

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

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

September 20, 2005

**STATE CLAIM NUMBER:** M120374

**NAME OF CLAIMANTS:** Kelton and Shirley Jensen

**MAILING ADDRESS:** 6055 Crowley Road  
Rickreall, Oregon 97371

**PROPERTY IDENTIFICATION:** Township 7S, Range 4W, Section 10  
Tax Lot 100  
Polk County

**DATE RECEIVED BY DAS:** March 30, 2005

**180-DAY DEADLINE:** September 26, 2005

**I. SUMMARY OF CLAIM**

The claimants, Kelton and Shirley Jensen, seek compensation in the amount of \$260,000 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 partition the subject 50.9-acres into one approximately 30-acre parcel and one 20-acre parcel, and to establish a single-family dwelling on the new 20-acre parcel. The property is located at 6055 Crowley Road, in Polk 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 claimants' division of the subject property into one 20-acre parcel and one approximately 30-acre parcel and to the development of a single-family dwelling on the newly created 20-acre parcel: Statewide Planning Goal 3 (Agricultural Lands) and the applicable provisions of ORS 215 and OAR 660, division 33 enacted after September 18, 1980. These laws will not apply to the claimants only to the extent necessary to allow them a use of the property permitted at the time they acquired it on September 18, 1980. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On April 26, 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, three written comments were received in response to the 10-day notice.

The comments are relevant to whether the claimants are owners; whether a state law restricts the claimants' use of the property; and whether the restrictions of the claimants' use of the property reduces the fair market value of the property. (See the comment letters in the department's claim file.) The comments have been considered by the department in preparing this report.

### **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 30, 2005, for processing under OAR 125, division 145. The claim identifies the state laws (specifically the Statewide Planning Goals, ORS 197, ORS 215 and OAR 660) 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 claimants, Kelton and Shirley Jensen, acquired the subject property on September 18, 1980, by Warranty Deed. The Jensen family acquired the property on March 14, 1978, by Warranty Deed. Recent Polk County Tax Records document that the claimants, Kelton and Shirley Jensen, are the current owners of the subject property. Included in the claim is a letter from First American Title Insurance Company of Oregon, certifying that the Jensen family has continuously owned the subject property since 1978, and that the claimants are the current owners of the subject property. (See the department’s claim file.)

### **Conclusions**

The claimants, Kelton and Shirley Jensen, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. The claimants acquired the property on September 18, 1980. The Jensen family has had an interest in the property since March 14, 1978.

### **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 lists the Statewide Planning Goals, ORS 197, ORS 215, and OAR 660 and states that these laws “Restrict development and use of EFU-zoned property.”<sup>1</sup> The claim also states that “[w]hen claimants’ family purchased the subject property it was zoned EFU-20. Since then, the state and county re-zoned it EFU-80. This prohibits claimants from partitioning the subject property from residential development.”

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<sup>1</sup>The claimants summarily cite all Statewide Planning Goals, ORS 197 and other administrative rules found under OAR 660 as restricting the use of the property. Other than Goal 3 and OAR 660, division 33, the claimants do not establish how any of these regulations restrict the use of their property. Goals 1, 2, and 4 through 19 and divisions of OAR 660 other than division 33, do not, on their face, restrict the use of the claimants’ property. ORS 197 establishes land use procedures. Claimants have not established how any provisions of that chapter restrict the claimants’ use of the subject property. On its face, ORS 197 does not, in itself, restrict the use of the subject property. In the absence of any explanation by the claimants as to how any of these regulations restrict the use of the subject property, this report does not address those regulations.

The claim is based generally on Polk County's current Exclusive Farm Use (EFU) Zoning District (Chapter 136) 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.

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.

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 Jensen family acquired the subject property on March 14, 1978, when it was zoned EFU, a qualified farm zone under ORS 215 by Polk County as required by Goal 3 and statutes. However, Polk County's EFU zone that applied to the property in 1978 was not acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251.

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 on a site-specific basis prior to the Commission's acknowledgment of Polk County's EFU and Farm Forest (FF) zones on April 22, 1988. (See endnote <sup>1</sup>). Until the County's land use regulations were acknowledged by the Commission in 1988, both the County's EFU zoning code and Goal 3 applied to the use of the property to determine what uses were permitted.<sup>2</sup> As for farm dwellings allowed under

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<sup>2</sup> See *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), and *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 the 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, the applicable statutes continue to apply, and insofar as the local implementing provisions are materially the same as the rules, the local provisions must be interpreted consistent with the substance of the rules. *Forster v. Polk County*, 115 Or App 475 (1992), and *Kenagy v. Benton County*, 115 Or App 131 (1992).

EFU zoning as required by Goal 3 on the date of family acquisition in 1978, farm dwellings were allowed if determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1977 edition). Before a farm dwelling could be established on agricultural land, the farm use to which the dwelling relates must “be existing”. Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use.<sup>3</sup>

In addition, the Goal 3 “commercial” standard (i.e., “appropriate for the continuation of the existing commercial agricultural enterprise in the area”) applied directly to the subject property for the approval of new dwellings on pre-existing. These laws (County EFU zone and Goal 3) determine whether a dwelling on the property was permitted at the time the Jenkins family acquired it.<sup>4</sup>

### **Conclusions**

The current zoning requirements and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in OAR 660, division 33, were all enacted after the Jensen family acquired ownership of the subject property in March 14, 1978, and do not allow division and a dwelling on the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the Jensens. In 1978, the property was subject to the requirements of Polk County’s EFU zone, Goal 3 and ORS 215 then in effect.

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. 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.

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<sup>3</sup> *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) *affirmed without opinion* 70 Or App 179 (1984) and *Newcomer v. Clackamas County*, 92 Or App 174 *modified* 94 Or App 33 (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)).

<sup>4</sup> Guidance on the application and interpretation of Statewide Planning Goal 3 (effective January 25, 1975,) and OAR 660, division 5 (effective July 21, 1982,) for the approval of a farm dwelling on an existing lot or parcel for Polk County can be found in Ordinance No. 87-26, which amended the Comprehensive Land Use Plan, Ordinance No.217 to adopt revised Goal 3 language and a “Commercial Agricultural Justification Statement” as an amendment to the Agricultural Lands Background Report of the Comprehensive Plan (December 23, 1987).

### **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 \$260,000 as the reduction in the property’s fair market value as a result of restrictions imposed after the claimants’ family acquired the property. This estimate is based on the claimants’ estimate of the market value of the property if a 20-acre buildable parcel was created for a single-family dwelling.

The claim also includes the current 2004-05 tax statement showing the current real market value for the property at \$244,660 without improvements. The claim states that the real market value is confirmed by a real estate agent, who estimates the value of a 20-acre buildable parcel to be between \$250,000 and 300,000.

#### **Conclusions**

As explained in Section V.(1) of this report, the Jensen family acquired the subject property on March 14, 1978. The current owners are Kelton and Shirley Jensen who acquired the property on September 18, 1980. Under Ballot Measure 37, the Jensens 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 prohibit the approval of a dwelling on the subject property. The claimants estimate the reduction in value due to the restrictions to be \$260,000.

Without an appraisal or 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 and local land use regulation that restrict the use of the property relative to what would have been allowed in 1978, when the claimants’ family acquired the

property. The state provisions that are implemented through the County's EFU zone include Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33. To the extent these laws were enacted after the claimants' family acquired the property on March 14, 1978, these laws are not exempt under Section 3(E) of Ballot Measure 37. Provisions of ORS 215 and Goal 3 adopted before March 14, 1978, are exempt under Section 3(E) of the Measure, which exempts laws in effect when the claimants' family acquired the property.

### **Conclusions**

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 these laws are not exempt under Section 3(E) of Measure 37 to the extent they were enacted after the claimants' family acquired the property. Provisions of ORS 215 and Statewide Planning Goal 3 in effect when the claimants' family acquired the property in 1978 are exempt under Section 3 (E) of the Measure and will continue to apply to the property.

Other laws in effect when the claimants' family acquired the property 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 of the subject property into one 20-acre parcel and one approximately 30-acre parcel, and approval of a single-family dwelling on the new 20-acre parcel. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$260,000. However, because the claim does not provide an appraisal or other specific explanation for 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 Kelton and Shirley Jensen to use the subject property for a use permitted at the time they acquired the property on September 18, 1980.

When the claimants acquired the subject property on September 18, 1980, it was zoned EFU, as it was when the claimants' family acquired the property in 1978. As explained in Section V.(2) of this report, at that time, the EFU zone was a qualified farm zone under ORS 215 by Polk County as required by Goal 3 and statutes. Because Polk County's EFU zone, that applied to the property in 1980, was not acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251, the Statewide Planning Goals were directly applicable to the use of the property. As discussed above, the County's EFU zoning, Goal 3, and ORS 215 (1979 Edition) applied to the use of the property to determine what uses were permitted.

Based on the information in the record, it is not clear that the proposed division of the property and establishment of a dwelling would have been permitted by Polk County, in 1980, under the standards in effect at that time.

## **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 Kelton and Shirley Jensen's division and development of the subject 50.9-acre property: applicable provisions of Statewide Planning Goal 3, ORS 215.263, 215.284 and 215.780, and OAR 660, division 33, enacted after September 18, 1980. These land use regulations will not apply to the claimants' use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on September 18, 1980.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property subject to the standards in effect on September 18, 1980. In 1980, the property was subject to the requirements of Polk County's EFU zone, Goal 3, and 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.

## VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 1, 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 Land Conservation and Development Commission (the Commission) acknowledged the County's EFU zone to be in compliance with Statewide Planning Goal 3 on March 25, 1981. However, the Commission's 1981 acknowledgment order was appealed to the Marion County Circuit Court. On August 3, 1984, Marion County Circuit Court affirmed in part and remanded in part the Commission's 1981 acknowledgment of the County's EFU zone (*1000 Friends of Oregon, Friends of Polk County, and Marilyn Stringer v. LCD and Polk County*, Marion County Circuit Court No. 126, 792 (1984)).

On February 12, 1986, the Oregon Court of Appeals reversed the Circuit Court's decisions and remanded the Commission's 1981 acknowledgment of the County's EFU zone, except with respect to the "Homestead Exemption" provisions that were upheld by both courts.

The Oregon Court of Appeals specifically reversed the Circuit Court and the Commission regarding the standards required for the approval of a farm dwelling and determined that the EFU/FF zones provisions for dwellings in conjunction with farm use on existing lots violated the Goal 3 "commercial" standard under Goal 3 and OAR 660, division 5 (Department of Land Conservation and Development April 10, 1986, Report to the Land Conservation and Development Commission on Polk County's Remand from the Court of Appeals). Oregon Court of Appeals, CA A33638 (February 12, 1986).

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On April 24, 1986, in response to the Oregon Court of Appeals remand of the County's EFU zone, the Commission issued a continuance order directing Polk County to revise the EFU/FF zones to comply with Statewide Planning Goal 3 and specifically to "amend the EFU and Farm/Forest zones to require that dwellings on existing parcels in conjunction with farm use cannot be approved except where it is found that the dwelling is appropriate for the continuation of the existing commercial agricultural enterprise within the area." (LCDC Order 86-CONT-037, p. 3, signed May 9, 1986).

On December 23, 1987, Polk County revised its agricultural lands element of the comprehensive plan and EFU zone to comply with the Commission's 1986 continuance order (County Ordinance 87-26 and 87-27). On February 17, 1988, the Commission acknowledged Polk County's revised comprehensive plan and EFU zone as complying with Statewide Planning Goal 3 and OAR 660, division 5 (Commission Order 88-ACK-347, order signed April 22, 1988).