

**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: M119741

NAME OF CLAIMANTS: Robbie R. Fisher and
Evelyn E. Fisher

MAILING ADDRESS: 5155 Gaffin Road SE
Salem, Oregon 97301

IDENTIFICATION OF PROPERTY: Township 8S, Range 2W, Section 5A,
Tax Lots 800, 1000, and 1300,
Marion County

DATE RECEIVED BY DAS: February 14, 2005

180-DAY DEADLINE: August 13, 2005

I. CLAIM

The claimants, Robbie R. Fisher and Evelyn E. Fisher, seek compensation in the amount of \$542,460 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 their 11.39-acre property into approximately six lots that are 1.73-acres or larger. The property is located at 5155 Gaffin Road SE, in Marion County. (See the 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 just compensation, that the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimants in order to allow the claimants to divide their property into 1.73-acre or larger parcels: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215.263 and 215.780, and OAR 660, division 33, in effect when the claimants acquired each of the three parcels that comprise the subject property. These laws will not apply only to the extent necessary to allow Mr. and Ms. Fisher a use of Tax Lot 800 permitted on December 11, 1963; a use of Tax Lot 1000 permitted on May 4, 1976; and a use of

Tax Lot 1300 permitted on and January 13, 1993. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On February 25, 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, one written comment, evidence or information was received in response to the 10-day notice. The comment does not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law. (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 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

The claim was submitted to DAS on February 14, 2005 for processing under OAR 125, division 145. The claim identifies laws effective October 17, 1979 that “established the special ag zone” and “prohibits the division of the property into small tracts” as the laws that are 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 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 December 11, 1963, Robbie and Evelyn Fisher acquired an interest in Tax Lot 800 (6.06-acres).¹ On May 4, 1976, the Fishers acquired Tax Lot 1300 (4.92-acres). On January 13, 1993, the Fishers acquired Tax Lot 1000 (0.31-acre). (See documents in department claim file.) A current title report and Marion County Tax Assessor records substantiate that Robbie and Evelyn Fisher are the current owners of the three Tax Lots that comprise the subject property.

Conclusions

The claimants, Robbie and Evelyn Fisher are “owners” of the subject property, as that term is defined in Section 11 of Ballot Measure 37. They have been owners of Tax Lot 800 since December 11, 1963; owners of Tax Lot 1300 since May 4, 1976; and owners of Tax Lot 1000 since January 13, 1993.

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 identifies laws effective October 17, 1979 that “established the special ag zone” and “prohibits the division of the property into small tracts” as the laws that are the basis for the claim.

The claim is based on Marion County’s current Special Agriculture (SA) zone and the applicable provisions of state law that require such zoning. The claimants’ property is zoned Exclusive Farm Use (EFU) in accordance with OAR 660, division 33, and ORS 215 because the claimants’ property is “Agricultural Land” as defined by Goal 3.² Goal 3 became effective on

¹ On May 4, 1976, the Fishers acquired the remaining interest in Tax Lot 800.

² The subject property contains predominantly Class I-IV soils. See Soil Survey of Marion County Area, Oregon, USDA Soil Conservation Service, September 1972.

January 25, 1975 and required that Agricultural Lands as defined by the Goal are zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263 and 215.780 and OAR 660, division 33, as applied by Goal 3, do not allow the subject property to be divided into smaller lots or parcels.

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). ORS 215.263 (2003 edition) establishes standards for the creation of new parcels in an EFU zone.

Statewide Planning Goal 14 (Urbanization), also effective January 25, 1975, generally required that lands outside urban growth boundaries be used for only rural uses.

The claimants acquired an interest in Tax Lot 800 on December 11, 1963. At that time, Tax Lot 800 was zoned R1, a residential zone, by Marion County. Some provisions of ORS 215 in were enacted in 1963, but were applicable only to property zoned for agricultural use.

The claimants acquired Tax Lot 1300 on May 4, 1976. At that time, Tax Lot 1300 was zoned Acreage Residential 5-acre minimum (AR-5) by Marion County, subject to Goal 3 and the regulations for farm and non-farm parcels in EFU zones under ORS 215. However, the County's AR-5 zone that applied to the property at that time 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. Since the Commission had not acknowledged Marion County's comprehensive plan and land use regulations, including the AR-5 zone in effect when the Fishers acquired the property on May 4, 1976, site-specific goal provisions, including applicable Statewide Planning Goals, applied directly to the property on the date of acquisition.³ In 1976, the State standards for a land division involving property where the local zoning was not acknowledged were that the resulting parcels must be of a size that was "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 land divisions 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 Tax Lot 1300 when the claimants acquired it in 1976 was limited to land divisions done consistent with Goal 3, which required the resulting farm or non-farm parcels to be: (1) "appropriate for the continuation of the existing Commercial Agricultural

³ 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 den 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 (*Byrd v. Stringer*, 295 Or 311, (1983)). However, insofar as the state and local provisions are materially the same in substance, the applicable statutes and 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 31 (1992)).

Enterprise in the area;” and (2) shown to comply with the legislative intent set forth in ORS 215.243.

No information has been provided showing that the claimants’ requested division complies with either the minimum lot size standard for farm parcels under Goal 3, or the standards for new parcels under ORS 215.263 (1975 edition), which were in effect at the time the Fishers purchased Tax Lot 1300 in 1976.

The claimants acquired Tax Lot 1000 on January 13, 1993. At that time, Tax Lot 1000 was zoned SA Special Agriculture (SA), the current zoning subject to Statewide Planning Goal 3 and the regulations for farm and non-farm parcels in EFU zones under ORS 215.

Conclusions

The minimum lot size standards established by Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, that were adopted since the claimants acquired an interest in Tax Lot 800 on December 11, 1963, Tax Lot 1300 on May 4, 1976, and Tax Lot 1000 on January 13, 1993, respectively, do not allow division of the property into smaller lots or parcels as may have been possible on the date they acquired each tax lot. The County’s current Special Agriculture zone applied to the subject property is based on the standards required by Statewide Planning Goal 3, ORS 215, and OAR 660, division 33. Thus, current land use laws adopted since 1963, 1976, and 1993 when the claimants acquired each of the tax lots that comprise the subject property, restrict the use of certain portions of the property from what could have been done when the claimants acquired those respective tax lots in 1963, 1976, and 1993.

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 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 claim estimates a fair market value reduction of \$542,460⁴, based on the Marion County Assessor’s current real market value for the subject property of \$327,540 (\$260,840 for Tax

⁴ Claimants’ Measure 37 claim to Marion County demanded compensation of the same \$542,460, but for four parcels: the three claimed here plus an additional parcel, Tax Lot 900.

Lot 800, \$3,800 for Tax Lot 1000, and \$62,900 for Tax Lot 1300) and “comparable sales, information from the Assessor’s Office, and multiple listing data” as follows:

One existing dwelling on 2.03-acres after partition:	\$250,000
Second existing dwelling on 2.03-acres after partition:	\$180,000
Four new 1.80-acre lots created from remaining 7.23-acres @ \$110,000 per lot:	\$440,000
Total estimated value of all new lots:	\$870,000
Minus 2004 real market value of \$327,540:	\$542,460

There is no certified appraisal or other documentation to substantiate the claimed values either before or with state land use regulations.⁵

Conclusions

As explained in Section V.(1) of this report, Robbie and Evelyn Fisher are the current owners of Tax Lot 800 as of December 11, 1963; Tax Lot 1300 as of May 4, 1976; and Tax Lot 1000 as of January 13, 1993. Thus, under Ballot Measure 37, the Fishers are due compensation for land use regulations 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, state laws restrict division of the subject property so that the 11.29-acre parcel cannot be divided into up to six lots or parcels that are approximately 1.73-acres in size as the claimants say was allowed when they acquired the property. These restrictions reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$542,460. However, it is not clear that the claimants’ requested use of all three tax lots would be permitted under the laws in effect when they acquired each of the tax lots. In addition, without an appraisal or a more detailed analysis of the information submitted, 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 laws. 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 Marion County’s Special Agriculture zone and the related provisions of state law that have restricted use of the property and reduced its fair market value, including

⁵ At Marion County’s request, the claimants submitted an appraisal to the county in connection with their county Measure 37 claim. The appraisal estimated a current value of \$450,000, a “Measure 37 value” of \$1,885,000, and “compensation value” (the difference between the first two amounts) of \$1,435,000. See appraisal report and March 10, 2005, Planning division memorandum to Marion County Hearings Officer; copies in the department’s claim file.

provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215, and OAR 660, division 33. In general, none of these laws are exempt as under Section 3(E) of the measure, as to Tax Lot 800 because these laws were enacted after claimants acquired that tax lot. The applicable provisions of Goals 3 and 14, and ORS 215 that were enacted before May 4, 1976, are exempt as to Tax Lot 1300 because these laws were enacted before the claimants acquired Tax Lot 1300. Most of the specified laws were in effect when the claimants acquired Tax Lot 1000, and are, therefore, exempt as to that tax lot under Section 3(E) of the measure.

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. To the extent these laws were in effect when the claimants acquired each of the three tax lots that comprise the subject property, these laws are exempt under Section 3(E) of Measure 30 and will continue to apply to the claimants' use of the property. Those specified laws that were enacted after the claimants acquired each of the tax lots would not be exempt under Section 3(E) of the measure.

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 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. 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 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. 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 set forth in this report, laws enforced by the Commission or the department prohibit the division of the 11.29-acre subject property into approximately 1.73 acre lots or parcels. The claim asserts these restrictions reduce the fair market value of the subject property by \$542,460. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, no appraisal or other substantiating documentation was submitted, and 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 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 the Fishers to use the subject property for a use permitted at the time they acquired Tax Lot 800 on December 11, 1963; Tax Lot 1300 on May 4, 1976; and Tax Lot 1000 on January 13, 1993.

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 Fishers' division of the three tax lots that comprise the subject property into approximately 1.73 acre lots or parcels: Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215.263 and 215.780, and OAR 660, division 33 that relate to the division of land, and that were enforced after December 11, 1963 as to Tax Lot 800, after May 4, 1976, as to Tax Lot 1300, and after January 13, 1993, as to Tax Lot 1000. These laws will not apply to the claimants' use of their property only to the extent necessary to allow them to use each of the tax lot for a use permitted on the date they acquired each tax lot.
2. The final action by the State of Oregon provides the state's authorization to the claimants to use Tax Lot 800 subject to the standards in effect on December 11, 1963; to use Tax Lot 1300 subject to the standards in effect on May 4, 1976; and to use Tax Lot 1000 subject to the standards in effect on January 13, 1993. On December 11, 1963, the property may have been subject to some provisions of ORS 215. On May 4, 1976, the property was subject to Statewide Goal 3 and applicable provisions of ORS 215, as discussed above in Section V.2 of this report. On January 13, 1993, the property was subject to Statewide Goal 3, applicable provisions of ORS 215, and OAR 660, division 33, as discussed above in Section V.2 of this report.
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 final 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 Marion County or other jurisdiction 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 15, 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.