

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

August 4, 2005

STATE CLAIM NUMBER: M119729

NAME OF CLAIMANTS: Ronald L. Spiering
Duane J. Spiering

MAILING ADDRESSES: Ronald L. Spiering
45150 Northwest Elk Mountain Road
Banks, Oregon 97106

Duane J. Spiering
45510 Northwest Cedar Canyon Road
Banks, Oregon 97106

IDENTIFICATION OF PROPERTY: Township 2N, Range 4W, Section 23
Tax Lot 1300
Washington County

Township 2N, Range 4W, Section 26
Tax Lot 200
Washington County

DATE RECEIVED BY DAS: February 11, 2005

180-DAY DEADLINE: August 10, 2005

I. CLAIM

The claimants, Ronald Spiering and Duane Spiering, seek compensation in the amount of \$1,738,000 for a 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 two parcels containing approximately 76.8-acres into four 10-acre parcels and seven 5-acre parcels with one single-family dwelling on each lot. The property is located at 45150 Northwest Elk Mountain Road, near the city of Banks in Washington County, Oregon.

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 just 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 divide their property into four 10-acre parcels and seven 5-acre parcels with one single-family dwelling on each lot: applicable provisions of Statewide Planning Goal 3 ORS 215.213, 215.263, 215.284, and 215.780, and OAR 660, division 33, enacted after December 15, 1975. These laws will not apply to the claimants to the extent necessary to allow Ronald and Duane Spiering a use of the subject property permitted at the time they acquired it on December 15, 1975. At that time the use of the property was subject to the version of Statewide Planning Goal 3 then in effect. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On March 1, 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, no written comments, evidence or information were received in response to the 10-day notice.

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 11, 2005, for processing under OAR 125, division 145. The claim identifies Washington County's Agriculture and Forest District (AF-20) zoning and state 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 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, Ronald and Duane Spiering, acquired the subject property by contract on December 15, 1975. (See Real Estate Contract included in the department’s claim file.) A staff report issued by Washington County in response to the claimants’ Measure 37 claim to the County indicates that Ronald and Duane Spiering remain owners of the subject property.

Conclusions

Based on the record currently before the department, the claimants, Ronald and Duane Spiering, are “owners” of the subject property as that term is defined in Section 11 (C) of Ballot Measure 37, as of December 15, 1975.

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 claimants’ 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 claimants or a family member acquired the property.

Findings of fact

The claim states that Washington County’s rezoning of the property from AF-5 to AF-20 has restricted the use of the claimants’ property. Other statements in the claim refer to House Bill 3661, ORS 215, OAR income standards and EFU zoning.

The claim is based on Washington County’s Agriculture and Forest District (AF-20) zone and the applicable provisions of state law that require such zoning. The AF-20 zone is an EFU zone within the county. The claimants’ property is zoned AF-20 as required by Statewide Planning Goal 3 in accord with OAR 660, Division 33, because the claimants’ property is “Agricultural Land” as defined by Goal 3.

Oregon's Statewide Planning Goals, including Goal 3, became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned for Exclusive Farm Use (EFU). Land that is zoned for EFU is also subject to restrictions based on certain provisions of ORS 215. Current land use regulations, particularly ORS 215.213, 215.263, 215.284, and 215.780, along with Goal 3 and OAR 660, division 33, do not allow the subject property to be divided into parcels less than 80-acres and establish standards for farm and non-farm dwellings.

ORS 215.780, which contains an 80-acre minimum size for the creation of new lots or parcels in EFU and Forest zones, became effective November 4, 1993 (chapter 792, Oregon Laws 1993 (1993 HB 3661)). ORS 215.263 contains standards for the creation of new parcels for farm and non-farm uses and for farm and non-farm dwellings allowed in an EFU zone and became effective on October 5, 1973. ORS 215.263 was amended in 2001 by HB 3326, to provide new standards for the creation of new parcels for non-farm dwellings as well as the non-farm dwellings themselves. ORS 215.213 provides the standards for farm and non-farm uses and for the placement of dwellings in EFU zones in counties with adopted standards for marginal lands.

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 215.213(3). 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 Spierings acquired the property on December 15, 1975, when it was zoned by Washington County as both Agriculture and Forest, ten-acre minimum (AF-10) and Agriculture and Forest, five-acre minimum (AF-5), qualified EFU zone under ORS chapters 215. Under the AF-10 zone in 1975, new lots or parcels were limited to a ten-acre minimum size. Under the AF-5 zone in 1975, new lots or parcels were limited to a five-acre minimum size. However, at that time, the County's AF-10 and AF-5 zones were 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. The Commission acknowledged the rural portion of Washington County's Comprehensive Plan and land use regulations, which include the subject property, as complying with the Statewide Planning Goals on May 31, 1984.

Since the Commission had not acknowledged Washington County's comprehensive plan and land use regulations, including the AF-5 and AF-10 zones, when the Spierings acquired the property on December 15, 1975, Statewide Planning Goal 3 applied directly to property on the date of acquisition.¹ In 1975, the state standards for a land division involving property where the

¹ 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 where site specific goal provisions applied prior to the Commission's acknowledgment of the County's Goal 3 program on February 9, 1979 (*Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (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 Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions, (*Byrd v. Stringer*, 295 Or 311, (1983)). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same in substance, the

local zoning was not acknowledged were that the resulting parcels must be of a size that is “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 the Spierings acquired it in 1975, was limited to land divisions done consistent with Goal 3, that required the resulting farm or non-farm parcels to be: (1) “appropriate for the continuation of the existing commercial agricultural enterprise in the area;” and (2) shown to comply with the legislative intent set forth in ORS 215.243.

As for dwellings allowed under EFU zoning as required by Goal 3 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). Before a farm dwelling could be established on Agricultural Land, the farm use to which the dwelling relates must “be existing.”² Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use.

ORS 215.213(3) (1975 edition) authorized a non-farm dwelling only where the dwelling was compatible with farm uses, consistent with the intent of ORS 215.243, did not interfere seriously with accepted farming practices on adjacent lands, did not materially alter the stability of the land use pattern for the area, and was situated on land generally unsuitable for production of farm crops and livestock ORS 215.213(3) (1975 edition).

The claim provides no information to establish whether the claimants’ request for 5-acre and 10-acre parcels complies with either the Goal 3 standard for lot size on for farm parcels, or the standards for new parcels under ORS 215.263 in place when they acquired the property in 1975 (1975 Edition).

Conclusions

Lot size and dwelling standards established by amendments to Statewide Planning Goal 3 amendments to ORS 215, and OAR 660, division 33, adopted since the claimants acquired the property in 1975, 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 1975. The County’s AF-20 zone is based on the standards established by Goal 3 and by ORS 215 and OAR 660, division 33. Land use laws adopted since 1975 restrict the use of the property from what could have been done when the property was acquired by the claimants in 1975. However, the claim does not establish whether the claimants’ requested level of development complies with the standards in effect when they acquired the property on December 15, 1975.

applicable rules must be interpreted and applied by the county in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

² *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) *affirmed without opinion*, 70 Or App 179 (September 14, 1984) and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33, (November 23, 1988).

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 use(s) that the claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and that may continue to apply to the claimant's 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 a 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.

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 states that the fair market value of the subject property has been reduced by \$1,738,000 as a result of land use laws enacted after the claimants acquired the property in 1975.

The claimants' estimate does not include an explanation for the alleged reduction in value and there is no certified appraisal to substantiate the claimed values either before or with state land use regulations.

Conclusions

As explained in section V.(1) of this report, Ronald and Duane Spiering are current owners of the subject property and acquired the property on December 15, 1975. Thus, under Ballot Measure 37, the Spierings 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 restrict division and development of the subject property.

The claim asserts this amount to be \$1,738,000. However, the claim does not establish whether the level of development desired by the claimants, would have been allowed under the standards in effect in 1975. Without an appraisal or other substantiating documentation, and without verification of the uses allowed when the claimants acquired the property, 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 Washington County's AF-20 zone and the related provisions of state law that have restricted use of the property and reduced its fair market value since the claimants acquired the property, including Statewide Planning Goal 3, "Agricultural Lands," and applicable provisions of ORS 215 and OAR 660, division 33. With the exception of those provisions of Goal 3 and ORS 215 in effect in 1975 when the claimants acquired the property, those specified laws do not appear to be exempt under Section 3(E) of Ballot Measure 37.

Conclusions

Without a specific development proposal, 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 appears that the general statutory, goal and rule restrictions specified above apply to the claimants' use of the property, and, to the extent they were enacted after the claimants acquired the property, generally it appears these laws would not come under any of the exemptions in Measure 37. Laws in effect when the claimants 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 under one or more of the exemptions in the Measure under subsections 3(A) to 3(D), or because they are laws that are not covered by the Measure.

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 claimant's 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 use(s) that the claimant has 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. 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 owners to carry out a use of the property permitted at the time the present owners 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 into four (4) 10-acre parcels and seven (7) 5-acre parcels with one single-family dwelling on each parcel. These restrictions reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$1,738,000. However, the claim does not provide an explanation, appraisal or other substantiating documentation about how the specified restrictions reduce the fair market value of the property. The claim also does not establish whether the desired level of development would be allowed under the laws in effect in 1975, when the claimants acquired the property. Without such verification, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, the department acknowledges that state land use laws have more likely than not 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 Ronald Spiering and Duane Spiering to use the subject property for a use permitted at the time they acquired it.

As explained in Section V. (2) of this report, the claimants acquired the property on December 15, 1975. At that time, the property was zoned AF-10 subject to Statewide Planning Goal 3 and the applicable goal and statutory standards for new farm and non-farm parcels and dwellings as explained in that section.³

Conclusions

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 Spierings' to divide their property into four 10-acre parcels and seven 5-acre parcels with one single-family dwelling on each lot: applicable provisions of Statewide Planning Goal 3, ORS 215.213, 215.263, 215. 284 and 215.780; and OAR 660, division 33, enacted after December 15, 1975. These land use regulations will not apply to the Spierings' use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property.

³ An indication of how these land division and dwelling standards applied to the property when it was acquired and that comply with the Goal 3 minimum lot size standard, ORS 215.263 and the farm and non farm dwelling standards under ORS 215.213 are the land division and dwelling standards in the County's acknowledged EFU and AF-20 zones. The acknowledged EFU and AF-20 zones for Washington County established an 80-acre minimum for new parcels and required that farm and non-farm dwellings comply with the applicable standards under ORS 215.213.

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 December 15, 1975. As explained in Section V. 2 of this report, on that date, the property was subject to Statewide Planning Goal 3 and applicable provisions of ORS 215 (1975 editions).

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 13, 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.