

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

June 21, 2005

STATE CLAIM NUMBER: M119074

NAME OF CLAIMANTS: Theresa Sugura and Don Reyes

MAILING ADDRESS: P.O. Box 341
North Plains, Oregon 97133

IDENTIFICATION OF PROPERTY: 22670 NW Dairy Creek Road
Township 2N, Range 3W, Section 4
Tax Lot 800, Washington County

DATE RECEIVED BY DAS: December 27, 2004

180-DAY DEADLINE: June 25, 2005

I. CLAIM

Theresa Sugura and Don Reyes, the claimants, seek compensation in the amount of \$2,200,000 for 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 39.08-acre property and develop it for residential uses. The property is located at 22670 NW Dairy Creek Road in Washington County. The Washington County Tax Assessor identifies the property as T2N, R3W, Section 4, tax lot 800. (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) finds that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of certain state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, specifically: Those provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, Division 33 that restrict the division of the property or the establishment of a dwelling. The proposed action would not apply these laws only to the extent necessary to allow the claimants a use of the property permitted when they acquired it. (See Section VI. of this report for the complete recommendation.)

III. COMMENTS RECEIVED

On February 15, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to surrounding property owners. DAS received one written comment in response to the 10-day notice. The comment did not address the criteria for approving or denying a claim for compensation under Ballot Measure 37. (See the department's claim file for a copy of the letter.) Without funding to pay compensation, comments regarding the possible impact of the proposed or intended development of the claimant's property are not relevant to the evaluation and determination of the claimants' Ballot Measure 37 claim, and cannot be considered by the department.

IV. TIMELINESS OF CLAIM

Requirement

Ballot Measure 37, Section 5, requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of the measure (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of the measure (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

The claim was submitted to DAS on December 27, 2004 for processing under OAR 125, Division 145. The claim identifies state laws related to exclusive farm use zoning as the basis for this claim. Only laws that were enacted prior to December 2, 2004, the effective date of Ballot 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 was submitted within two years of December 2, 2004, the effective date of Ballot Measure 37 based on land use regulations enacted 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

According to the claim, on July 23, 1963, the Dudley Jones Company acquired ownership of the subject property. Dudley Jones was president of the Dudley Jones Company and was claimant Theresa Sugura’s father. On February 22, 1980, the Dudley Jones Company conveyed ownership of the subject property to Jacqueline M. Jones (37%) and Jerianne Jones Leonetti (37%), claimant Sugura’s sisters, and Dudley William Jones (26%), claimant Sugura’s brother. On March 3, 1982, Claimant Sugura acquired her sister’s, Jerianne Jones Leonetti, partial interest (37%) in the subject property as part of a trade between the two sisters involving the subject property and another tax lot.

Claimants, Ms. Sugura and Mr. Reyes, were married in 1992. However, Mr. Reyes first acquired an ownership interest in the property on June 6 and 11, 2002. On those dates, the claimants jointly acquired the remaining interests of Sugura’s other sister, Jacqueline M. Jones (37%), and Sugura’s mother, Lucille P. Jones, (26%), and Reyes acquired an ownership interest in Sugura’s original 37% interest. Deeds in the names of the claimants have been submitted for these two acquisitions, and the Washington County Tax Assessor’s Office confirmed that Ms. Sugura and Mr. Reyes are listed as current owners of the subject property.¹

Conclusions

The department finds that the claim sufficiently demonstrates ownership by members of the Jones family since July 23, 1963. Theresa J. (Jones) Sugura acquired an ownership interest (37%) on March 3, 1982. Donald B. Reyes acquired an ownership interest in the property on June 6 and 11, 2002. As of March 13, 1982, Theresa J. Sugura, and as of June 6 and 11, 2002, Donald B. Reyes, respectively, are “owners” of the subject property as defined in section 11(C) of Measure 37.

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 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.

¹ Based on department staff phone conversation with Washington County’s Tax Assessor’s Office on May 18, 2005.

Findings of Fact

The claim cites OAR 660, Division 33, and certain sections of ORS 215, specifically, ORS 215.203, 215.243, 215.296, 215.283, 215.780, 215.263, 215.262, 215.213, and 215.284, as not allowing the division of the property, the establishment of dwellings, or other uses on the subject property. Some of these laws restrict the claimants' property from what was permitted when it was acquired by the family in 1963, and some do not.

The claimants' property is agricultural land and zoned EFU as required by Statewide Planning Goal 3 (OAR 660-033-0090). The following laws do not restrict the use of the subject property because they are Legislative policy statements that are not directly or indirectly applied to the approval of land divisions or dwellings on land zoned for exclusive farm use: ORS 215.262 (effective January 1, 2002, Chapter 704, Or Laws 2001) and ORS 215.243 (effective October 5, 1973, ORS 503, Or Laws 1973).

However, the provisions of the following laws that apply to the division of land zoned for exclusive farm use (EFU) and the establishment of one or more dwellings on such land, do restrict the use of the property: Statewide Planning Goal 3 (Agricultural Lands), (OAR 660-015-0000(3)); ORS 215.203, 215.296, 215.263, 215.283, 215.284 and 215.780, and OAR 660, division 33. The provisions of these laws relating to the division of land zoned EFU or the establishment of dwellings on such land restrict the use relative to what the Jones/Segura family was permitted to do in 1963. Goal 3 became effective on January 25, 1975, and it required agricultural land as defined by the Goal to be zoned EFU pursuant to the relevant provisions of ORS 215. ORS 215.203, ORS 215.296, ORS 215.263, ORS 215.283, ORS 215.213, ORS 215.284 and ORS 215.780 all became effective after the Jones/Sugura family acquired the property in 1963.

Conclusions

The claimants' property is agricultural land and zoned EFU as required by Statewide Planning Goal 3 (OAR 660-033-0090). Certain provisions of ORS 215.203, 215.213, 215.263, 215.284, 215.780 and Goal 3 as implemented by OAR 660, Division 33, restrict the creation of new parcels smaller than 80 acres and establish the standards for the approval of farm or non farm dwellings. None of the laws identified in the claim as restricting the use of the property were in effect in 1963 when the Jones/Sugura family first acquired it.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any laws described in Section V.(2) of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes a September 1, 1999 appraisal of the subject property by a certified real estate appraiser, which estimated the market value of the subject property to be \$400,000. A January 25, 2002 appraisal by a state licensed appraiser estimated the market value of the subject property to be \$435,000, subject to bringing the property into zoning compliance with regard to two existing dwellings on the property. The claim states that zoning and building code violations were corrected on February 19, 2002.

The Washington County Tax Assessor's records for the subject property indicate a real market value for the subject property of \$124,760. The claimants estimate the current fair market value of the property to be around \$500,000. The claimants base the \$2,200,000 reduction amount on the value of surrounding five-acre parcels at around \$275,000 per parcel. The claim includes no appraisal or other documentation of the market value without current restrictions, and the reduction in value due to such restrictions.

Conclusions

As explained in section V.(1) of this report, the current owners are Theresa J. Sugura and Donald B. Reyes. Theresa Sugura acquired her interest in the property on March 3, 1982 and Donald Reyes acquired his interest in the property on June 6 and 11, 2002. Sugura's family acquired the property in 1963. Thus, under Ballot Measure 37, Theresa Sugura and Donald Reyes are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value.

The claim provides some evidence of a reduction in fair market value of the property due to restrictions relating to state laws. However, without an appraisal based on the value of property when divided, 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 laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The regulations subject to this claim are those provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215.203, 215.213, 215.263, 215.283, 215.284 and ORS 215.780 and OAR 660, Division 33 that apply to the division of EFU-zoned land and the establishment of dwellings on EFU-zoned land. These laws were adopted after the claimants' family acquired the property in 1963. Furthermore, none of the laws

identified in the claim appear to be exempt, either on their face or as applied to the subject property, under Section 3 of Ballot Measure 37.

Conclusions

It appears that the general statutory, goal and rule restrictions on residential development and use of agricultural land apply to the owners' 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, because they were not raised in this claim, or because they are laws that are not covered by the Measure to begin with.

VI. FORM OF RELIEF

Section 1 of Measure 37 requires payment of compensation to an owner of private real property if the Land Conservation and Development Commission (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 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.

Findings of Fact

Based on the findings and conclusion set forth in this report, laws enforced by the Commission or the department restrict the division of the subject property into parcels or lots for residential development. The laws enforced by the Commission or the department reduce the fair market value of the property to some extent. The claim asserts this amount to be \$2,200,000. However, because the claim does not provide a specific explanation for how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, the department acknowledges that the laws on which the claim is based 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 Ms. Sugura a use of the subject property permitted when she acquired it in 1982 and Mr. Reyes a use of the property permitted when he acquired his interest in it in 2002.

Based on the record before the department, Ms. Sugura and Mr. Reyes have established that they are entitled to relief. Therefore, department staff recommends not applying certain land use regulations enforced by the Commission or the department, to the extent necessary to allow Ms. Sugura a use of the subject property permitted when she acquired

it in 1982 and Mr. Reyes a use of the property permitted when he acquired his interest in it in 2002.

Ms. Sugura acquired the property on March 3, 1982 when it was zoned by the county GFU-38, a qualified exclusive farm use zone under ORS 215. Under this zone, there was a 38-acre minimum parcel size for the creation of new lots or parcels. However, the county's GFU-38 Zone that applied to the property at that time (Chapter 160) had not been submitted by Washington County for review by the Commission for acknowledgment, and therefore it had not been 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 Commission acknowledged Washington County Comprehensive Plan and land use regulations as being in compliance with the statewide goals in 1984.² Since the Commission had not acknowledged Washington County's comprehensive plan and land use regulations, including the GFU-38 Zone in effect when the property was acquired by Ms. Sugura on March 3, 1982, Statewide Planning Goal 3 applied directly to the subject property on the date of acquisition.³

Statewide Goal 3 "Agricultural Lands," as adopted in 1975, required that agricultural land be "preserved and zoned for exclusive farm use pursuant to ORS 215." The subject property is "agricultural land" as defined by Goal 3 and was subject to EFU zoning pursuant to ORS 215 when acquired by Theresa Sugura on March 3, 1982.

In 1982, the state standards for a land division involving property where the local zoning was not acknowledged (in this case the GFU-38 zone) were that the resulting parcels must be of a size that are "appropriate for the continuation of the existing commercial agricultural enterprise in the area" (Statewide Planning Goal 3). (See endnote ¹.) Further, ORS 215.263 (1981 edition) required that all divisions of land subject to the provisions for exclusive farm use zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy).

Thus, the opportunity to divide the property when acquired in 1982 was limited to land divisions consistent with Goal 3 that required 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 215.243.

² See the Commission's Continuance Order 82-CONT-132, dated October 14, 1982 (Section IV, pp. 20-24) and Commission Acknowledgment Order 84-ACK-103, dated July 30, 1984 (Section IV, pp. 10-15).

³ 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), *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 (see *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).

As for dwellings allowed under EFU zoning as required by Goal 3 on the date of acquisition in 1982, farm dwellings were allowed if determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1981 edition), and non farm dwellings were subject to ORS 215.213(3) (1981 edition).⁴ Other uses were authorized and governed by the applicable provisions under Goal 3 and ORS 215.213.

No information has been provided showing that the division, placement of dwellings or other uses cited by the claimants comply with either the Goal 3 minimum lot size standard for farm parcels under Goal 3, the standards for new non-farm parcels under ORS 215.263 (1981 Edition), or the approval standards for dwellings or other uses in effect at the time Ms. Sugura acquired her interest in the property in 1982.⁵

Mr. Reyes acquired an interest in the property in 2002, after most provisions of the land use regulations for which the claimants seek relief were enacted. As a result, the department’s proposed action would not apply only those provisions of the identified land use regulations that were enacted after the date he acquired his interest.

Conclusions

Based on the current 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 provisions of the following land use regulations enforced by the Commission or the department that apply to division of the property and the establishment of one or more dwellings by Ms. Sugura: Statewide Land Use Planning Goal 3, ORS 215, and OAR 660, Division 33. Only those provisions of these laws that were enacted after she acquired an interest in the property in 1982, and that restrict the division of the property or the establishment of dwellings, are not applied.
2. In lieu of compensation under Measure 37, the State of Oregon will not apply the provisions of the following land use regulations enforced by the Commission or the department that apply to division of the property and the establishment of one or more dwellings by Mr. Reyes: Statewide Land Use Planning Goal 3, ORS 215, and OAR 660, Division 33. Only those provisions of these laws that were enacted after he acquired an

⁴Under ORS 215.213, a farm dwelling may be established on agricultural land, only if the farm use to which the dwelling relates is existing, (*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). Guidance on the application of the applicable statutory standards for farm and non-farm dwellings in EFU zones can be found in the applicable Commission rules (OAR 660, Division 5 adopted July 21, 1982, amended June 7, 1986 and repealed August 7, 1993).

⁵ An indication of the appropriate land division standards that may have applied to the property when it was acquired and that complied with the Goal 3 minimum lot size standard in Washington County are the land division standards in the County’s later-acknowledged EFU Zone, which provided for the creation of new farm parcels on a case-by-case basis (see end note i).

interest in the property in 2002, and that restrict the division of the property or the establishment of dwellings, are not applied.

3. The action by the State of Oregon provides the state's authorization to claimant Sugura to partition and use the subject property, subject to those standards in effect on March 3, 1982. Those standards include the provisions of ORS 215 and Goal 3 that were in effect on that date. The department acknowledges this relief may not allow claimants to use the property as requested in the claim.

4. To the extent that any law, order, deed, agreement or other legally-enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license, or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.412 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

5. Any use of the property by the claimants remain subject to the following laws: (a) those laws not listed in (1) or (2), above; (b) any laws enforced by a public entity other than the Commission or department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempt under Section (3) of the Measure.

6. 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 Washington County or other jurisdiction that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under Measure 37 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on June 3, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant 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.

ⁱ As noted, Goal 3 (Agricultural Lands) 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 apply, prior to acknowledgement of a jurisdiction's comprehensive plan and land use regulations. After the local plan and land use regulations are acknowledged by the Commission, the Statewide Planning Goals and implementing rules no longer directly apply to such local land use decisions. 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.

The Goal 3 standard for the review of land divisions or the establishment of a minimum lot size states:

“Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area.”

On August 20, 1977, the Commission distributed a policy paper explaining the meaning of the Goal 3 minimum lots size standard (see “Common Questions about Goal #3; Agricultural Lands” (August 30, 1977, as revised and supplemented July 12, 1979). Further interpretation of the Goal 3 minimum lot size standard can be found in *Meeker v Clatsop County*, 287 Or 665 (1979), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, *rev. den* 290 Or 137 (1980) and *Thede v. Polk County*, 3 Or LUBA 336 (81).

In 1982, the policy paper and court decisions were incorporated into an administrative rule to guide the interpretation and application of the Goal 3 minimum lot size standard (see OAR 660, Division 05, specifically rules 0015 and 0020 effective July 21, 1982).

For further guidance on the interpretation and application of this standard and rule see *Kenagy v. Benton County*, 6 Or LUBA 93 (1982); *Goracke v. Benton County*, 8 Or LUBA 128 (1983); 68 Or App 83 (1984); 12 Or LUBA 128 (1984); 13 Or LUBA 146 (1985); 74 Or App 453 (1985), *rev. den* 300 Or 322 (1985); and OAR 660-05-015 and 020 as amended effective June 7, 1986 (repealed effective August 7, 1993).

The 1982 administrative rule (OAR 660-05-0015 and 0020) was further amended to incorporate the holdings of these cases (effective June 7, 1986 and repealed effective August 7, 1993).