

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

August 3, 2005

OREGON CLAIM NUMBER: M119723

NAME OF CLAIMANTS: Danny and Mary Erwert

MAILING ADDRESS: 24275 South Highway 213
Mulino, Oregon 97042

IDENTIFICATION OF PROPERTY: Township 4S, Range 2E, Section 4
Tax Lot 1101
Clackamas County

DATE RECEIVED BY DAS: February 11, 2005

180-DAY DEADLINE: August 10, 2005

I. CLAIM

The claimants, Danny and Mary Erwert, seek compensation in the amount of \$280,479 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 their 6.26 acre property into one-acre parcels, each to be developed with single-family dwelling. The property is located on the west side of S. Highway 213 just of S. Spangler Road, in Clackamas County. (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. 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 the claimants to divide the subject property into one-acre lots and develop each with a single-family dwelling: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780, and OAR 660, division 33. These laws will not apply to the claimants' use of the property only to the extent necessary to allow Mr. Erwert a use of the property allowed when he acquired the property on December 5, 1975; and to allow Ms. Erwert a use of the property allowed when she acquired an interest in the property on December 15, 1996. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On February 14, 2005, pursuant to OAR 125-145-0080 the Department of Administrative Services (DAS) provided notice to properties owners surrounding the property subject to this claim. In response to the notice issued by DAS, one person provided general comments that are not specific to the criteria used in the department's review of this claim. The comment was not specific to the criteria required under Measure 37 to be used in 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 claimants' property are not relevant to the evaluation and determination of the claimants' Ballot Measure 37 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 February 11, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's Exclusive Farm Use (EFU) zoning and state laws that restrict the use of the property as the basis of 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.

V. ANALYSIS OF CLAIM

1. Ownership

Ballot Measure 37 provides for payment of compensation or relief from laws for “owners” as those terms are 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 are Danny and Mary Erwert. Danny Erwert acquired the property on December 5, 1975. (See land sale contract and November 6, 1980 fulfillment deed in department claim file.) On December 18, 1996 Danny Erwert conveyed an undivided one-half interest in the subject property to Mary E. Erwert. (See department claim file.)

Conclusions

Danny and Mary Erwert, are “owners” of the subject property as that term is defined in Section 11 of Measure 37. Danny Erwert acquired an interest on December 5, 1975, and Mary Erwert acquired an interest on December 18, 1996. Danny Erwert is a “family member” as to Mary Erwert as that term is defined by Section 11 (A) of Measure 37.

2. Challenged Regulations

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 Fact

The claim states that the reduction in the fair market value is based on restrictions on the subject 6.26-acres that prevent it from being “divided into one-acre residential parcels.”

The claim is based on Clackamas County’s EFU zone. The County zoning is required by Goal 3 in accord with OAR, division 33 and ORS 215 because the claimants’ property is “Agricultural Land” as defined by Goal 3. Goal 3 requires that Agricultural Lands are to be zoned EFU, pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284, 215.780 and Goal 3 as implemented by OAR 660, division 33, do not allow the subject property to be divided into parcels less than 80-acres. These provisions also establish standards for farm and non-farm dwellings on the existing or any proposed parcel(s). The subject 6.26-acres cannot be further divided and is not entitled to a farm or non-farm dwelling under the current requirements of Goal 3, ORS 215.263, 215.284, and 215.780, and OAR 660 division 33.¹

ORS 215.780 established 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). (See also OAR 660-033-0100(1) – Minimum Parcel Size Requirements.) 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. (See citations of administrative rule history for OAR 660-033-0130 and 0135.)

Mr. Erwert purchased the property in 1975, when it was zoned Rural Agricultural (RA-1), 1-acre minimum. The property was rezoned EFU on August 23, 1979. The EFU zone was later amended to implement HB 3361 (1993).²

The RA-1 zone in effect in 1975 had a one-acre minimum parcel size requirement for the creation of new lots or parcels (adopted December 10, 1970).³ However, at the time, the County's RA-1 zone was not acknowledged 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. Because the Commission had not acknowledged Clackamas County's local comprehensive plan and land use regulations, including the RA-1 zone that applied to the subject property, Statewide Planning Goal 3 applied directly to the property when Mr. Erwert acquired it in December 1975.

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

¹ 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 it cannot be divided to allow a non-farm dwelling under ORS 215.263(4). The existing parcel is also not eligible for a non-farm dwelling because the property is composed of predominately Class II and III agricultural soils, and therefore the property would not qualify for a non-farm dwelling under ORS 215.284(1). (Soils Survey of Clackamas County, property located on Sheet #28. Soil map units for Jory silty clay loam, 45B and 45C, found on pages 60 through 63, November 1985.)

² Source: Clackamas County's decision on Measure 37 Claim for Erwert, Order No. 2005-135, June 8, 2005. (See the department's claims file).

³ See Footnote 2.

Commission's acknowledgment of local plans.⁴ Clackamas County's EFU and GAD (General Agriculture District) zones were acknowledged on December 31, 1981. Until the County's land use regulations were acknowledged by the Commission, the use of the subject property was subject to both the county's ordinances and the applicable statewide land use planning goals.⁵

In 1975, the State standards for a land division 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 the property when acquired by Mr. Erwert in 1975 was limited to land divisions done consistent with Goal 3 that required the resulting parcels 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 215.243.ⁱ

As for the dwellings allowed under EFU zoning as required by Goal 3 on the date of acquisition in 1975, farm dwellings were allowed if determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1975 edition) and non-farm dwellings were subject to ORS 215.213(3) (1975 edition).

Information has not been presented in the claim to establish that the claimants' desired one-acre parcels with residential dwellings complies with the standards for new parcels under Goal 3 and ORS 215.263 or for non-farm dwellings under ORS 215.213(3) (1975 Edition).

Conclusions

Mr. and Ms. Erwert's claim is based on the assumption that the County's RA-1 zone was the governing land use regulation when he acquired the property in 1975. However, because the County's RA-1 zone had not been acknowledged by the Commission at the time Mr. Erwert acquired the property, the standards for new farm parcels under Goal 3 and ORS 215.263 (1975 edition) applied to the property, rather than the one-acre minimum parcel size requirement of the unacknowledged RA-1 zone.

⁴ 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), *Alexanderson v. Polk County*, 289 Or 427, *rev. denied*, 290 Or 137 (1980) and *Perkins v City of Rajneeshpuram*, 300 Or 1, (1985). After the County's plan and land use regulations were acknowledged by the Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions (See *Byrd v. Stringer*, 295 Or 311 (1983). 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. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

⁵ The subject property was zoned RA-1 until it was ultimately rezoned on August 23, 1979, to EFU, more than two years after Mr. Erwert purchased the property. In 1981, the County revised the zone to comply with a Commission order that directed the County to bring its EFU Zone into compliance with Goal 3. On December 11, 1981, the Commission determined that the County's revised EFU-20 Zone complied with Goal 3 because the County included the proper standards for land divisions (Commission Continuance Order, December 31, 1981, Department of Land Conservation and Development, October 23, 1981 Report, pp. 9-13).

Based on the correct statutory standards for land divisions applicable to this property when Mr. Erwert acquired it in 1975, it is possible that the property could satisfy the requirements of Goal 3 and ORS 215.263 (1975 edition) to create one-acre parcels, which is more than the ORS 215.263 and 215.780 currently allow. Non-farm dwellings may also be possible based on the standards for such dwellings in effect in 1975, which is more than allowed under the current standards for dwellings under ORS 215, as applied by Goal 3 and OAR 660, division 33.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any land use regulation described in Section V. (3) of this report “has the effect of reducing the fair market value of the property, or any interest therein.”

Findings of Fact

According to the claimants, the inability to divide their 6.26-acres into one-acre residential lots, because of current restrictions under the EFU Zone, results in a fair market value reduction of \$280,479. The claimants based this amount by comparing current assessed value of the subject property of \$197,036 to the value of a recent sale of a 1.56-acre residential parcel in the area. They multiplied the per-acre value of that sale by the 6.26 acreage of the subject property to arrive at a per-acre estimated value of the subject property as six individual parcels. The claim also includes sales and assessed value information from other nearby properties. However, an appraisal of the property was not included in the submitted claim.

Information in the claim does not show that the identified fair market value reduction of \$280,479 would actually result from land use regulations enacted after the claimants acquired the property in 1975. As stated above, partitioning of the subject property at the time of purchase in 1975 was subject to compliance with Goal 3 and requirements of ORS 215, and no information has been presented to show that the one-acre lot development would be authorized under the statutory standards that applied at that time. All that can be determined is that because the potential to further divide the property existed in 1975, there is likely some reduction in fair market value of the property since no new parcels and dwellings are currently permitted.

Conclusions

As explained in Section V. (1) of this report Danny and Mary Erwert are owners of the subject property. Danny Erwert acquired the property in 1975, and Mary Erwert acquired an interest in the property in 1996 from her husband. Under Measure 37, the Erverts are due compensation for land use laws that restrict the use of the property in a manner that reduces its fair market value.

The claimants have not provided information to show that their desired partition of the subject property into one acre parcels was permitted under the Goal 3 and ORS 215 standards that applied when Mr. Erwert purchased the property in 1975. Until it is determined whether additional parcels could have been created in 1975, a specific amount of any reduction in the fair market value of the property cannot be determined. However, since the property cannot be divided at all under current standards but possibly could be divided under the Goal 3 standard in

effect in 1975, 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. These are Statewide Planning Goal 3, "Agricultural Lands," and applicable provisions of ORS 215 and OAR 660, division 33. With the exception of provisions of Goal 3 and ORS 215 in effect when Mr. Erwert acquired the property in 1975, none of the laws identified in the claim appear to be exempt under Section 3 of Ballot Measure 37.

Conclusions

It appears that the general statutory, goal and rule restrictions on the division, residential development and use of agricultural land apply to the claimants' use of the property, and for the most part, these laws do not appear to come under any of the exemptions in Measure 37. The restrictions in ORS 215 and Goal 3 in effect when Danny Erwert acquired the property will continue to apply to the property. 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 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.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the division of the subject property into 1-acre parcels, with residential dwellings on each resulting parcel. The claim asserts laws enacted or enforced by the Commission or department reduce the fair market value of the subject property by \$280,479. However, because the amount identified by the claimants is not based on the correct development standard and because the claim does not provide a 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 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, Ballot Measure 37 authorizes the department to modify, remove or not apply one or more land use regulations to allow Mr. Erwert to use the subject property for a use allowed when he acquired the property on December 5, 1975, and to allow Ms. Erwert to use the subject property for a use allowed when she first acquired interest in the property on December 18, 1996.

Ms. Erwert acquired her interest in the property on December 18, 1996, after the effective date of the statutory provisions that restrict the creation of a non-farm parcel in the Willamette Valley under ORS 215.263(4), and the restriction in the Willamette Valley on the approval of a non-farm parcel under ORS 215.284(1) (chapter 792, Oregon Laws 1993 (HB 3661)).

Conclusion

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of paying just compensation under Measure 37, the State of Oregon will not apply the following laws to Danny Erwert's division of the property into six parcels or to the establishment of a single-family dwelling on each parcel: those provisions of Statewide Planning Goal 3, ORS 215.263, 215.284 and 215.780, and OAR 660, division 33, that restrict the division and development of the property that were enacted after Mr. Erwert acquired the property on December 5, 1975. In lieu of paying just compensation under Measure 37, the State of Oregon will not apply the following laws to Mary Erwert's division and development on each parcel: those provisions of Statewide Planning Goal 3, ORS 215.263, 215.284 and 215.780, and OAR 660, division 33, that restrict the division and development of the property that were enacted after Ms. Erwert acquired an interest in the property on December 18, 1996.
2. The action by the State of Oregon provides the state's authorization to Danny Erwert to use the property subject to the laws in effect on December 5, 1975, including applicable provisions of Statewide Planning Goal 3 and ORS 215 then in effect; and to Mary Erwert to use the property subject to the laws in effect on December 18, 1996, including applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33, then in effect.
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 any of 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 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 excepted under section (3) of the measure.

5. Without limiting the generality of the foregoing terms and conditions, in order for any of 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 any of 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 11, 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.

Endnote:

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 5, 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 (May 9, 1984); 12 Or LUBA 128 (September 26, 1984); 13 Or LUBA 146 (April 4, 1985); 74 Or App 453 (July 17, 1985), *rev. denied* 300 Or 322 (November 29, 1985); 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).