

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

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

September 13, 2005

**STATE CLAIM NUMBER:** M120195

**NAMES OF CLAIMANTS:** Russell L. and Marilyn A. Morrison

**MAILING ADDRESS:** 16436 Abiqua Road NE  
Silverton, Oregon 97381

**PROPERTY IDENTIFICATION:** Township 6S, Range 1E, Section 19D,  
Tax Lot 2300  
Marion County

**OTHER CONTACT INFORMATION:** Owen Von Flue, Agent  
800 Liberty Street NE  
Salem, Oregon 97301

**DATE RECEIVED BY DAS:** March 17, 2005

**180-DAY DEADLINE:** September 13, 2005

**I. SUMMARY OF CLAIM**

The claimants, Russell L. and Marilyn A. Morrison, seek compensation in the amount of \$60,000 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 their five-acre property to create a new 1.5-acre parcel and to construct a single-family non-farm dwelling on the newly created parcel. The property is located at 16436 Abiqua Road NE, Silverton, in Marion 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 neither the Land Conservation and Development Commission (the Commission) or the department have enforced laws enacted after May 20, 1977, that restrict the claimants' use of private real 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 2, 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 March 17, 2005, for processing under OAR 125, division 145. The claim identifies “The Exclusive Farm Use (EFU) zone’s restrictions on non-farm dwellings and sub-divisions; Oregon Revised Statutes authorizing restrictions on the uses on Agricultural Lands and Oregon Administrative Rules restricting uses on Agricultural Land” as laws that restrict the use of the property and are 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 claimants, Russell L. and Marilyn A. Morrison, acquired the subject property on May 20, 1977, as documented by a Bargain and Sale Deed included with the claim. According to the claim, the claimants’ ownership of the property has been continuous since acquisition. (See Affidavit of Owen Von Flue included with the claim.)

### **Conclusions**

The claimants, Russell L. and Marilyn A. Morrison, are owners of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of May 20, 1977.

### **2. The Laws that are the Basis for this Claim**

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 claimants’ agent states: “restrictions and ordinances were all imposed on the Property after the Claimants purchased it.” Claimants specifically refer to EFU zoning in Marion County Ordinance chapter 136, ORS Chapter 197 and OAR 660-033-0010 et. seq. as restricting the use of the property

The claim is based, in part, on Marion County’s current EFU Zone 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.

---

<sup>1</sup> The claimants’ property is “agricultural land” because it contains predominately Natural Resources Conservation Service (NRCS) Class I-IV soils. (See Soil Survey of Marion County, sheet 21, September 1974.) Further, the property is “high-value farmland” under ORS 215.710 and 60% is composed of NRCS “prime” soils. (See Marion County Staff Report dated April 20, 2005 in the department’s claim files.)

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 parcel(s) 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. ORS 215.263(4) does not allow new parcels for non-farm dwellings in the Willamette Valley.

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.) For the Willamette Valley, non-farm dwellings are not allowed unless a parcel is predominately composed of Class IV-VIII soils (ORS 215.284(3)).

When the Morrisons purchased the property on May 20, 1977, it was zoned Marion County Rural Agriculture Recreational (RAR).<sup>2</sup> However, on that date, Marion County's Comprehensive Plan and land use regulations had not been acknowledged for compliance with the Statewide Planning Goals. The Commission acknowledged the Marion County Comprehensive Plan and land use regulations in 1982, by acknowledgement order dated June 10, 1982. Since the Commission had not acknowledged the County's plan and land use regulations, including the RAR zone, when the Morrisons acquired the property in 1977, Statewide Planning Goal 3 applied directly to property.<sup>3</sup> In 1977, the state standards for a land division involving property where the local zoning was not acknowledged were that the resulting parcels must be of a size "appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area" (Statewide Planning Goal 3). Further, ORS 215.263 (1975 edition) required that all divisions of land subject to the provisions for EFU zoning comply with the legislative intent set

---

<sup>2</sup> In a telephone conversation, County staff stated this zone allowed a minimum lot of 6,000 square feet.

<sup>3</sup> Statewide Planning Goal 3 became effective on January 25, 1975, and was applicable to legislative land use decisions and some quasi-judicial land use decisions where site-specific goal provisions applied prior to the Commission's acknowledgment of the County's Goal 3 program on February 9, 1979 (*Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, *rev den* 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985)). After the County's plan and land use regulations were acknowledged by Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions (*Byrd v. Stringer*, 295 Or 311 (1983)). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same in substance, the applicable rules must be interpreted and applied by the County in making its decision (*Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992)).

forth in ORS 215.243 (Agricultural Land Use Policy). Thus, the opportunity to divide the property when the Morrisons acquired it in 1977, was limited to land divisions consistent with Goal 3, which required the resulting parcels to be: (1) “appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area;” and (2) shown to comply with the legislative intent set forth in ORS 215.243.

As for dwellings allowed under EFU zoning as required by Goal 3 in 1977, farm dwellings were allowed if determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1975 edition). Before a farm dwelling could be established on “agricultural land,” the farm use to which the dwelling related must “be existing.”<sup>4</sup> Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use. ORS 215.213(3) (1975 edition) authorized a non-farm dwelling only where the dwelling was compatible with farm uses, consistent with the intent of ORS 215.243, did not interfere seriously with accepted farming practices on adjacent lands, did not materially alter the stability of the land use pattern for the area, and was situated on land generally unsuitable for production of farm crops and livestock (ORS 215.213(3) (1975 edition)).

No information has been provided showing that the claimants’ request to divide the property for an additional residence complies with either the Goal 3 standard for lot size for farm parcels or the standards for new parcels under ORS 215.263 (1975 Edition). The claimants have not provided any information to document that the proposed division of the subject five-acre property could be divided to create a new 1.5-acre parcel in a manner that meets the requirement of Goal 3 and is (1) “appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area; and (2) shown to comply with the legislative intent set forth in ORS 215.243.” Nor has any information been provided to establish that an additional dwelling would comply with the approval standards for dwellings under ORS 215.213 in effect at the time they acquired the property in 1977.

Based further on the information provided in this claim and the Marion County staff report on a Measure 37 claim filed by the claimants with the county dated April 20, 2005, the department does not believe that the subject five-acre parcel, predominately composed of NRCS Class II and III “prime” soils could be divided pursuant to the standards applicable under ORS 215 and Goal 3 in 1977. A 1.5-acre parcel with additional dwelling would not be “appropriate for the continuation of the existing commercial agricultural enterprise within the area” or consistent with the Agricultural Land Use Policy in ORS 215.243. Further, because of the quality of the soil, the parcel is not “generally unsuitable fore the production of farm crops and livestock” and therefore would not have been eligible for a non-farm dwelling pursuant to the applicable standards in ORS 215.215(3) that applied in 1977. Based on the laws in place in 1977, the claimants would not have been allowed to divide the subject property for residential development when they acquired the property.

---

<sup>4</sup> *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).

## **Conclusions**

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) (OAR 660-015-0000(3)) and provisions applicable to land zoned EFU in ORS 215, were all enacted before the Morrison's acquired the subject property in May, 1977, and do not allow the division of the property, nor do they allow non-farm dwellings on agricultural land. Based on the current record, the claimants have not established that current laws restrict the claimants' 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 claimants acquired the property in 1977.

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. 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.

### **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 informal estimate of \$60,000 as the reduction in the property's fair market value as a result of regulations enacted after the claimants acquired the property. This estimate is "achieved by multiplying the fair market value of the newly created buildable lot (\$90,000) by an appropriate development factor; in this case 70%." These values are substantiated by an appraisal of the value of the property for residential development.

## **Conclusions**

As explained in Section V. (1) of this report, the current owners are Russell L. and Marilyn A. Morrison, who acquired the property on May 20, 1977. Based on information in the records, the claimants are not due compensation because no land use regulations adopted since the claimants acquired the property in 1977 have the effect of reducing the fair market value of the property. (See Section V.(2) of this report.)

### **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**

The claim is based on Marion County's EFU zone and the related provisions of state law that are claimed to restrict use of the property and reduced its fair market value, including Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33. With the exception of provisions of Goal 3 and ORS 215 in effect in 1977 when the claimants acquired the property, those specified laws do not appear to be exempt under Section 3(E) of Ballot Measure 37.

## **Conclusions**

It appears that the general statutory and goal restrictions on residential development and use of Agricultural Land apply to the claimants' anticipated use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure, or because they are laws that are not covered by the Measure. Provisions of Goal 3 and ORS 215 were in effect when the claimants acquired the subject property. Laws in effect when the claimants acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property.

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 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 a 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.

Based on the record, the claimants are not entitled to relief under Ballot Measure 37. Department staff recommends that this claim be denied because neither the Commission nor the Department have enforced laws that were enacted after the claimants acquired the property in 1977 that restrict the claimants' use of the private real property that is the subject of this claim.

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

The department issued its draft staff report on this claim on August 19, 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.