Goal 3.<sup>1</sup> Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284, 215.780 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 allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

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 administrative rule history for OAR 660-033-0100, -0130 and -0135).

The claimants acquired the subject property on April 14, 1969 or before, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. The subject property was not zoned by Yamhill County in 1969.<sup>2</sup>

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<sup>1</sup> The claimant’s property is “Agricultural Land” and is composed of “high value farmland” soils, including Class I soils (Soil Survey of Clackamas County Area Oregon, Map 26.)

<sup>2</sup> Yamhill County Staff Report, Docket M37-55-05, page 2.

## **Conclusions**

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33 were all enacted after the claimants acquired ownership of the subject property in 1968 and 1969, and do not allow the division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the Qualeys in 1969. The property was not zoned by the County as of 1969.

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 claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and that may continue to apply to the claimants' 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 claimants seek 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**

The claim includes an estimate of \$1,800,000 as the reduction of the property's fair market value, due to current regulations. This amount is based on the claimants' estimate of \$45,000 per acre, for 40 acres, and the market value of up to eight buildable, five-acre lots with dwellings. This estimate was derived from the current selling price for comparable properties in the same area based on research assistance from a local realtor. The claim also includes a 2004-2005 real property Tax Statement from Yamhill County that shows the current real market value for land and improvements to be \$468,802.

## **Conclusions**

As explained in Section V.(1) of this report, the current owners are Duane and Carol Qualey. Carol Qualey acquired the property on April 16, 1968. Under Ballot Measure 37, Duane and Carol Qualey are due compensation for land use regulations 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 claimants acquired the property restrict division of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$1,800,000.

Without an appraisal based on 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 state land use regulations that restrict the use of the property relative to what would have been allowed in 1968, when the property was acquired by Carol Qualey, and 1969 when the property was acquired by Duane Qualey. These provisions include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Yamhill County has implemented through its EFU zone. None of these laws appear to be exempt under Section 3(E) of Measure 37, which exempt laws in effect when the claimant or claimant's family acquired the property.

#### **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 claimants' 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 Duane and Carol Qualey acquired the property in 1968 and 1969, are also exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' 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 claimants seek 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 uses that the claimants have 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 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 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.

### **Findings of Fact**

Based on the findings and conclusions set forth in this report laws enforced by the Commission or the department restrict the division and development of the subject property into nine parcels with dwellings. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$1,800,000. However, because the claim does not provide an appraisal or other documentation of how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely 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 the Qualeys' to use the subject property for a use permitted at the time they acquired their respective interests in the property. As explained in Section V.(1), Carol Qualey acquired the subject property on April 16, 1968, and the claim establishes that Duane Qualey acquired the property on April 14, 1968.

### **Conclusion**

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 claimants' division and development of the 77.95 acre property: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33 enacted after each claimant acquired an ownership interest in the subject property. These land use regulations will not apply to Carol Qualey's use of the property only to the extent necessary to allow her a use permitted at the time she acquired the property on April 16, 1968. These land use regulations will not apply to Duane Qualey's use of the property only to the extent necessary to allow him a use permitted at the time he acquired the property on April 14, 1969.
2. The action by the State of Oregon provides the state's authorization to Carol Qualey to use the property subject to the standards in effect on April 16, 1968, and provides the state's authorization to Duane Qualey to use the property subject to the standards in effect on

April 14, 1969. These standards include the provisions of ORS 215, and OAR 660, division 33 then 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 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 215.402 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 claimants 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 claimants to use the property, it may be necessary for them 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 September 21, 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.