

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

June 21, 2005

STATE CLAIM NUMBER: M119086

NAME OF CLAIMANT: Waite Family Trust,
Vern R. Waite, Trustee

MAILING ADDRESS: 10616 Grand Cypress Ave.
Las Vegas, Nevada 89134

IDENTIFICATION OF PROPERTY: 13199 County Lane, Sherwood
Township 3S, Range 1W, Section 16
Tax lots 1400, 1404 and 1494,
Clackamas County

OTHER INTEREST IN PROPERTY: Alice Ann Waite,
Trustee for Waite Family Trust

DATE RECEIVED BY DAS: December 29, 2004

180-DAY DEADLINE: June 27, 2005

I. CLAIM

The Waite Family Trust, the claimant seeks compensation in the amount of \$400,000 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 claimant desires compensation or the right to build a dwelling on the subject property. (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 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 ORS 215.284 and Statewide Planning Goal 3 (Agricultural Lands) and OAR 660, Division 33, not apply to the subject property to the extent necessary to allow The Waite Family Trust a use of the property permitted at the time it was acquired on May 21, 1992. As a result, the Trust's use of the property

will be subject to those specified laws in effect on May 21, 1992. (See the complete recommendation in Section VI. of this report.)

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. According to DAS, there was one written comment received in response to their 10-day notice. The comment was written in support of the claim but did not relate to the evaluation criteria in Measure 37. 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 claimant's 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

This claim was submitted to DAS on December 29, 2004, for processing under OAR 125, Division 145. The claim includes a list of land use regulations, including the County's exclusive farm use zone, ORS 215 and OAR 660-033-120, all of which were enacted prior to December 2, 2004, the effective date of Measure 37. (See citations of statutory and 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

Mr. Waite, the claimant on behalf of the Waite Family Trust, states that he has been the owner of three parcels of land in Clackamas County since 1973. The three parcels are identified as street address 13199 Country Lane, Sherwood, Oregon 97140, Clackamas County. They are further identified as: tax lot 1400 (0.7 acres), tax lot 1404 (7.62 acres) and tax lot 1494 (7.08 acres).

Mr. Waite says that the property has been “owned by myself” since 1973, but also lists the Waite Family Trust, Vern R. Waite and Alice Ann Waite trustees, as a property owner on the County’s Measure 37 claim¹. Based on information included in the claim, Alice Waite does not appear to be a claimant.

Clackamas County planning staff says that the Clackamas County Assessor’s office has a deed for one of the three tax lots, dated May 4, 1982. The Assessor’s office also indicates property transfers for the subject property as follows:

Date	From	To
May 4, 1982	Vern R. Waite	Waite, Inc.
March 20, 1986	Waite, Inc.	Alice A. Waite
May 21, 1992	Alice A. Waite	Waite, Inc. and Waite Family Trust
May 21, 1992	Waite, Inc.	Waite Family Trust

Following a March 30, 2005 request by phone, Mr. Waite submitted additional information. A title report and deed indicate that Vern Waite acquired the subject property on March 1, 1973. In addition, a document signed March 10, 1992, confirms the establishment, of the Waite Family Trust, Vern R. Waite and Alice Ann Waite, Trustors and/or Trustees on March 10, 1992. Based on information in the claim file, the subject property was transferred to the trust when it was established on May 21, 1992. Mr. Waite retains an ownership interest in the property as a trustee.

¹ The Department received a letter, faxed June 9, 2005, from Vern R. Waite Trustor and/or Trustee for the Waite Family Trust, clarifying that the claim had been submitted on behalf of the Trust, with Mr. Waite as Trustee.

Conclusions

The Waite Family Trust, the claimant, is an “owner” of three Clackamas County parcels that are the subject of this claim, as that term is defined in Section 3 of Ballot Measure 37. The property was transferred to the trust by Waite, Inc. on May 21, 1992. The subject property had been transferred from Alice Waite to Waite, Inc., on the same day (May 21, 1992).

Vern Waite acquired the property on March 1, 1973, and the property has changed hands several times since then, within his family, and including ownership by Waite, Inc., described by Mr. Waite as a business that held rental properties. The property has been owned by Mr. Waite, or a family member, as that term is defined in the Ballot Measure 37, since 1973. The Waite Family Trust, acquired its ownership interest in 1992 and is a current owner of the subject property as that term is defined in Section 11 of Ballot Measure 37.

2. The Laws that are the Basis for the 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 claimant states that current zoning for the three lots is EFU-80 (exclusive farm use – 80-acre minimum lot size). The land is considered high value farmland. (See 1996 Clackamas County hearings officer report in claim file.) Clackamas County planning staff confirmed this current zoning. Claimant also states that in 1973 when Mr. Waite purchased it, the zoning was EFU-20, which allowed him to build a house.² Mr. Waite cites ORS 197—Comprehensive Land Use Planning Coordination (1973), and 215—County Planning; Zoning, which he believes were adopted by Clackamas in 1993. He also cites OAR 660-33-120--Uses Authorized on Agricultural Land (1993). Together, these are the relevant state regulations that he asserts prevent him from building his dwelling.

Mr. Waite applied to Clackamas County for a dwelling on the subject property on August 29, 1996 under the standards for dwellings not provided in conjunction with farm use. Hearings Officer Richard Christ denied the application. (See Clackamas County file

² Clackamas County staff indicate that a different set of dates apply to the zoning history of subject parcels. They indicate that the land was unzoned until December 14, 1967. On that date an RA-1 zone (1 acre minimum) was applied; a dwelling was a primary use permitted with that zone. On August 23, 1979 an EFU-20 zone was applied by the County (but not acknowledged by the Commission until December 11, 1981) until November 27, 1996, when it was zoned EFU with an 80-acre minimum parcel size in compliance with HB 3661.

Z0925-96-ALR.) Mr. Waite’s claim makes reference to the right to build a dwelling being grandfathered, but then removed.

When Mr. Waite first acquired an interest in the property in 1973, the statewide planning goals and implementing regulations were not in effect. On May 21, 1992, when the Waite Family Trust acquired the property, Clackamas County’s EFU-20 zone applied. Under the EFU 20 zone, a dwelling may have been allowed on the site under a farm management plan or a non-farm use permit.³ The statutory rules and provisions for farm and nonfarm dwellings applicable to the claimant’s property in 1992 are found in ORS 215.283(1)(f) and ORS 215.283(3)(1989 edition) and OAR 660 Division 05 (1986 Edition, repealed August 7, 1993). Specifically, ORS 215.283(1)(f) provides for “a dwelling customarily provided in conjunction with farm use.” OAR 660-05-030 further required that such a dwelling: (1) be located on a parcel which is large enough to satisfy the Goal 3 minimum lot size standard, i.e., “appropriate for the continuation of the existing commercial agricultural enterprise within the area” as explained in OAR 660-05-015, and (2) be situated on a parcel currently employed for farm use as explained in OAR 660-05-0030(4) (see OAR 660, Division 5, 1986 Edition).

Conclusions

When Mr. Waite first acquired the property in 1973, the Statewide Planning Goals and implementing regulations had not been adopted and did not restrict the use of the subject property. The current provisions of ORS 215.284 and OAR 660-033-0135(7) and OAR 660-033-0130(4)(c) were adopted after the property was transferred to the Waite Family Trust in 1992. The current provisions do not allow claimant to site a dwelling on the subject property. It is possible that a dwelling could have been approved under the more general provisions of ORS.215.283(1)(f), ORS 215.283(3) (1989 Edition) and OAR 660, Division 5 (1986 Edition) and the Clackamas County regulations that were in effect in 1992 when the claimant acquired an interest in the property..

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that the current land use regulation(s) described in Section V.(2) of this report “has the effect of reducing the fair market value of the property, or any interest therein.”

³ Guidance on the application and interpretation of the applicable statutory and rule standards in Clackamas County can be found in the County’s acknowledged Exclusive Farm Use Zone, which incorporated the applicable provisions of OAR 660, Division 5; i.e., Clackamas County EFU Zone revised on January 23, 1992 by County Order 92-68, amending Clackamas County Zoning and Development Ordinance, ZDO-78, including section 401, Exclusive Farm Use, 20 Acre District—EFU 20. However, relevant state statutes remain applicable after acknowledgement, and interpretation of the local county code provisions must reflect any statutory requirements not embodied in the local law. (See *Kenagy v. Benton County*, 115 OR App 131 (1992).)

Findings of Fact

The reduction in fair market value claimed by the Waite Family Trust is “approximately \$300,000 to \$350,000.” The Trust calculated the current value of subject property without regulation at \$400,000 to \$450,000, based on his analysis of comparable buildable properties in the area. Claimant then subtracted the current real market value on the property’s 2004 tax statement, \$103,897, from his estimate of current market value to arrive at the estimated reduction. No appraisal is included with the claim.

Conclusions

As explained in section V.(1) of this report, the Waite Family Trust is a current owner of the property. The property was acquired by the trust on May 21, 1992. Under Ballot Measure 37, the Trust is 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 states that the reduction due to land use restrictions is \$400,000.

Without an appraisal based on the value of a residential dwelling or another explanation of the reduction in fair market value, it is not possible to substantiate the amount of reduction in fair market value that has occurred as a result of the laws specified in the claim. Furthermore, without a final determination of what use of the property was permitted on May 21, 1992, the extent to which the use of the property has been restricted cannot be determined. It is not clear whether the claimant would have qualified for the approval of a dwelling on the property under the standards in effect when they acquired it in 1992. However, OAR 660-033-0135(7) and OAR 660-033-0130(4)(c), as currently implemented by Clackamas County, clearly do not allow a dwelling on the subject property, whereas it is possible that a dwelling could be approved under the more general provisions in effect when the claimant acquired an interest in the property in 1992. Therefore, based on the submitted information, the department determines that it is more likely than not that there has been some restriction of the use of the property and 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 identifies the County’s exclusive farm use zoning as restricting the use of the subject property relative to what would have been allowed in 1973 when the property was first acquired by the claimant. The provisions in the County’s zone implement OAR 660, Division 33, and related provisions of state statutes and Goal 3 (Agricultural Land). These laws were enacted after Mr. Waite acquired the property in 1973.

Conclusions

Without a specific listing of laws that are the basis for the claim or a description of a specific use of the property, it is impossible for the department to determine what laws may restrict the use of the property, or whether those laws may fall under one or more of the exemptions under Measure 37. There may be other specific laws that are exempt and continue to apply under one or more of the exemptions in the Measure, because they were not identified in the 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 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 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 placement of a dwelling on the subject property. These laws more likely than not have reduced the fair market value of the property to some extent. The claim asserts this amount to be \$400,000. However, because the claim does not provide a specific explanation for how the specified restrictions reduce the fair market value of the property from what they could have done under the regulations in place at the time the Trust acquired the property in 1992, a specific amount of compensation cannot be determined. Nevertheless, based on the current record for this claim, the department finds that the laws on which the claim is based more likely than not 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 one or more land use regulations to allow the Waite Family Trust to use the subject property for a use permitted at the time it acquired the property on May 21, 1992.

Conclusion

Based on the record before the department, the Waite Family Trust has established that it is entitled to relief. Therefore, department staff recommends that, in lieu of compensation, the requirements of applicable state laws enacted after May 21, 1992, and

enforced by the Commission or the department, specifically the provisions of OAR 660, Division 33, and ORS 215.284 relating to the placement of a dwelling, not apply to the subject property to the extent necessary to allow the Waite family Trust a use of the property permitted at the time it acquired its current interest in the property (in 1992). The Waite Family Trust will need to apply to Clackamas County for a single-family dwelling pursuant to the dwelling standards in place at the time the Trust acquired the property that is the subject of this claim, in order to obtain a final determination of what use of the property is permitted. On May 21, 1992 the property was subject to ORS 215.283(1)(f), ORS 215.283(3) (1989 edition) and OAR 660-05-030 (1986 edition).

Any use of the property by the claimant remains subject to the following laws: (a) those laws not specified in their claim to the State of Oregon, dated December 6, 2004 or not identified in this report; (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.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on June 6, 2005. OAR 125-145-0100(3), and provided an opportunity for the claimant or the claimant's 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.