

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

August 1, 2005

STATE CLAIM NUMBER: M119628

NAME OF CLAIMANTS: Marion and Yvonne Stewart

MAILING ADDRESS: 11252 South Township Road
Canby, Oregon 97013

IDENTIFICATION OF PROPERTY: Township 4S, Range 1E, Section 1
Tax Lot 800,
Clackamas County

OTHER CONTACT INFORMATION: Matt Stewart
39679 South Cooper Road
Molalla, Oregon 97013

DATE RECEIVED BY DAS: February 7, 2005

180-DAY DEADLINE: August 6, 2005

I. CLAIM

The claimants, Marion and Yvonne Stewart, seek compensation in the amount of \$450,000 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 the right to partition their property and to establish a single-family residence on it. The property is 39.95-acres located at 11252 South Township Road, near Canby Oregon. (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 this claim is valid. Department staff recommends, in lieu of compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimants to allow them to partition their property and establish a single-family residence on the partitioned parcel: Statewide Planning Goal 3, ORS 215.263, 215.780 and 215.284; and applicable provisions of OAR 660, division 33, to the extent necessary to allow Mr. and Ms. Stewart a use of the subject property permitted at the time they acquired it on October 1, 1949. (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 owners of surrounding properties. According to DAS, there was one written comment, in response to the 10-day notice. Comments specific to the criteria in Ballot Measure 37 are addressed in the appropriate sections of this report. 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 claimant's Ballot Measure 37 claim. (See 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

This claim was submitted to DAS on February 7, 2005, for processing under OAR 125, division 145. The claim identifies Goal 3, ORS 215.283(1) (f), ORS 215.263(1), ORS 215.780(1) (a) and OAR 660, Division 33, as land use laws that restrict 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 has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulation 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 of 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, Marion and Yvonne Stewart, acquired the subject property on October 1, 1949. (See copy of land sale contract and fulfillment deed, dated April 16, 1964, in the department’s claim file.) A copy of the Real Property Tax Statement from Clackamas County for July 1, 2004, through June 30, 2005 lists the claimants as the current owners of the subject property (Clackamas County Tax Map 41E01 00800).

Conclusions

The claimants, Marion and Yvonne Stewart are “owners” of the subject property as that term is defined in Section 11(C) 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 claim states:

“Grandson will build and reside in building with his family. He will also maintain the balance of the land and buildings.”

(See supplemental information provided by the claimants on February 7, 2005 and March 17, 2005 in the department’s claim file.) Based on a phone conversation with the claimants’ grandson, Matthew Stewart on July 12, 2005, the claimants’ desire to partition off 5-acres from the subject property as a home site. The original claim expressed a desire to partition off a 2-acre home site.

The claim is based, in part, on Clackamas County’s current Exclusive Farm Use (EFU) Zone and the applicable provisions of state law that require such zoning. The claimants’ property is zoned EFU as required by Goal 3 in accord with OAR 660, division 33 and ORS 215 because the claimants’ property is “agricultural land” as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284, 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 establish standards for allowing the existing or any proposed parcel(s) to have farm or non farm dwellings on them.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (chapter 792, Oregon Laws 1993). ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f).

OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. Subsequent amendments to comply with HB 3326, (chapter 704, Oregon Laws 2001, and effective January 1, 2002) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

The claimants acquired the subject property on October 1, 1949, prior to adoption of the state's land use laws related to zoning of land for agricultural uses.

Conclusions

Lot size and dwelling standards in ORS 215, and OAR 660, division 33, in accord with Statewide Planning Goal 3, adopted since the claimants acquired the property in 1949, do not allow the division of the property into parcels less than 80 acres in size or allow the approval of dwellings as may have been possible in 1949. The County's EFU zone is based on the standards required by Goal 3, ORS 215 and OAR 660, division 33. Land use laws adopted since 1949, restrict the use of the property from what could have been done when the property was acquired by the claimants in 1949.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

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 claimants did not identify a specific amount of compensation due for the reduction in fair market value as a result of land use laws in their original claim. However, they have since provided information on the values of comparable properties from the Clackamas County assessor's office. According to the claimants' grandson, the property value without a dwelling, based on the most recent tax statement is \$8,000. (This does reflect the tax deferral for farm use.) The value of small acreage lots, based on properties sold in the area, without dwellings has averaged approximately \$40,000 per acre and with dwellings, \$200,000 per acre. Based on this information, it is estimated that the reduction in the value of the property due to restrictions on division of a 5-acre home site is approximately \$500,000.

Conclusions

As explained in section V. (1) of this report, Marion and Yvonne Stewart are the current owners of the subject property as of October 1, 1949. Thus, under Ballot Measure 37, the Stewarts are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in section V.(2) of this report, laws adopted since the claimants acquired the property in 1949 restrict division of the subject property and establishment of a dwelling. The claimants have estimated a \$500,000 reduction in fair market value as a result of land use laws that restrict the partition of their property for use as a homesite.

Without an appraisal based on the partition of the property for a home site or other explanation, 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 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 is based on Clackamas County's EFU zone and the related provisions of state law that have restricted use of the property and reduced its fair market value, including Statewide Planning Goal 3, "Agricultural Lands," and applicable provisions of ORS 215 and OAR 660, division 33. All of the specific state land use regulations cited in the claim were enacted after the claimants acquired the property in 1949, and do restrict the use of the property in a manner that likely reduces its fair market value. None of the laws identified in the claim appear to be exempt under Section 3(E) of Ballot Measure 37.

Conclusions

Without a specific development proposal for the property, it is not possible 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 on residential development and use of farm land apply to the claimant's use of the property, and for the most part these laws are not exempt under section 3(E) of Measure 37.

Laws in effect when the claimant acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the property that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under section (3) of Measure 37 that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the property.

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 conclusions in this report, laws enforced by the Commission or the department, prohibit the division of the subject property and the establishment of a single-family residence on it. These restrictions appear to reduce the fair market value of the subject property to some extent. Information provided from the claimant indicates that the reduction in fair market value due to the restrictions is approximately \$500,000. However, because the claim does not provide an appraisal or other specific explanation for how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely 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 just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or

parts of certain state land use regulations to allow the Stewarts to use the subject property for a use permitted at the time they acquired the property on October 1, 1949.

Conclusions

Based on the record, and provided the claimants provide some evidence of a reduction in value caused by land use restrictions enacted since they acquired the property in 1949, 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 Stewarts' partitioning of their property to create one additional parcel and the establishment of a single family dwelling on the parcel created: Statewide Planning Goal 3, ORS 215.263, 215.780 and 215.284; and applicable provisions of OAR 660, division 33. These land use regulations will not apply to the Stewarts' use of their property only to the extent necessary to allow the claimants to a use permitted at the time they acquired the property on October 1, 1949.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property subject to the standards in effect on October 1, 1949.
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 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 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 July 12, 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.