

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

**Final Staff Report and Recommendation
June 28, 2005**

STATE CLAIM NUMBER: M119144

NAME OF CLAIMANT: Charlene and John Frome

MAILING ADDRESS: 17133 S. Steiner Road
Beavercreek, Oregon 97004

IDENTIFICATION OF PROPERTY: Township 3S, Range 2E, Section 24
Tax lots 1501, 1601 and 1602
Clackamas County

DATE RECEIVED BY DAS: January 3, 2005

180-DAY DEADLINE: July 2, 2005

I. CLAIM

Charlene and John Frome, the claimants, seek compensation in the amount of \$1,225,500 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to partition the subject property into one-acre lots for sale and residential use. (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. In lieu of compensation, department staff recommends that the requirements of certain state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, including specified provisions of Statewide Planning Goal 3, OAR 660, Division 33, and ORS 215 that restrict the right of the claimants to divide the property and to establish single-family dwellings on each lot or parcel not apply to the subject property to allow the claimants a use of the property permitted at the time they acquired it. As a result, the claimants' use of Tax Lot 1501 will be subject to those specified laws in effect on October 28, 1969, when they acquired that portion of the property. The claimants' use of Tax Lots 1601 and 1602 will be subject to those specified laws in effect on April 15, 1976 and May 28, 1977, respectively, when they acquired those portions of the property. (See the complete recommendation in Section VI. of this report).

III. COMMENTS ON THE CLAIM

Comments Received

On March 15, 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, there was one written letter received by DAS in response to the 10-day notice. The letter provided general comments that are not specific to the criteria used in the department's review of this claim. (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

The claim was submitted to DAS on January 3, 2005, for processing under OAR 125, Division 145. The claim identifies the Exclusive Farm Use (EFU) zone that restricts the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The claim was 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 payment of compensation or relief from specific laws to “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, Charlene and John Frome, acquired Tax Lot 1501 (8.87-acres) on September 5, 1969 (see Land Sale Contract, Clackamas County Record 69-19262). The claimants acquired Tax Lot 1601 (4.89-acres) on April 15, 1976 (see Warranty Deed, Clackamas County Record 76-121123). The claimants acquired Tax Lot 1602 (7.96-acres) on May 28, 1977 (see Land Sale Contract, Clackamas County Record 77-21532).¹

Copies of the current property tax statements (July 1, 2004 through June 30, 2005) were obtained from the Clackamas County Tax Collector showing John P (“JP”) and Charlene M. Frome, the claimants, as the current owners of the three tax lots that are the subject of this claim.²

Conclusion

The claimants, Charlene and John Frome, are “owners” of the 21.72-acre subject property, as that term is defined by 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 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

According to the County Measure 37 form completed by the claimants and submitted to the state, they would like to partition the property into “one-acre parcels, buildable for single family dwellings on each lot.” The local regulation on which this claim is based is the Clackamas County Exclusive Farm Use (EFU) zone. That zone implements Statewide Planning Goal 3, “Agricultural Lands,” and OAR 660-033-0100. The subject 21.72-acres cannot be further divided and is not entitled to a

¹ According to information included in the claim, “Tax Lot 1501, 1601 and 1602 combined form one legal lot of record. Tax Lot 1601 and 1602 were created without minor partition approval.” (Clackamas County’s Research Request form completed by Paul Frome, dated September 1, 1989).

² Received by the department via facsimile on April 21, 2005.

non-farm dwelling under the current requirements of Goal 3, ORS 215.780, 215.263 and OAR 660-033-010.³

When the claimants purchased Tax Lot 1501 in 1969, Tax Lot 1601 in 1976, and Tax Lot 1602 in 1977, they were zoned by Clackamas County as RA-1 Rural Agricultural - Single Family Residential and they had a one-acre minimum parcel size requirement for the creation of new lots or parcels. Tax Lot 1501 was acquired prior to the enactment of the Statewide Planning Goals and, only the County zoning applied at that time. In 1969, there were no state land use laws that restricted Tax Lot 1501 from being divided into one-acre parcels under the RA-1 zone.

With regard to Tax lots 1601 and 1602, which the claimants acquired after the enactment of the Goals, the County RA-1 Zone that applied to those tax lots when they were acquired was not acknowledged at that time 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. Until the County land use regulations were acknowledged by the Commission, Statewide Planning Goal 3, applied directly to Tax Lots 1601 and 1602 when they were acquired in 1976 and 1977.⁴

As adopted in 1975, Statewide Goal 3 (Agricultural Lands) required that agricultural land “be preserved and zoned for Exclusive Farm Use (EFU) pursuant to ORS Chapter 215.” The subjects properties (Tax Lots 1601 and 1602) are agricultural land as defined by Goal 3 and were subject to EFU zoning pursuant to ORS 215 when acquired by the claimants in 1976 and 1977.⁵ At that time, the State standard for land divisions involving property where the local zoning was not acknowledged required 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). Further, ORS 215.263 (1975 edition) required that all divisions of land subject to the provisions for EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). Thus, the opportunity to divide Tax Lots 1601 and 1602 when the claimants acquired them in 1976 and 1977 was limited to land divisions done consistent with Goal 3 that

³ The minimum parcel size for the creation of new farm parcels is 80 acres (ORS 215.780). Because the property is located in the Willamette Valley, under ORS 215.263(4) it cannot be divided to allow a non-farm dwelling. The subject property is also not eligible for a non-farm dwelling under ORS 215.284(1) because the property is composed of predominately Class II agricultural soils. (Soils Survey of Clackamas County, property located on Sheet #28. Soil map unit for 45B “Jory silty clay loam, 2 to 8 percent slopes” found on pages 60 and 61, November 1985).

⁴ Statewide Planning Goal 3 became effective on January 25, 1975 and was applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the Clackamas County's EFU-20 and GAD (General Agriculture District) zones on December 31, 1981. See *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), and *Alexanderson v. Polk County*, 289 Or 427, rev. denied, 290 Or 137 (1980)). After the County's plan and land use regulations were acknowledged by LCDC, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions (*Byrd v. Stringer*, 295 Or 311 (1983)).

⁵ According to the claim, the subject property was zoned RA-1 until it was ultimately rezoned on June 19, 1980 to EFU-20. On December 11, 1981, the Commission determined that county's revised EFU-20 Zone complied with Goal 3 because the County included the proper standards for land divisions. (See Commission Continuance Order, December 31, 1981, Department of Land Conservation and Development October 23, 1981. Report, pp. 9-13.)

required the resulting parcels to be: (1) appropriate for the continuation of the existing commercial agricultural enterprise in the areas;” and (2) shown to comply with the legislative intent set forth in ORS 215.263. (See endnote ¹).

As for the dwellings allowed under EFU zoning as required by Goal 3 on the dates of acquisition in 1976 and 1977, farm dwellings were allowed if determined to be “customarily provided in conjunction with farm use” under ORS 215.215(1)(d) (1975 edition). Non-farm dwellings were subject to ORS 215.231(3) (1975 edition).

No information has been presented in the claim to show that the potential one-acre lot development on Tax Lots 1601 and 1602 cited by the claimants complies with the “commercial” standard for farm parcels under Goal 3 or the standards for non-farm parcels under ORS 215.263 (1975 Edition).

Conclusions

Tax Lot 1501: The minimum lot size and dwelling standards established by Statewide Planning Goal 3 and OAR 660, Division 33, and by the provisions of ORS 215, were all adopted after the claimants acquired Tax Lot 1501 in 1969 and do not allow the division of this Tax Lot or the approval of a dwelling on each lot created. Land use laws enforced by the Commission or the department since 1969 restrict the use of Tax Lot 1501 relative to the uses allowed when it was acquired.

Tax Lots 1601 and 1602: The Fromes’ claim for Tax Lots 1601 and 1602 is based on the assumption that the County RA-1 zone was the governing land use regulation when they acquired these Tax Lots in 1976 and 1977. However, because the County RA-1 Zone had not been acknowledged by the Commission at the time the claimants acquired these tax lots, the Goal 3 “commercial” standards for farmland divisions and the standards for new parcels under ORS 215.263 (1975 edition) applied to this portion of the property when the claimants 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

According to the claim, the fair market value of the property has been reduced and compensation of \$1,225,500 is due to the claimants. No information has been provided to substantiate that amount, except a statement that the claimants will provide a certified appraisal if the County (State) decides to pay for compensation for loss in property value (see County Measure 37 Claims Form completed by claimant and included in the claim to the State).

Conclusions

As explained in Section V. 1 of this report, the current owners are Charlene and John Frome, who acquired a portion of the subject property (Tax Lot 1501) in 1969 and portions (Tax Lots 1601 and 1602) in 1976 and 1971. Based on the submitted information, the department has determined that it is more likely than not that there has been some reduction in the fair market value of Tax Lot 1501 as a result of laws enforced by the Commission or the department. Without an appraisal, it is not possible to substantiate the specific dollar amount the claimant demands for compensation.

With regard to Tax Lots 1601 and 1602, the claim does not show that the identified fair market reduction of \$1,225,500 is actually attributed, in part, to land use regulations enacted after the claimants acquired those lots in 1976 and 1977, respectively. Partitioning of Tax Lots 1601 and 1602 at the time of their purchase in 1976 and 1977 was subject to Goal 3 or the standards for non-farm parcels under ORS 215.263 (1975 Edition). It is possible that under the Goal 3 minimum standard for land divisions in place at that time, an additional parcel could have been created. Thus, since today no new parcels are currently permitted, it is more likely than not that some reduction in the fair market value of the property has occurred.

In addition, because approximately 40 percent of the subject property (Tax Lot 1501 consisting of 8.87-acres) was acquired prior to the enactment of the Goal 3, it is likely that there has been some reduction in the fair market value of the entire 21.72-acres. Thus, 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 regulation that is the basis for this claim is Clackamas County EFU zone. The EFU zone implements Statewide Planning Goal 3 (Agricultural Lands), pursuant to ORS 215. The versions of ORS 215 Goal 3 and relevant sections of OAR 660 relating to agricultural lands in place before the claimant acquired Tax Lot 1601 in 1976 and Tax Lot 1602 in 1977, are exempt under Measure 37. Other applicable state regulations cited in the claim do not appear on their face to be exempt under Section 3 of Ballot Measure 37.

Conclusions

The versions of ORS 215, and Goal 3 relating to agricultural lands in place before April 15, 1976 (Tax Lot 1601) and May 28, 1977 (Tax Lot 1602), the dates the claimant acquired those properties, are exempt from this claim. Other applicable regulations cited in the claim do not appear, either on their face or as applied to the subject property, to be exempt under Section 3 of Ballot Measure 37.

There may be other specific laws that continue to apply under one or more of the exemptions in the Measure, 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 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 allowed 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 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 restricts subdivision and development of housing on the subject property. The laws enforced by the Commission or department reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$1,225,500. This amount is not substantiated by an appraisal or by other documentation. Nevertheless, based on the current record for this claim, the department believes 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, Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow the claimant to use Tax Lot 1501 for a use permitted at the time they acquired this portion of the property on September 5, 1969, and to use Tax Lots 1601 and 1602 for a use permitted at the time they acquired these portions of the property on April 15, 1976 and May 28, 1977, respectively.

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 the claimants' use of the subject property: those provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215.780, ORS 215.263 and OAR 660, Division 33 (specifically OAR 660-033-0010) that restrict the claimants' rights to divide the property or to establish a dwelling on the property; and for Tax Lot 1501, to the extent necessary to allow a use permitted when it was acquired on September 5, 1969; and, for Tax Lots 1601 and 1602, to the extent necessary allow a use permitted when they were acquired on April 15, 1976 and May 28, 1977, respectively.
2. The action by the State of Oregon provides the state's authorization to the claimants to divide the property and to establish dwellings on the property, to the extent that those uses were permitted under the standards in effect on the dates they acquired each of the properties. For Tax Lot 1501,

none of the laws specified in this report were in effect on the date the claimants acquired it in 1969. For Tax Lots 1601 and 1602, the standards that were in effect at the time they acquired the property include the provisions of Goal 3 and ORS 215 that were in effect on April 16, 1976 for Tax Lot 1601 and May 28, 1977 for Tax Lot 1602.

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 215.412 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.

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 DLCD; 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 June 10, 2005. OAR 125-145-0100(3), 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.

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 added to July 12, 1979). Further interpretation of the Goal 3 minimum lot size standard can be found in *Meeker v Clatsop County*, *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, *rev. denied*, 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 015 and 020 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 (7/16/82); *Goracke v. Benton County*, 8 Or LUBA 128 (6/8/83); 68 Or App 83 (5/9/84); 12 Or LUBA 128 (9/26/84); 13 Or LUBA 146 (4/4/85); 74 Or App 453 (7/1785), *rev. denied* 300 Or 322 (11/26/85); and OAR 660-05-015 and 020 as amended effective June 7, 1986 (repealed effective August 7, 1993).

The 1982 administrative rule (OAR 660-05-015 and 020) was further amended to incorporate the holdings of these cases (effective June 7, 1986 and repealed effective August 7, 1993).