

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

September 8, 2005

STATE CLAIM NUMBER: M120174

NAME OF CLAIMANTS: Jess R. Moses and Jana A. Moses

MAILING ADDRESS: 705 S Rosemont Road
West Linn, Oregon 97068

PROPERTY IDENTIFICATION: Township 2S, Range 1E, Section 22
Tax Lot 801
Clackamas County

DATE RECEIVED BY DAS: March 16, 2005

180-DAY DEADLINE: September 12, 2005

I. CLAIM

The claimants, Jess R. Moses and Jana A. Moses, seek compensation in the amount of \$1,900,000 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 their 6.22-acre property into 13 approximately ½-acre lots, all with dwellings. The property is located at 705 S Rosemont Road, south of the City of West Linn, 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 this claim is valid. Department staff recommends, in lieu of compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimants to allow them to divide and develop their property: the applicable provisions of Statewide Planning Goal 14 and OAR 660-004-0040, enacted after July 24, 1978. These laws will not apply to the claimants only to the extent necessary to allow Mr. and Ms. Moses a use of the subject property permitted at the time they acquired it on July 24, 1978. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On March 23, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, three written comments, evidence or information were received in response to the 10-day notice.

The comments do 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 letters in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

Ballot Measure 37, Section 5, requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of the Measure (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of the Measure (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on March 16, 2005, for processing under OAR 125, division 145. The claim identifies OAR 660-004-0040 as the state law that restricts the use of the property and is the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulation adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

Ballot Measure 37 provides for payment of compensation of relief from specific laws for “owners” as that term is defined in the Measure. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimants, Jess R. Moses and Jana A. Moses, acquired the subject property by Deed on July 24, 1978. They continue to own the subject property.¹

Conclusions

The claimants, Jess R. Moses and Jana A. Moses, are “owners” of the subject property as that term is defined in Section 11 of Ballot Measure 37, as of July 24, 1978.

2. The Laws That Are the Basis for the Claim

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a law must restrict the claimant’s use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

Findings of Fact

The claim states that “Zoning was for 20,000 sf lots when I purchased the property on July 24, 1978. In August 1979 the zoning was changed to Rural Residential 5-acre lots.” It further states that OAR 660-004-0040, “restricts any new lot or parcel to 20-acres if within one mile of the UGB. When we purchased the property in July 1978, it was zoned for 20,000 sf lots and then changed to 5-acre zoning. We have been ¼ mile from the UGB for 27 years.”

Since 1979, and in accord with Statewide Planning Goal 14 (Urbanization), the subject property has been zoned Rural Residential Farm Forest (RRFF-5), which has a five-acre minimum lot size and permits one single family dwelling per lot or parcel.² The subject property is 6.22-acres and is developed with one dwelling. The lot cannot be divided in the RRFF-5 zone.

¹ An excerpt from a July 28, 2003, mortgage insurance policy states that Title was vested in Mr. and Ms. Moses at that time. The June 29, 2005 Clackamas County Planning Staff report to the Board of County Commissioners on the Moses’ Measure 37 claim to the County confirms that the Moses’ are the current owners. (See the department claim file.)

² Clackamas County Zoning Ordinance, Sections 309.03A and 309.08B.

Statewide Planning Goal 14 (Urbanization) was effective January 25, 1975, and required that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision³, the Commission amended Goal 14 and adopted OAR 660-004-0040, Application of Goal 14 (Urbanization) to Rural Residential Areas, which was effective October 4, 2000. The rule provides that after October 4, 2000, an exception to Goal 14 is required to create a lot or parcel in a rural residential zone that is smaller than the county's minimum lot size standard. For rural residential land within one mile of the Portland metropolitan area urban growth boundary (UGB), that minimum lot size is 20-acres (OAR 660-004-0040(8)(e)). This standard applies to the subject property because it is located within 600 feet of the UGB, and it does not allow the subject 6.22-acre property to be divided without a Goal 14 exception. (See OAR 660-004-0040(7) and (8).)

When the claimants acquired the subject property in July 1978, it was zoned by Clackamas County as Single Family Residential (RA-2). This zone permitted one single family dwelling on a lot or parcel at least two-acres in size.⁴ However, this zoning 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 plan and land use regulations in 1978, including the RA-2 zone in effect when Mr. and Ms. Moses acquired the property in 1978, Statewide Planning Goal 14 (Urbanization) and other goals applied directly to the property.⁵

As stated above, Goal 14 (Urbanization) required that local comprehensive plans identify and separate urbanizable land from rural land. Prior to 2000, Goal 14 was held to prohibit residential development outside urban growth boundaries at densities of one to four-acres per lot or parcel (see *DLCD v. Klamath County*, 38 Or LUBA 769 (2000)).

Conclusions

Lot size standards for rural residential lots or parcels established by OAR 660-004-0040 and adopted since the claimants acquired the property in 1978 prohibit division of the property into smaller lots or parcels for residential development. Under the unacknowledged RA-2 zone in effect in 1978, the claimants could potentially have divided the property into no smaller than

³ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or App 447 (1986).

⁴ Clackamas County Zoning Ordinance, Sections 308.03B and 308.08B.

⁵ The Statewide Planning Goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the County's plan and implementing regulations. (*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 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 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).

two-acre lots, which is more than is now permitted under OAR 660-004-0040 in the RRFF-5 zone. Land use laws adopted since 1978 restrict the use of the property from what could have been done when the claimants acquired the property in 1978.

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

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any laws described in Section V.(2) of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim estimates that the fair market value of the subject property has been reduced by \$1,900,000 as a result of land use laws enacted after the claimants acquired the property in 1978. They estimate the current market value with restrictions as \$700,000. They estimate the market value of the property divided into 13 approximately ½-acre lots for residential development at \$200,000 per lot, or a total of \$2,600,000, based on other properties sold between 1999 and 2004.⁶ 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, Jess R. and Jana A. Moses are the current owners of the subject property as of July 24, 1978. Thus, under Ballot Measure 37, Mr. and Ms. Moses 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 of the subject property. The claim asserts the reduction in value due to the restrictions to be \$1,900,000. However, this estimate is based on dividing the 6.22-acre property into 13, ½ acre lots, which was not permitted when they acquired the property in 1978. As explained in Section V.(2), under the unacknowledged zoning in effect in 1978, the claimants could have potentially divided the property into no smaller than two-acre lots. Without an appraisal or other documentation, and without evidence of the fair market value of the property based on the number of lots

⁶ Section 8 of the claim the Moses' submitted to DAS bases the estimated \$1,900,000 reduction in value on the current value "as one parcel worth \$700,000 versus 13 lots valued at \$200,000 per lot." However, in an undated letter to DAS received May 31, 2005, Jess Moses states: "I want to clarify what my intentions are if the waiver is approved. My intention then [when the land was purchased in 1978], and still is, to give each of our 3 children a site to build a home next to us and leave the remainder in open space where I can continue to keep 2 horses and 2 cows."

permitted 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 Statewide Planning Goal 14 and OAR 660-004-0040, which set forth the requirements to create new lots or parcels in rural residential areas. Goal 14 was enacted in 1975, before the claimants acquired the property in 1978. Amendemnts to Goal 14 and OAR 660-004-0040 were enacted after the claimants acquired the property in 1978 and restrict the use of the property in a manner that likely reduces its fair market value. Except for provisions of Goal 14 in effect when the claimants acquired the property, these laws are not are exempt under Section 3(E) of Ballot Measure 37. Section 3(E) exempts laws in effect when the claimants acquired the property.

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that the goal and rule restrictions establishing minimum lot sizes for rural residential development 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 Goal 14 in effect when the claimants acquired the property in 1978 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 to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions in this report, laws enforced by the Commission or the department restrict the division of the property described in the claim. These restrictions reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$1,900,000. Without an appraisal or other substantiating documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the record, the department acknowledges that it is more likely than not 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 just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow Mr. and Ms. Moses to use the subject property for a use permitted at the time they acquired the property on July 24, 1978. Based on the application of Statewide Planning Goal 14 in 1978, the division of the property into ½-acre lots as requested by the claimants was not allowed when they acquired the property.

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 Jess R. and Jana A. Moses' division of their property or to the establishment of a single family dwelling on each lot or parcel created: those provision of Statewide Planning Goal 14 and OAR 660-004-0040, amended and enacted after July 24, 1978. These laws will not apply to the claimants only to the extent necessary to allow them a use permitted at the time they acquired the property. The department notes that the proposed division of the subject property into ½-acre lots was not allowed under laws in place in 1978.

2. The final action by the State of Oregon will provide the state's authorization to the claimants to use their property subject to the standards in effect on July 24, 1978. On that date, the property was subject to the applicable provisions of Statewide Planning Goal 14 and the standards for approval of land use decisions prior to acknowledgement of the county's local plan and zoning ordinances in effect at that time.
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 Clackamas County or another 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 August 18, 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.