

**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:** M120516

**NAMES OF CLAIMANTS:** Stanley and Kay Varuska

**MAILING ADDRESS:** 6305 N.W. Canyonview Rd.  
Gaston, OR 97119

**PROPERTY IDENTIFICATION:** Township 2S, Range 4W, Section 16  
Tax Lot 100  
Yamhill County

**DATE RECEIVED BY DAS:** April 8, 2005

**180-DAY DEADLINE:** October 5, 2005

**I. SUMMARY OF CLAIM**

The claimants, Stanley and Kay Varuska, seek compensation in the amount of \$175,000 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 build a single-family dwelling on their approximately 20-acre property, located 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 Mr. and Ms. Varuskas' development of a single-family dwelling: applicable provisions of ORS 215 and OAR 660, division 33 in effect on June 9, 1976. These laws will not apply to the claimants only to the extent necessary to allow Mr. and Ms. Varuska a use of the property permitted at the time they acquired it in 1976. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On April 7, 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, one written comment was received in response to the 10-day notice.

The comment does not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law. (See comment letter in the department's claim file.)

### **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 8, 2005, for processing under OAR 125, division 145. The claim identifies OAR 660, division 33 as the law that restricts the use of the property and is 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, Stanley and Kay Varuska, acquired the subject property on June 9, 1976, as reflected by a Bargain and Sale Deed included with the claim. According to the Yamhill County Assessor’s Office, Stanley and Kay Varuska are the current owners of the subject property.

### **Conclusions**

The claimants, Stanley and Kay Varuska, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of June 9, 1976.

### **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 “EFU-40 zoning...does not allow a single-family dwelling.” The claim also mentions the \$80,000 income test established by OAR 660, division 33.

The claim is based on Yamhill County’s current Exclusive Farm Use (EFU) Zone and the applicable provisions of state law that require such zoning. The claimants’ property is zoned EFU as required by 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.

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<sup>1</sup> The claimants’ property is “agricultural land” based on its soil type. The soil capability class is VI (not prime farmland) according to the Natural Resources Conservation Service (NRCS) Soils Survey web site.

Current land use regulations, particularly ORS 215.284 and OAR 660, division 33 as applied by Goal 3 establish standards for allowing the existing parcel to be developed with a farm or non-farm dwelling.

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 claimants acquired the subject property on June 9, 1976. At that time the property was zoned EFU-40. This date was after Statewide Planning Goal 3 was adopted but before Yamhill County's comprehensive plan was acknowledged by the Commission under ORS 197.250 and 197.251. Because the Commission had not acknowledged Yamhill County's plan and land use regulations in 1976, Statewide Planning Goal 3 (Agricultural Lands) and other Goals applied directly to the property when it was acquired by Mr. and Ms. Varuska.<sup>2</sup>

Under the state standards in effect on June 9, 1976, 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 relates must "be existing."<sup>3</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, and 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

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<sup>2</sup> Statewide Planning Goal 3 was applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the County's plan and implementing regulations. (*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. denied*, 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).

<sup>3</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).

generally unsuitable for production of farm crops and livestock ORS 215.213(3) (1975 edition).

No information has been provided to establish that the claimants' request for a single-family dwelling complies with state standards for farm or non-farm dwellings under Goal 3 and ORS 215 (1975 Edition) in effect when the claimants acquired the property.

### **Conclusions**

The zoning requirements established by Statewide Planning Goal 3 (Agricultural Lands), were enacted before Mr. and Ms. Varuska acquired ownership of the subject property. Dwelling standards established by applicable provisions to land zoned EFU in ORS 215 and OAR 660, division 33 were enacted after Mr. and Ms. Varuska acquired ownership of the subject property in June 1976, and do not allow the building of a single-family dwelling, thereby restricting the use of the property relative to the uses that may have been allowed when the property was acquired.

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.

### **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 \$175,000 as the property's fair market value reduction, as a result of restricting regulations. This estimate is based on the sale prices of two surrounding properties with dwellings on them. No information on the present value of the subject property was submitted.

### **Conclusions**

As explained in Section V.(1) of this report, the current owners are Stanley and Kay Varuska, who acquired the property on June 9, 1976. Under Ballot Measure 37, Mr. and Ms. Varuska are due compensation for land use regulations that may 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 building a single-family dwelling on the subject property. The claimants estimate the reduction in value due to the restrictions to be \$175,000.

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 land use regulations that restrict the use of the property relative to what would have been allowed in 1976, when the property was acquired by Mr. and Ms. Varuska. 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. These laws are not exempt under Section 3(E) of Ballot Measure 37 to the extent they were enacted after June 9, 1976. Provisions of Statewide Planning Goal 3 and ORS 215 in effect on June 9, 1976, are exempt under Section 3(E) of Measure 37, which exempts laws in effect on the date the claimants 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 these laws are not exempt under Section 3(E) of Measure 37 to the extent they were enacted after June 9, 1976. Provisions of Statewide Planning Goal 3 and ORS 215 in effect when the claimants acquired the property in 1976 are exempt under Section 3(E) of the measure and will continue to apply to the property.

Other laws in effect when the claimants 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 claimant's development of a single-family dwelling on the subject property. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$175,000. However, because the claim does not provide an appraisal or other documentation to establish 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 Mr. and Ms. Varuska to use the subject property for a use permitted at the time they acquired the property on June 9, 1976.<sup>4</sup>

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<sup>4</sup>An indication of how the dwelling standards applied to the property when it was acquired and that comply with the farm and non-farm dwelling standards under ORS 215.213 (1975 edition), are the dwelling standards in the County's acknowledged EFU zone. The acknowledged EFU zone for Yamhill County required that farm and non-farm dwellings comply with the applicable standards under ORS 215.213 (1975 edition.)

## **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 Stanley and Kay Varuskas' development of a single-family dwelling on the subject property: applicable provisions of ORS 215 and OAR 660, division 33 enacted after June 9, 1976. These land use regulations will not apply to Mr. and Ms. Varuskas' use of their property only to the extent necessary to allow them a use permitted at the time they acquired the property on June 9, 1976.
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 June 9, 1976. On that date, the property was subject to applicable provisions of Statewide Planning 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 15, 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.