

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation**

September 2, 2005

STATE CLAIM NUMBER: M120134

NAME OF CLAIMANTS: Raymond and Jean Thorne

MAILING ADDRESS: 4298 Harlan Drive NE
Salem, Oregon 97305

PROPERTY IDENTIFICATION: Township 7S, Range 4W, Section 13B
Tax Lot 2300
Polk County

DATE RECEIVED BY DAS: March 14, 2005

180-DAY DEADLINE: September 10, 2005

I. SUMMARY OF CLAIM

The claimants, Raymond and Jean Thorne, seek compensation in the amount of \$214,000 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 compensation or the right to develop a single-family dwelling on the 15-acre subject property. The property is located near the corner of Best Road and Orchard Heights Road NW in Polk 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 state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimants' development of a single-family dwelling: Statewide Planning Goals 3 (Agricultural Lands), ORS 215.284, and the applicable provisions of OAR 660, Division 33. These laws will not apply to the claimants only to the extent necessary to allow them a use of the property permitted at the time they acquired it in 1987. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 21, 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 is relevant to when the claimant became the present owner of the property; whether a state law restricts the claimants' use of the property and whether the laws that are the basis for the claim are exempt under section 3 of Measure 37. The comments have been considered by the department in preparing this report.

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 March 14, 2005, for processing under OAR 125, division 145. The claim identifies the Polk County Exclusive Farm Use (EFU) Zone (section 136.040(A)) as 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 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

The claimants, Raymond and Jean Thorne, acquired the subject property on May 26, 1987, as evidenced by a land sale contract included with the claim. A fulfillment deed, dated July 26, 1992 is also included in the claim. A copy of a Title Report dated February 15, 2005, confirms that the claimants are the current owners of the subject property, as does a current Polk County Tax Statement.

Conclusions

The claimants, Raymond and Jean Thorne, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of May 26, 1987.

2. The Laws that are the Basis for this 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 is based in Polk County EFU Zone, Section 136.040(A), which requires that a property predominantly composed of high-value farmland earn at least \$80,000 in gross farm income in order to qualify for the approval of a single-family farm dwelling. This provision is required by Statewide Goal 3 (Agricultural Lands) and the applicable provisions of OAR 660-033-0135(7). 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 3.¹

Current land use regulations, particularly ORS 215.283 and 215.284, and OAR 660, Division 33, as applied by Goal 3, establish standards for the approval of farm dwellings.

¹ The claimant’s property is “Agricultural Land” because it contains NRCS (Natural Resources Conservation Service) Class I-IV Soils (Soil Survey of Polk County, sheets 17 and 18, issued October 1982).

Specifically, OAR 660-033-0135(7) (applicable to farm dwellings on high-value farmland) became effective on March 1, 1994, and implements the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0135(7) requires for the approval of a dwelling “customarily provided in conjunction with farm use” on high-value farmland that the owner demonstrate that the farm operation produced at least \$80,000 in gross annual income from the sale of farm products in the last two or three of the last five years.

The claimants acquired the subject property on May 26, 1987 when it was zoned EFU, a qualified farm zone under ORS 215 by Polk County as required by Goal 3 and its implementing statutes and rules. The County’s EFU 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. Statewide Planning Goal 3, which became effective on January 25, 1975, was applicable to legislative land use decisions and some quasi-judicial land use decisions, on a site-specific basis prior to the Commission’s acknowledgment of Polk County’s EFU and FF (Farm Forest) zones on April 22, 1988, (See Endnote. ¹) Thus, until the County’s land use regulations were acknowledged by the Commission in 1988, both the County’s EFU zoning code and Goal 3 applied to the use of the property to determine what uses were permitted.²

As for farm dwellings allowed under EFU zoning as required by Goal 3 on the date of acquisition in 1987, farm dwellings were allowed if determined to be “customarily provided in conjunction with farm use” under ORS 215.283(1)(f) (1985 edition). Before a farm dwelling could be established on Agricultural Land, the farm use to which the dwelling relates must “be existing.” The approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use.³ Further, the county’s EFU Zone did not require that farm dwellings on existing parcels be approved only when the dwelling is on a parcel “appropriate for the continuation of the existing commercial agricultural enterprise within the area.

Conclusions

The current zoning requirements and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in OAR 660, Division 33, were all enacted after Raymond and Jean Thorne acquired the subject property on

² 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), and *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 (*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).

³ *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). Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use (*Matteo v. Polk County*, 14 Or LUBA 67, 73 (1985)).

May 26, 1987, and do not allow a dwelling on the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the Thorne's in 1987. In 1987, the property was subject to the requirements of the County's EFU zone, Goal 3 and OAR 660, Division 5 then in effect.

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 land use regulation 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 includes an informal estimate of a \$214,000 reduction in the property's fair market value as a result of land use laws enacted after they acquired the property in 1987. In support of this estimate, the claim provides a current 2004-05 Tax Statement showing the current real market value to be \$236,000, and a "competitive market analysis" (not an appraisal) from a realtor estimating the value of the subject property to be \$400,000 to \$450,000 if were "buildable." The difference in these two estimates results in the claimants' asserted \$214,000 reduction in fair market value.

Conclusions

As explained in section V. (1) of this report, the current owners are Raymond and Jean Thorne, who acquired the property on May 26, 1987. Under Ballot Measure 37, the Thorne's 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, laws adopted since the claimants acquired the property prohibit the approval of a dwelling on the subject property. The claimants estimate the reduction in value due to the restrictions to be \$214,000.

Without an appraisal or other substantiating documentation, it is not possible to substantiate the specific dollar amount the claimant demands 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 enacted or 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 state land use regulations that restrict the use of the property relative to what would have been allowed in 1987 when the Thornes acquired the property, including in particular OAR 660-033-0135 (7), as well as relevant provisions of Statewide Planning Goal 3 and ORS 215. With the exception of provisions of ORS 215, Goal 3 and OAR 660 in effect on May 26, 1987, the specific laws upon which the claim is based are not exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimants acquired the property.

Conclusions

It appears that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimants' use of the property, and for the most part these laws are not exempt under section 3(E) of Measure 37. Provisions of ORS 215, Goal 3 and OAR 660, Division 5, in effect when the claimants acquired the property in 1987 are exempt under Section 3(E) of the Measure and will continue to apply to the property. Other laws in effect when the claimants acquired the property are also 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 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. 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 in order to allow the present owner to carry out a use of the property permitted at the time the current 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 approval of a dwelling on the property. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$214,000. However, because the claim does not provide an appraisal or other specific documentation 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 compensation, Ballot Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Raymond and Jean Thorne to use the subject property for a use permitted at the time they acquired the property on May 26, 1987.

Conclusion

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 claimants' establishment of a single family dwelling on their 15-acre property: applicable provisions of Statewide Planning Goal 3, ORS 215.284, and OAR 660, Division 33 enacted after May 26, 1987. These land use regulations will not apply to the claimants' use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on May 26, 1987.
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 May 26, 1987. In 1987, the property was subject to the requirements of ORS 215, Goal 3, and OAR 660, Division 5 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 215.402 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 August 9, 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.

Endnote

ⁱ The Land Conservation and Development Commission (the Commission) acknowledged the county's EFU zone to be in compliance with Statewide Planning Goal 3 on March 25, 1981. However, the Commission's 1981 Acknowledgment Order was appealed to the Marion County Circuit Court. On August 3, 1984, Marion County Circuit Court affirmed in part and remanded in part the Commission's 1981 Acknowledgment of the County's EFU zone (*1000 Friends of Oregon, Friends of Polk County and Marilyn Stringer v. LCDC and Polk County*, Marion County Circuit Court No. 126, 792 (August 3, 1984)).

On February 12, 1986 (prior to when the claimant acquired the property), the Oregon Court of Appeals reversed the Circuit Court's decisions and remanded the Commission's 1981 Acknowledgment of the County's EFU zone, except with respect to the "Homestead Exemption" provisions that were upheld by both courts.

The court specifically reversed the Circuit Court and the Commission regarding the standards required for the approval of a farm dwelling and determined that the EFU/FF zones provisions for dwellings in conjunction with farm use on existing lots violated the Goal 3 "commercial" standard under Goal 3 and OAR 660 division 5. Source: Department of Land Conservation and Development April 10, 1986 Report to the Land Conservation and Development Commission on Polk County's Remand from the Court of Appeals. SOURCE: Oregon Court of Appeals, CA A33638 (February 12, 1986).

On April 24, 1986, in response to the Oregon Court of Appeals remand of the county's EFU zone, the Commission issued a Continuance Order directing Polk County to revise the EFU/FF zones to comply with Statewide Planning Goal 3 and specifically to "amend the EFU and Farm/Forest zones to require that dwellings on existing parcels in conjunction with farm use cannot be approved except where it is found that the dwelling is appropriate for the continuation of the existing Commercial Agricultural Enterprise within the area." (LCDC Order 86-CONT-037, p. 3, signed May 9, 1986).

On December 23, 1987, Polk County revised its Agricultural Lands element of the comprehensive plan and EFU zone to comply with the Commission's 1986 Continuance Order (County Ordinance 87-26 and 87-27). On February 17, 1988, the Commission acknowledged Polk County's revised comprehensive plan and EFU Zone as complying with Statewide Planning Goal 3 and OAR 660, division 5 (Commission Order 88-ACK-347, order signed April 22, 1988).