

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Draft Staff Report and Recommendation

July 21, 2006

STATE CLAIM NUMBER: M122481 (Report A)¹

NAMES OF CLAIMANTS: Sparkle Anderson
John H. Fuller
Betty B. McKinney
Eve M. Riggs
Malia L. Riggs

MAILING ADDRESS: 27480 SW Stafford Road
Wilsonville, Oregon 97070

PROPERTY IDENTIFICATION: Township 3S, Range 1E, Section 7
Tax lots 500, 600, 601, 1300,
1301, 1302 and 1400
Clackamas County

DATE RECEIVED BY DAS: September 26, 2005

180-DAY DEADLINE: August 11, 2006²

I. SUMMARY OF CLAIM

The claimants, Sparkle Anderson, John Fuller, Betty McKinney and Eve and Malia Riggs, seek compensation in the amount of \$34.4 million for the reduction in fair market value as a result of 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 170.78-acre EFU-zoned subject property into approximately one-acre parcels and to develop a dwelling on each parcel. The subject property is located at 27480 SW Stafford Road, near Wilsonville, in Clackamas County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid.

¹ Report A is one of two reports addressing property owned by the claimants (listed above) and for which relief is requested. This report addresses the 170.78-acre subject property zoned Exclusive Farm Use (EFU). Companion Report B addresses the 0.43-acre property presently owned by Betty McKinney.

² This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

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 170.78-acre subject property into one-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after each claimant acquired his or her present ownership interest in each of the tax lots that composes the subject property.

The above laws will not apply to:

- (1) Betty McKinney only to the extent necessary to allow her to use tax lot 600 for the use described in this report and only to the extent that use was permitted when she acquired it on December 20, 1963, and only to the extent necessary to allow her to use tax lots 500 and 1301 for the use described in this report and only to the extent that use was permitted when she acquired an interest in these tax lots on March 18, 1970, and April 7, 2000, respectively;
- (2) John Fuller only to the extent necessary to allow him to use tax lot 1400 for the use described in this report and only to the extent that use was permitted when he acquired it on January 28, 1966, and only to the extent necessary to allow him to use tax lots 1300 and 1302 for the use described in this report and only to the extent that use was permitted when he acquired them on March 18, 1970;
- (3) Sparkle Anderson only to the extent necessary to allow her to use tax lots 600 and 601 for the use described in this report and only to the extent that use was permitted when she acquired them on December 20, 1963, and only to the extent necessary to allow her to use tax lot 500 for the use described in this report and only to the extent that use was permitted when she acquired an interest in it on December 18, 1976;
- (4) Eve Riggs only to the extent necessary to allow her to use tax lot 600 for the use described in this report and only to the extent that use was permitted when she acquired it on December 20, 1963, and only to the extent necessary to allow her to use tax lot 500 for the use described in this report and only to the extent that use was permitted when she acquired an interest in it on December 18, 1976; and
- (5) Malia Riggs only to the extent necessary to allow her to use tax lots 500 and 600 for the use described in this report and only to the extent that use was permitted when she acquired an interest in them on October 16, 1997.

The department acknowledges that the relief to which Malia Riggs and Betty McKinney are entitled under ORS 197.352 will not allow Ms. Riggs to use tax lots 500 and 600 and will not allow Ms. McKinney to use tax lot 1301 in the manner set forth in the claim. (See the complete recommendations in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 14, 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 is relevant to whether the restriction of the claimants' use of the subject property reduces the fair market value of the property. The comment has been considered by the department in preparing this report. (See the comment letter in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(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 Measure 37 (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 Measure 37 (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 September 26, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's EFU-20-80 zone as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for "owners" as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines "owner" as "the present owner of the property, or any interest therein."

Findings of Fact

The claimants are Betty McKinney, Sparkle Anderson, John Fuller and Eve and Malia Riggs.

Tax Lot	Acreage	Claimants/Current Owners	Acquisition Dates
500	10.00	Betty McKinney Eve Riggs and Sparkle Anderson Malia Riggs	March 18, 1970 December 18, 1976 October 16, 1997
600	94.42	Betty McKinney, Eve Riggs and Sparkle Anderson Malia Riggs	December 20, 1963 October 16, 1997
601	29.25	Sparkle Anderson	December 20, 1963
1300/1302	10.0/9.5	John Fuller	March 18, 1970
1301	8.51	Betty McKinney	April 7, 2000
1400	9.17	John Fuller	January 28, 1966

Betty McKinney, Sparkle Anderson and Eve Riggs each acquired an interest in tax lot 600 on December 20, 1963, as reflected by a warranty deed included with the claim. Betty McKinney acquired tax lot 500 on March 18, 1970, upon the death of her mother, Mary W. Kruse, in accordance with Ms. Kruse's will, and as reflected by the certificate of death included with the claim.³

Eve Riggs and Sparkle Anderson each acquired an interest in tax lot 500 on December 18, 1976, as reflected by a quitclaim deed included in the claim.

Sparkle Anderson acquired tax lot 601 on December 20, 1963, as reflected by the warranty deed included with the claim.

Betty McKinney acquired tax lot 1301 on April 7, 2000, and as reflected by a statutory special warranty deed included with the claim.⁴

John Fuller acquired tax lot 1400 on January 28, 1966, as reflected by a warranty deed included with the claim. Mr. Fuller acquired tax lots 1300 and 1302 on March 18, 1970, upon the death of Mary W. Kruse, in accordance with her will, and as reflected by the certificate of death included with the claim.

Malia Riggs acquired interest in tax lots 500 and 600 on October 16, 1997, as reflected by a quitclaim deed included with the claim.

The claimants each acquired an interest in the various tax lots that composes the subject property from family members. The claimants' family acquired the subject property on several occasions between 1917 and 1970, as reflected by deeds included in the claim.⁵ The Clackamas County

³ Mary W. Kruse is Ms. McKinney's mother, Sparkle Anderson, Eve Riggs and John Fuller's grandmother and Malia Riggs' great-grandmother.

⁴ Clackamas County has determined that Ms. McKinney did not acquire an ownership interest in tax lot 1301 until she purchased it from Mary Kruse's estate on April 7, 2000.

⁵ According to the claim, and further documented by Clackamas County, the dates the claimants' family acquired the subject tax lots vary from 1917 to 1970. An earlier family ownership date would make no material difference in the relief sought by the claimants.

Assessor's Office confirms the claimants' current ownership of the subject property, as described above.

Conclusions

The claimants, Betty McKinney, John Fuller, Sparkle Anderson and Eve and Malia Riggs, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C). Betty McKinney, Sparkle Anderson and Eve Riggs acquired tax lot 600 on December 20, 1963. Betty McKinney acquired tax lot 500 on March 18, 1970, tax lot 600 on December 20, 1963, and tax lot 1301 on April 7, 2000. John Fuller acquired tax lot 1400 on January 28, 1966, and tax lots 1300 and 1302 on March 18, 1970. Sparkle Anderson acquired tax lot 601 on December 20, 1963. Eve Riggs acquired tax lot 500 on December 18, 1976. Malia Riggs acquired tax lots 500 and 600 on October 16, 1997.

The claimants each acquired the tax lots they presently own from "family members," as that term is defined by ORS 197.352(11)(A), who acquired the subject property between 1917 and 1970.

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must 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 or a family member acquired the property.

Findings of Fact

The claim indicates that the claimants desire to divide the 170.78-acre EFU-zoned subject property into one-acre parcels and to develop a dwelling on each parcel. It indicates the desired use is not allowed under the property's current zoning.

The claim is based generally on Clackamas 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 Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.⁶ 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 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS

⁶ The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

215.263 (2005 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. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

Goal 14 would likely apply to the division of the claimants' property into parcels less than two acres. Goal 14 generally requires that land divisions outside urban growth boundaries be used for rural uses. Goal 14 became effective on January 25, 1975.

The claimants' family acquired the subject property between 1917 and 1970, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants' family acquired the subject property, and do not allow the desired division or residential development of the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimants' family acquired the property between 1917 and 1970.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (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 \$34.4 million as the reduction in the subject property's fair market value due the regulations that restrict the claimants' desired use of the property. This amount is based on the claimants' assessment of the value of dividing the subject property into 172 one-acre parcels at \$200,000 per parcel.

Conclusions

As explained in Section V.(1) of this report, the claimants are Betty McKinney, Sparkle Anderson, John Fuller and Eve and Malia Riggs, whose family members acquired the subject property between 1917 and 1970. Under ORS 197.352, these claimants are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants' family acquired the subject property restrict

the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the subject property's fair market value is a reduction of \$34.4 million.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the subject property's fair market value. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after the claimants' family acquired the subject property between 1917 and 1970.

Conclusions

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimants' family acquired the property between 1917 and 1970. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced laws that restrict the use of the subject 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 subject 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 of the department 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 claimants' desired use of the subject property. The claim asserts that the laws enforced by the Commission or the department have the effect of reducing the fair

market value of the subject property by \$34.4 million. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when their family acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow:

(1) Betty McKinney to use tax lot 600 for a use permitted at the time she acquired it on December 20, 1963, tax lot 500 for a use permitted at the time she acquired it on March 18, 1970, and tax lot 1301 for a use permitted at the time she acquired it on April 7, 2000;

(2) John Fuller to use tax lot 1400 for a use permitted at the time he acquired it on January 28, 1966, and tax lots 1300 and 1302 for a use permitted at the time he acquired them on March 18, 1970;

(3) Sparkle Anderson to use tax lots 600 and 601 for a use permitted at the time she acquired them on December 20, 1963, and tax lot 500 for a use permitted when she acquired it on December 18, 1976;

(4) Eve Riggs to use tax lot 600 for a use permitted when she acquired it on December 20, 1963, and tax lot 500 for a use permitted at the time when she acquired it on December 18, 1976; and

(5) Malia Riggs to use tax lots 500 and 600 for a use permitted at the time she acquired them on October 16, 1997.

As described above, Betty McKinney acquired tax lot 500, Betty McKinney, Eve Riggs and Sparkle Anderson acquired tax lot 600, Sparkle Anderson acquired tax lot 601 and John Fuller acquired tax lots 1300, 1302 and 1400, all prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

Sparkle Anderson and Eve Riggs acquired tax lot 500 after the adoption of the statewide planning goals, but before the Commission acknowledged Clackamas County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the county's plan and land use regulations when Ms. Anderson and Ms. Riggs acquired tax lot 500 on December 18, 1976, the

statewide planning goals, and Goals 3 and 14 in particular, applied directly to tax lot 500 when Ms. Anderson and Ms. Riggs acquired it.⁷

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for EFU pursuant to ORS 215. The Goal 3 standard for land divisions involving property where the local zoning was not acknowledged required that the resulting parcels must be of a size that is “appropriate for the continuation of the existing commercial agricultural enterprise within the area.” Further, ORS 215.263 (1975 edition) only authorized the partition of land subject to EFU zoning, and required that all divisions of land subject to EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). Thus, Sparkle Anderson and Eve Riggs’ opportunity to divide tax lot 500 when they acquired their interest in 1976 was limited to land divisions that were consistent with Goal 3, which required that the resulting parcels 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.

Under the Goal 3 standards in effect on December 18, 1976, farm dwellings were allowed if they were determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1975 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1975 edition).

No information has been presented in the claim to establish that Sparkle Anderson and Eve Riggs’ desired division of tax lot 500 into one-acre parcels complies with the “commercial” standard for farm parcels under Goal 3 or the standards for non-farm parcels under ORS 215.263 (1973 edition), nor is there any information to establish that these claimants’ desired development of a dwelling on each parcel satisfies the standards for farm or non-farm dwellings under ORS 215.213 (1975 edition).

When Malia Riggs acquired tax lots 500 and 600 on October 16, 1997, and Betty McKinney acquired tax lot 1301 on April 7, 2000, these tax lots were zoned EFU by Clackamas County and subject to the current lot size and dwelling standards under Goal 3, ORS 215 and OAR 660, division 33, and as described in Section V.(2) of this report.

In addition to the laws identified above, there may be other laws that apply to each claimant’s use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of these tax lots until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific

⁷ The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission’s acknowledgment of each county’s comprehensive plan and implementing regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev. den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county’s plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer applied directly 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, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) 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 the 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 subject property.

Conclusions

Based on the record, the department recommends that the claim be approved to the extent of each claimant's present ownership of each of the tax lots subject to this claim, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimants' division of the 170.78-acre subject property into one-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, enacted or adopted after each of the claimants acquired his or her present ownership interest in each of the tax lots that composes the subject property.

These laws will not apply to claimants Betty McKinney, Sparkle Anderson and Eve Riggs only to the extent necessary to allow them to use tax lot 600, and to allow Ms. Anderson to use tax lot 601, for the use described in this report, and only to the extent that use was permitted when the three claimants acquired tax lot 600 and when Ms. Anderson acquired tax lot 601 on December 20, 1963.

These laws will not apply to claimant John Fuller only to the extent necessary to allow him to use tax lots 1300, 1302 and 1400 for the use described in this report, and only to the extent that use was permitted when he acquired tax lot 1400 on January 28, 1966, and tax lots 1300 and 1302 on March 18, 1970.

These laws will not apply to claimants Betty McKinney, Sparkle Anderson and Eve Riggs only to the extent necessary to allow them to use tax lot 500 for the use described in this report, and only to the extent that use was permitted when Ms. McKinney acquired an interest in tax lot 500 on March 18, 1970, and when Ms. Anderson and Ms. Riggs each acquired an interest in tax lot 500 on December 18, 1976.

These laws will not apply to claimants Malia Riggs and Betty McKinney only to the extent necessary to allow Malia Riggs use tax lots 500 and 600 and to allow Betty McKinney to use tax lot 1301 for the use described in this report, and only to the extent that use was permitted when Malia Riggs acquired an interest in tax lots 500 and 600 on October 16, 1997, and Betty McKinney acquired an interest in tax 1301 on April 7, 2000. The department acknowledges that the relief to which Malia Riggs and Betty McKinney are entitled under ORS 197.352 will not allow Malia Riggs to use tax lots 500 and 600 and will not allow Betty McKinney to use tax lot 1301 in the manner set forth in the claim.

