

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation  
June 29, 2005**

**STATE CLAIM NUMBER:** M119150

**NAME OF CLAIMANT:** John H. Poppe, Sr. Trust

**MAILING ADDRESS:** 713 NE Sandstone Ct.  
Prineville, OR 97754

**IDENTIFICATION OF PROPERTY:** Township 11S, Range 12E, Section 36  
Tax Lot 500  
Jefferson County

**OTHER INTEREST IN PROPERTY:** John H. Poppe, Sr.

**DATE RECEIVED BY DAS:** January 4, 2005

**180-DAY DEADLINE:** July 03, 2005

**I. CLAIM**

John H. Poppe, Sr., as Trustee of the John H. Poppe, Sr. Trust, the claimant, 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 build a dwelling. (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 laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the Trust to allow it to reconstruct or establish a dwelling on the property: the applicable provisions of ORS 215.283(1)(f), 215.284(4), Statewide Planning Goal 3, and OAR 660-033-0130(4) and 660-033-0135 to the extent necessary to allow the claimant a use permitted at the time it acquired the property. The Trust's use of the property will be subject to those laws in effect on October 23, 1992. (See Section VI. of this report for the complete recommendation).

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

#### **Comments Received**

On January 4, 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, there was one written comment received in response to the 10-day notice. The comment was general in nature and did not relate to the evaluation criteria in Measure 37. Because no funds are available to pay compensation, comments regarding the possible impact of the proposed or intended development of the claimant's property are not relevant to the evaluation and determination of the claimant's Ballot Measure 37 claim, and cannot be considered by the department.

### **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**

The claim was filed with DAS on January 4, 2005, for processing under OAR 125, Division 145. The claim identifies "ordinances enacted in 1975" (Statewide Planning Goals, including Goal 3 (Agricultural Lands)), as restricting the right to build a dwelling on the property. 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 payment of compensation or relief from specific laws for “owners” as that term is defined in the Measure. Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

### **Findings of Fact**

This Measure 37 claim was submitted in letter format by John H. Poppe Sr., as Trustee of the John H. Poppe, Sr. Trust, a revocable Living Trust. Mr. Poppe was a signatory to this letter as was his wife, Dorita Jordan, who is listed as "spouse." Ms. Jordan's signature seems to attest that she filled out the "form". Based on the record currently before the department, it does not appear that Ms. Jordan has an interest in the property.

The claimant, The John H. Poppe, Sr. Trust acquired the subject property from John Poppe, Sr. by a Bargain and Sale Deed on October 23, 1992. That transaction was recorded on October 23, 1992, as indicated on a Jefferson County Assessor's form. John H. Poppe is the trustor, trustee and beneficiary of the Trust. A copy of the Real Property Tax Statement from Jefferson County, dated February 14, 2004, shows that the claimant is the listed owner.

John H. Poppe and Avis L. Poppe (deceased) acquired the property on November 15, 1966. A title insurance policy issued by Oregon Title on Nov. 30, 1966 attests to their ownership on that date.

### **Conclusions**

The John H. Poppe Sr. Trust, John H. Poppe, Sr., Trustee, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. John H. Poppe, Sr., is a family member, as defined by Ballot Measure 37, and acquired the property in 1966.

### **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 states that: Mr. Poppe wants to rebuild a house that was on the property but cannot, due to “Ordinances enacted in 1975.”

OAR 660, Division 33, establishes standards for the approval of farm and non-farm dwellings. Specifically, OAR 660-033-0135 requires that, for the approval of a dwelling “customarily provided in conjunction with farm use,” the owner must demonstrate, in part, that the owner’s farm operation produced \$80,000 gross farm annual income from the sale of farm products in the last two or three of the last five years. OAR 660-033-0135 became effective on March 1, 1994 and interprets the statutory standard for a primary dwelling in an Exclusive Farm Use (EFU) zone under ORS 215.283(1)(f) (1993).

For a non-farm dwelling, ORS 215.284(4) as applied by OAR 660-033-0130(4), requires, in part, that such a dwelling may only be established on a parcel predominately composed of Class IV to VIII soils. OAR 660-033-0130(4) became effective on August 7, 1993 and was amended to comply with ORS 215.284(4) on March 1, 1994. (See citations of administrative rule history for OAR 660-033-0130 and 0135.)

John H. Poppe, Sr. acquired the property on November 30, 1966. Jefferson County zoning at that time was A-1, Agricultural District, allowing 1-acre parcels with dwellings permitted as an outright use. The A-1 zone was a qualified farm zone for farm assessment purposes under ORS 215 and 308 (1965 edition). The applicable statutory standard in effect on that date is found in ORS 215.203 (1965 edition), which provided for “dwellings and other buildings customarily provided in conjunction with farm use.”<sup>1</sup>

The John H. Poppe, Sr. Trust acquired the property on October 23, 1992. Jefferson County zoning at that time was EFU A-1 for the subject property. The EFU A-1 had an 80-acre minimum lot size, and dwellings were only allowed in conjunction with farm use. On October 23, 1992, the property was subject to ORS 215.283(1)(f), ORS 215.283(3) and OAR 660-05-030.

## **Conclusions**

The current statutory and rule provisions for farm and non-farm dwellings in ORS 215 and OAR 660, Division 33, clearly do not allow a single family dwelling to be approved on the subject property, whereas it is possible that a dwelling could have been approved under the more general provisions of ORS 215.203 (1965 Edition), in effect on November 30, 1966, when Mr. Poppe acquired the property.

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<sup>1</sup>Before a dwelling “customarily provided in conjunction with farm use” may be established in a qualified EFU zone under ORS Chapter 215, the farm use to which the dwelling relates must “be existing” (*Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) *affirmed without opinion* 70 Or App 179 (September 14, 1984) and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33, November 23, 1988). Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use (*Matteo v. Polk County*, 14 Or LUBA 67, 73 (1985)).

### **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**

John H. Poppe, Sr. estimates the current fair market value for the subject property as \$2,500 per acre with irrigation equipment, resulting in a current fair market value of \$125,000 (though 39 acres at \$2,500 per acre is equal to \$97,500). A 2004 tax statement lists a real market value of \$55,546 for the property without improvements.

Mr. Poppe estimates the value of adding a dwelling to the property at \$100,000. No explanation was given for this estimate of additional value.

#### **Conclusions**

As explained in section V.(1) of this report, the current owner, The John H. Poppe, Sr. Trust acquired the property in 1992. Under Ballot Measure 37, the trust is due compensation based on family ownership dating to 1966, for land use laws that restrict the use of the subject property in a manner that reduces the fair market value.

Without an appraisal or other explanation based on the value of a dwelling on the subject property, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

### **4. Exemptions under Section 3 of Measure 37**

Ballot Measure 37 does not apply to certain laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

#### **Findings of Fact**

Laws that were in effect at the time the owner or a family member acquired the property are exempt under Section 3(E) of the Measure. Certain provisions of ORS 215 (1965 version) in effect in 1966 when Mr. Poppe acquired the property are exempt and will continue to apply to the use of the property.

#### **Conclusions**

Except for the provisions of ORS 215 and other laws that pre-date the original acquisition of the subject property in 1966, no cited regulations in the claim are exempt under Section 3(E) of

Ballot Measure 37. There may be other specific laws that continue to apply under one or more of the exceptions in Measure 37 or because they are laws that are not covered by the Measure.

## **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 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 allowed at the time the present owner acquired the property. The Commission has by rule 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 ability of the claimant to build a house on the subject property. The laws enforced by the Commission or department reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$100,000. This amount is not substantiated in the claim. Nevertheless, based on the current record for this claim, the department believes that the laws on which the claim is based 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 compensation, Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations, to allow the John H. Poppe Sr. Trust, to use the subject property for a use permitted at the time it acquired the property on October 23, 1992.

### **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 John H. Poppe Sr. Trust to allow the trust to reconstruct or establish a dwelling on the property: the applicable provisions of ORS 215.283(1)(f), 215.284(4), Statewide Planning Goal 3, and OAR 660-033-0130(4) and 660-033-0135 to the extent necessary to allow the claimant a use permitted at the time it acquired the property<sup>1</sup>.
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 23, 1992. On that date, the property was subject to the provisions of ORS 215 that were in effect, Statewide Goal 3, and the standards for

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<sup>1</sup>Had John H. Poppe Sr. been the applicant, the applicable date for not applying state laws would have been November 16, 1966.

farm and non-farm dwellings in effect on that date, specifically, the standards in OAR 660–005-0030.

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 215.412 or ORS 227.1 60, 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 remains 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 with out limitation, those laws exempted under section (3) of this 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 June 10, 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.