

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

**Final Staff Report and Recommendation
July 26, 2005**

STATE CLAIM NUMBER: M119546

NAME OF CLAIMANTS: Harvey O. and Dickie Ann Kempema

MAILING ADDRESS: 22484 Northwest Dogwood Street
Hillsboro, Oregon 97124

PROPERTY IDENTIFICATION: Township 1N, Range 3W, Section 27,
Tax Lot 1100
Washington County

DATE RECEIVED BY DAS: February 1, 2005

180-DAY DEADLINE: July 31, 2005

I. CLAIM

Harvey and Dickie Ann Kempema, the claimants, seek compensation in the amount of \$2,000,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the subject property into five-acre parcels. The property is located at 35150 Northwest Hornecker Road, in Washington County and is 55.81 acres. (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 not valid because neither the Land Conservation and Development Commission (the Commission) or the department have enforced laws that restrict the claimants' use of private real property. Based on this determination, the department does not make any further evaluation or determination on the merits or substance of the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 25, 2005, pursuant to OAR 125-145-0080 the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. An earlier notice was sent on February 23, 2005. According to DAS, one comment arrived after the ten-day period requesting that the state deny the claim. The adjacent property owner indicated that allowing residential uses puts unjust pressure on farms. This comment is not specific to the criteria required under Measure 37 for the department's review of this claim. Because no funds have been made available for payment of compensation, comments regarding the possible impact of the proposed or intended development of the claimant's property are not relevant to the department's evaluation and determination of the claimants' Ballot Measure 37 claim. (See comment letters 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 February 1, 2005 for processing under OAR 125, division 145. The claim identifies OAR 629 and 660 and ORS chapters 92, 215, 227, 526 and 527 as the bases for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37 are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

Ballot Measure 37 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in the Measure. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimants, Harvey O. Kempema and Dickie Ann Kempema, acquired the subject property by land sale contract on June 25, 1973. (See copy of the contract and fulfillment deed in department file.). A copy of a Metroscan Property Profile dated December 22, 2004, indicates that Harvey and Dickie Ann Kempema are the current property owners of the subject property, (Washington County Account Number R2014695.)

Conclusions

The claimants, Harvey and Dickie Ann Kempema, are “owners” of the subject property as that term is defined by Section 11(C) of Ballot Measure 37, as of June 25, 1973.

2. The Laws that are the Basis for this Claim

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a law must restrict the claimant’s use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

Findings of Fact

The claim states that the claimants “...cannot divide into 5-acre parcels.” (See Measure 37 claim.) The claim identifies “OAR 629 OAR 660, ORS 92, ORS 215, ORS 227, ORS 526 and ORS 527” and “Any rules or laws since SB 100 went into effect.” as the bases for the claim.

OAR 660 Division 33, ORS 92 and ORS 215 apply to the claim.¹ OAR 629, and ORS 526 and 527 are administered by the Oregon Department of Forestry, and are not addressed in this report.

The subject property has a dwelling and is currently zoned Exclusive Farm Use (EFU) by Washington County as required by Statewide Planning Goal 3 in accord with OAR 660, Division 33, and ORS 215. Current land use regulations, particularly ORS 215.263, 215.213, 215.780 and OAR 660, Division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80-acres and limit the approval of any additional farm or non-farm

¹ ORS 227 applies to land within cities. The subject is not within any city’s jurisdiction. The claimants do not specify how this statute restricts the use of their property in any way, and does not appear to be applicable or relevant to the property subject to this claim.

dwelling on them. An additional accessory farm dwelling or a dwelling for a family member whose assistance is needed in the management of the farm may be allowed on the subject property under ORS 215.213(1) (e) and (f). Any such dwelling approved cannot be divided from the subject property under either ORS 215.263(8) or 215.780.

As explained in Section V.(1) of this report, the claimants acquired the subject property on June 25, 1973. At that time, it was within the County's "Agricultural and Forest District" (F-1). The F-1 zoning district authorized a "single family dwelling or dwellings for owners, operators and/or help required carrying out a use specified in Section 152-1.1." The uses specified in Section 152-1.1 were agricultural uses of the lot or parcel. Further, the F-1 zone required that any new parcels be at least 38-acres in size (see Sections 152-1.1 and 156-1.4(b) as amended by Resolution and Order No. 73-131 adopted on June 5, 1973, effective June 12, 1973). As such, the Claimants' 55.81 acre parcel could not have been divided when it was acquired in 1973, and could qualify only for approval of one additional dwelling for agricultural use. On the date the claimants acquired the property, ORS 215.213 authorized counties to approve farm dwellings, but only if they were customarily provided in conjunction with farm use. Non-farm dwellings were not allowed.

The provisions of ORS 92 prohibiting the sale of land without the prior approval of a partition or subdivision plat, generally date from prior to 1973, when the claimants acquired the property.

Conclusions

The minimum lot size standards established by ORS 215.263, and ORS 215.780, as applied by Goal 3 and OAR 660, division 33 were all adopted after the property was acquired by the claimants in 1973, and limit the approval of an additional dwelling on the subject property, and do not allow the division of the property. However, in 1973, the subject property was within a zoning district that also did not allow its division, and limited approval of an additional dwelling. ORS 215.213 also authorized a farm dwelling only if it was one that was customarily provided in conjunction with farm use. Then, as now, the subject property could not be divided into any smaller parcels, and an additional dwelling was possible on the subject parcel based on standards that are essentially the same as the current standards for such dwellings. Thus, the current state land use regulations applicable to the subject property do not restrict its use relative to the uses allowed when the claimants acquired the property in 1973.

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 an informal estimation of the property's fair market value, in the absence of current regulations, of \$2,000,000. No materials were submitted to substantiate this claim. The

claim also includes a property profile estimating the current market value with improvements to be approximately \$149,500, taking into consideration the tax deferral for the land in farm use.

Conclusions

As explained in section V.(2) of this report, current land use regulations do not restrict the use of the subject property relative to the uses allowed when the claimants acquired the property in 1973. Because the claimants could not divide the subject property when they acquired it and were subject to essentially the same standards for approval to build an additional dwelling on the property in 1973 as they are under the current land use regulations, the current land use regulations do not restrict the use of the property. Nor do land use regulations enacted by the state since the claimants acquired the property that relate to the division of the property or the establishment of an additional dwelling have “the effect of reducing the fair market value of the property, or any interest therein.”

The Kempemas are not due compensation for land use regulations that do not restrict the use or reduce the fair market value of the subject property.

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

Not applicable. See section V. (2) above.

Conclusions

It appears that the general statutory, goal, and rule restrictions on residential development and use of agricultural land that apply to the claimants’ 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, or because they are laws that are not covered by the Measure.

VI. FORM OF RELIEF

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if 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 a 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.

Based on the record, the claimants are not entitled to relief under Ballot Measure 37. Department staff recommends that this claim be denied because neither the Commission nor the Department have enforced laws that were enacted after the claimants acquired the property that restrict the claimants' use of the private real property that is the subject of this claim. Based on this determination, the department does not make any further evaluation or determination on the merits of the claim.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on June 29, 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.