

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

July 25, 2005

STATE CLAIM NUMBER: M119558

NAMES OF CLAIMANTS: Candace Ewalt¹, Tim Ewalt, Erik Koue, and Jennifer Koue

MAILING ADDRESSES: Candace and Tim Ewalt
8437 Southwest 77th Street
Redmond, Oregon 97756

Erik and Jennifer Koue
7205 Northwest 19th Street
Terrebonne, Oregon 97756

IDENTIFICATION OF PROPERTY: Township 14E, Range 13S, Section 20,
Tax Lot 100,
Deschutes County

OTHER CONTACT INFORMATION: Edward P. Fitch, Attorney at law
Bryant, Emerson & Fitch
888 West Evergreen Avenue
P.O. Box 457
Redmond, Oregon 97756-0103

DATE RECEIVED BY DAS: February 2, 2005

180-DAY DEADLINE: August 1, 2005

I. CLAIM

The claimants, Candace Ewalt, Tim Ewalt, Erik Koue, and Jennifer Koue, seek compensation in the amount of \$ 1,500,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of private real property. The claimants desire compensation or the right to develop their property into 2.5-acre lots or parcels for residential development. The property is located at 7205 NW 19th Street, Terrebonne, in Deschutes County. (See claim.)

¹ (Also known as: Mary Candace Goodrum, Candace Koue, Candace G. Koue, Candace Goodrum Ewalt, and Candace G. Koue-Ewalt.)

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 as to Candace Ewalt, Tim Ewalt, and Erik Koue, and is not valid as to Jennifer Koue. Department staff recommends that, in lieu of compensation, the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the subject property in order to allow Candace Ewalt, Tim Ewalt, and Erik Koue to divide and establish dwellings on the subject property: ORS 215.283, 215.284, 215.705, and 215.780, and OAR 660-033-0130 and 660-033-0135. These laws will not apply only to the extent necessary to allow Candace Ewalt, Tim Ewalt and Erik Koue a use of the property permitted at the time he or she acquired his or her interest in the property that is the subject of this claim. The department acknowledges that the relief recommended in this report will not allow Tim Ewalt to use the property in the manner set forth in his claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On February 23, 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, three written comments, (one of which was signed by six different people) were received in response to the 10-day notice. None of these comments address the specific requirements of Ballot Measure 37. Because no funds have been made available for payment of compensation, comments regarding the possible impact of the proposed or intended development of the claimants' property are not relevant to the 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 criterion 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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on February 2, 2005 for processing under OAR 125, Division 145. The claim generally identifies “all regulations and ordinances restricting ability of owners to divide property into 2.5 acre parcels” as the laws that restrict the use of the subject property. 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 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

On September 11, 1958, Lewis Milne Koue and his first wife, Carole Koue, acquired the subject property. On April 26, 1983, claimant Candace Ewalt, then known as Mary Candace Goodrum, married Lewis Koue. There is no evidence in the record that she acquired any interest in the subject property at that time. On January 25 1993, claimant Candace Ewalt (then known as Candace G. Koue), Lewis Koue’s widow, and claimant Erik Koue, Lewis Koue’s son, acquired an interest in the subject property from Lewis Koue’s estate.²

Tim Ewalt and Candace Ewalt were married in 1992. On March 23, 1994, Candace Koue conveyed her interest in the property to herself, as Candace G. Ewalt, and to her husband, Tim Ewalt. Claimants Erik Koue and Jennifer Koue were married on May 18, 1996. The record contains no evidence that Jennifer Koue has acquired any interest in the subject property.

Conclusions

Candace Ewalt, Tim Ewalt, and Erik Koue are “owners” of an interest in the 58.63-acre subject property, as that term is defined in Section 11 (C) of Measure 37. Candace Ewalt and Erik Koue acquired their interests in the property on January 25, 1993. Tim Ewalt acquired his interest in

² According to a May 16, 2005 letter from claimants’ attorney to department staff (see copy in the department claim file), Lewis Koue passed away in June 1990. The January 1993 personal representative’s deed (see copy in the department claim file) also gave Lewis Koue’s other children, Marlane L. Koue Swander, David Koue, and Monique Bailey, an interest in the subject property. In August 1993, David Koue conveyed his interest to Marlane Swander, Monique Bailey, and Erik Koue. In January 1997, Monique Bailey conveyed her interest to claimant Erik Koue. On the same date, Marlane Swander, then known as Marlane Koue, conveyed her interest to Candace Ewalt.

the property on March 23, 1994. The department finds that there is no information in the record to establish that claimant Jennifer Koue is an “owner” of the subject property, as that term is defined in Section 11(C) of Measure 37.

Lewis Koue is a “family member” as that term is defined in Section 11 (A) of Measure 37. He acquired his interest in 1958.

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 claim generally cites “all regulations and ordinances restricting ability of owners to divide property into 2.5-acre parcels.”

There were no zoning restrictions on the subject property when Lewis Koue acquired it in 1958. It has been zoned EFU-40 (Exclusive Farm Use, minimum lot size 40 acres) by Deschutes County since 1979, which was before claimants Candace Ewalt, Tim Ewalt, and Erik Koue acquired their interests in 1993 and 1994.³ The EFU-40 zone was adopted to implement Statewide Planning Goal 3 (Agricultural Lands) (1975) and was subsequently amended to comply with the minimum parcel size and dwelling standards of ORS 215.780 (1993) and OAR 660-033-0100 (1993). The property is “agricultural land” as defined by Deschutes County and Goal 3 because the soils are 150A Tetherow sandy loam, Class VI capability (Class IV if irrigated).

Statewide Planning Goal 3 (Agricultural Lands) (OAR 660-015-0000(3)) and laws applicable to land zoned for agricultural use in ORS 215 (including ORS 215.780) and OAR 660, Division 33 (including OAR 660-033-0130 and 660-033-0135), restrict the zoning, use, and division of the subject property. Some provisions of ORS 215 pertaining to EFU zoning became effective in 1963. Goal 3 became effective on January 25, 1975, and it required agricultural land as defined by Goal 3 to be zoned EFU pursuant to ORS 215 (see OAR 660-015-0000(3)). The agricultural lands administrative rule, OAR 660, Division 33, became effective August 7, 1993. ORS 215.780, which restricts EFU lot size, became effective November 4, 1993 (chapter 792, Or Laws 1993). Other provisions of state law established the standards for the approval of dwellings on land zoned EFU. These include ORS 215.283 (1983), 215.284 (1983),

³ The Commission first acknowledged Deschutes County’s comprehensive plan and land use regulations on April 30, 1981, but this acknowledgment was appealed to the Court of Appeals, which remanded the plan and regulations to the County. On January 30, 1986, the Commission again acknowledged Deschutes County’s comprehensive plan and land use regulations, including the EFU-40 zone, as in compliance with the Statewide Planning Goals. This was prior to the ownership of claimants Candace Ewalt, Tim Ewalt, and Erik Koue in 1993 and 1994.

and 215.705 (1993), and OAR 660-033-0130 and 660-033-0135. These current state laws restrict the claimants' ability to develop the property as stated in the claim.

Conclusions

The relevant state goals, statutes, and rules that current restrict the use of the subject property were not in effect when the claimants' family acquired ownership of the subject property in 1958.

Statewide Planning Goal 3 (Agricultural Lands), and some of the provisions of ORS 215 pertaining to EFU zoning, were enacted before claimants Candace Ewalt and Erik Koue acquired their interests in the subject property on January 25, 1993. ORS 215.780 and OAR 660-033-0130 and 660-033-0135 were enacted after January 1993 and do not allow the division of the property for residential development, thereby restricting use of the property relative to the uses allowed when Ms. Ewalt and Mr. Koue acquired their interest in the property on January 25, 1993.

All of the relevant goals, statutes, and rules were enacted before claimant Tim Ewalt acquired an interest in the property on March 23, 1994 and therefore do not restrict his use of the property relative to uses allowed when he acquired his interest.

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 regulations 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 alleges a fair market value reduction of \$1,500,000 under current land use regulations based on "a market analysis of similar properties."⁴ The fair market value of the property under current land use restrictions is \$368,560, based upon information from the County Assessor.⁵ The claimants' attorney asserts that the value of the property is \$1.5 million "if it can be divided as the claimants' desire."⁶ The claim includes no appraisal or other substantiating documentation of these estimated values.

Conclusions

Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 pertaining to EFU zoning were in effect at the time claimants Candace Ewalt and Erik Koue acquired

⁴ See May 16, 2005 letter from the claimants' attorney in the department claim file.

⁵ See May 16, 2005 letter from the claimants' attorney in the department's claim file. The Deschutes County Assessor records on the County's web site show the current real market value of the subject property as \$368,560.

⁶ See May 16, 2005 letter from the claimants' attorney in the department's claim file.

ownership of the property in January 1993. Specific provision of ORS 215 and OAR 660, Division 33 pertaining to minimum lot size and dwelling standards, specifically, ORS 215.283, 215.284, 215.705, and 215.780, and OAR 660-033-0130 and 660-033-0135, were enacted after January 1993. These laws do not allow the division of the subject property into 2.5-acre lots or parcels for residential development and therefore have the effect of reducing its fair market value to some extent. The exact amount of that reduction is not known. The claim asserts this amount to be \$1,500,000. However, because the claim does not include an appraisal or other substantiating documentation, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that some of the laws on which the claim is based more likely than not have reduced the fair market value of the property to some extent.

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 generally refers to land use laws that restrict the ability of the property owners to divide the land into 2.5-acre parcels or lots for residential development. These provisions include Statewide Planning Goal 3 (Agricultural Lands), ORS 215 (specifically, ORS 215.283, 215.284 and 215.705, and 215.780), and OAR 660, Division 033 (specifically, OAR 660-033-0100(1), 660-033-0130 and 660-033-0135). All of these laws were adopted after the claimants' family acquired the property in 1958.

Conclusions

Without a complete listing of laws that are the basis for the claim, it is impossible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that the general statutory, goal and rule restrictions related to the subject property's EFU designation and that apply to the claimants' use of the property, were adopted after the claimants' family acquired the property and are, therefore, not exempt under Measure 37, Section 3. 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 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 a law to allow the present owner to carry out a use of the property permitted at the time the owner acquired the property. The Commission, by rule, has directed that if the department determines that 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 2.5-acre parcels or lots for residential development. Claimants Candace Ewalt, Erik Koue, and Tim Ewalt cannot create the desired residential lots from the subject property. The laws enforced by the Commission or department reduce the fair market value of the property to some extent. The claim asserts this amount to be \$1,500,000. However, because the claim does not include an appraisal or other substantiating documentation, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that some of 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 one or more land use regulations to allow claimants Candace Ewalt, Erik Koue, and Tim Ewalt to use the subject property for a use permitted at the time each of them acquired the property.

Jennifer Koue is not an owner of the subject property and is not entitled to relief.

Conclusions

Based on the record, the department recommends that the claim be denied as to Jennifer Koue and approved as to Candace Ewalt, Erik Koue, and Tim Ewalt, subject to the following terms:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to allow the claimants to divide the property into 2.5-acre lots or parcels for residential development: the applicable provisions of ORS 215.283, 215.284, 215.705, and 215.780, and OAR 660-033-0130 and 660-033-0135 enacted after January 25, 1993 as to Candace Ewalt and Erik Koue; and enacted after March 23, 1994 as for Tim Ewalt. These land use regulations will not apply to the claimants' use of the property only to the extent necessary to allow these claimants a use permitted at the time they each acquired their respective interests in the property. The department acknowledges that the relief recommended in this report will not allow Tim Ewalt to use the property in the manner set forth in his claim.
2. The action by the State of Oregon provides the state's authorization to Candace Ewalt and Erik Koue to use the property subject to the standards in effect on January 25, 1993 and to Tim Ewalt to use the property subject to the standards in effect on March 23, 1994.
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 final 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 final order will remain subject to the following laws: (a) those laws not specified in (1) above; (2) 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.
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 Deschutes County or any other public jurisdiction that enforces land use regulations applicable to the property. Nothing in the final order will relieve the claimants from the necessity of obtaining a decision under Measure 37 from local public entities that have jurisdiction to enforce a land use regulation applicable to a use of the property by the claimants. The department recommends that the claim for Jennifer Koue be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on July 1, 2005. OAR 125-145-0100(3), provided an opportunity for the claimants 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.