

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

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

September 26, 2005

STATE CLAIM NUMBER: M120413

NAMES OF CLAIMANTS: Michael E. Gerig¹ and Ann Marie Gerig²

MAILING ADDRESS: 6335 Fruitland Road NE
Salem, Oregon 97301

PROPERTY IDENTIFICATION: Township 7S, Range 2W, Section 22D
Tax Lot 1000
Marion County

OTHER CONTACT INFORMATION: Wallace W. Lien, Attorney at law
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1775 32nd Place NE, Suite A
Salem, Oregon 97303-1674

DATE RECEIVED BY DAS: April 1, 2005

180-DAY DEADLINE: September 28, 2005

I. SUMMARY OF THE CLAIM

The claimants, Michael E. Gerig and Ann Marie Gerig, seek compensation in the amount of \$924,222 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 the 21.8-acre property into seven, approximately three-acre parcels and to develop a dwelling on each parcel. The property is located at 1048 69th Avenue NE, east of the City of Salem, in Marion County. (See claim.)

¹ Also known as Michael Ernest Gerig.

² Also known as Ann M. Gerig.

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 Michael and Ann Marie Gerig's division and residential development of the property: Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow Michael Gerig a use of the property permitted at the time he acquired it in 1978, and to allow Ann Marie Gerig a use of the property permitted at the time she acquired it in 2002. The department acknowledges that the relief to which Ann Marie Gerig is entitled under Measure 37 will not allow her to use the property in the manner set forth in this claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 2, 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, seven written comments, evidence or information were received in response to the 10-day notice. One of the comment letters is signed by 44 people.

Some of the comments are relevant to when the claimants became the present owners of the property and whether any of 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.

Other comments do not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects or impacts that 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 April 1, 2005, for processing under OAR 125, division 145. The claim generally identifies the Statewide Planning Goals, ORS 197, ORS 215, and OAR 660 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

Michael Gerig acquired his interest in the subject property from his grandmother, Nellie M. Gerig, upon her death on April 19, 1978.³ Ann Marie Gerig acquired her interest in the subject property by Deed from her husband, Michael Gerig, on February 5, 2002. The claim states that Michael Gerig’s grandparents, Val and Nellie Gerig, acquired the subject property on July 31, 1935. However, other than an affidavit of ownership prepared by the claimants, the claim includes no documentation to establish the date of acquisition by Michael Gerig’s family. Marion County Assessor records confirm that Michael Ernest Gerig and Ann M. Gerig are the current owners (see claim file).

³ The copy of Decree of Final Distribution in the department’s claim file shows vesting of the subject real property in both Michael Gerig and Janice Leora Gamble; however the record does not indicate whether Ms. Gamble still retains an interest in the property, and she is not a claimant in this matter.

Comments Received

Several commenters state that the current owner acquired the property on February 5, 2002. As stated above, this is true for Ann Marie Gerig, but the record contains evidence that Michael Gerig acquired his interest in the property on April 19, 1978.

Conclusions

Michael Gerig is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of April 19, 1978. Ann Marie Gerig is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of February 5, 2002. Michael Gerig’s grandparents, Val and Nellie Gerig are “family members” as that term is defined by Section 11(A) of Ballot Measure 37. The claim asserts that the Gerig family acquired ownership of the property in 1935. However, the claim includes inadequate documentation to establish the date that Michael Gerig’s family acquired the property.

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 generally identifies the Statewide Planning Goals, ORS 197, ORS 215, and OAR 660 as laws that “restrict development and use of Exclusive Farm Use (EFU) Zoned property.”⁴

The claim is based generally on Marion County’s current EFU zone and the applicable provisions of state law that require such zoning. Since April 9, 1975⁵, the claimants’ property has been zoned EFU as required by Statewide Planning Goal 3 in accordance with OAR 660, division 33, and ORS 215 because the claimants’ property is “Agricultural Land” as defined by Goal 3.⁶ Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal are zoned EFU pursuant to ORS 215.

⁴ The claimants summarily cite all Statewide Planning Goals, ORS 197 and other administrative rules found under OAR 660 as restricting the use of the property. Other than Goal 3 and OAR 660, division 33, the claimants do not establish how any of these regulations restrict the use of their property. Goals 1, 2 and 4 through 19 and divisions of OAR 660 (other than division 33) do not, on their face, restrict the use of the claimants’ property. ORS 197 establishes land use procedures. Claimants have not established how any provisions of that chapter restrict the claimants’ use of the subject property. On its face, ORS 197 does not in itself restrict the use of the subject property. In the absence of any explanation by the claimants as to how any of these regulations restrict the use of the subject property, this report does not address those regulations.

⁵ See April 18, 2005, memorandum from Marion County Planning to Marion County Hearings Officer in the department’s claim file.

⁶ The claimants’ property consists of Class II Woodburn silt loam soils. (See Soil Survey of Marion County Area, Oregon, USDA Soil Conservation Service, September 1972, sheet #29, Guide to Mapping Units, and pp. 114-115.)

Current land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660, division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels smaller than 80 acres, and establish standards for allowing the existing or any proposed parcel(s) to have farm or non-farm dwellings on them.

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) established standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interpreted the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. Subsequent amendments to comply with HB 3326 (Chapter 704, Oregon Laws 2001, 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.)

Comments Received

Several commenters state that soil and groundwater conditions would not support the additional wells and septic systems needed for each new lot or parcel. These are issues that will be addressed if and when the claimants apply for a development permit from Marion County.

Conclusions

When Michael Gerig acquired the property on April 19, 1978, it was zoned EFU by Marion County. 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. The Commission did not acknowledge Marion County's Comprehensive Plan until 1983. Since the Commission had not acknowledged Marion County's comprehensive plan and land use regulations when Michael Gerig acquired the property on April 19, 1978, Statewide Planning Goal 3 applied directly to property on the date of acquisition.⁷

Marion County considers the property to be "high-value" farmland. (See April 18, 2005, memorandum from Marion County Planning to Marion County Hearings Officer in the department claim file.)

⁷ Statewide Planning Goal 3 was applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the County's Goal 3 program on July 30, 1984. (*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, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same in substance, the

In 1978, 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 are “appropriate for the continuation of the existing commercial agricultural enterprise in the area” (Statewide Planning Goal 3). Further, ORS 215.263 (1973 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). ORS 215.263 did not provide for the creation of a small parcel for a non-farm dwelling separate from the provisions just noted.⁸ Thus, the opportunity to divide the property when Michael Gerig acquired it in 1978 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 enterprise in the area;” and (2) shown to comply with the legislative intent set forth in ORS 215.243. (See endnote¹.)

As for dwellings allowed in an EFU zone, in 1978, ORS 215 and EFU zoning required by Goal 3 allowed farm dwellings if determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1973 edition). Before a farm dwelling could be established on Agricultural Land, the farm use to which the dwelling relates must “be existing.”⁹ Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use. ORS 215.213(3) (1973 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) (1973 edition).)¹⁰

No information has been provided showing that the claimants’ requested use of the property complies with either of the applicable division or dwelling standards under Goal 3 or ORS 215.213 (1973 edition) in effect at the time Michael Gerig acquired the property in 1978.

Ann Marie Gerig acquired the subject property on February 5, 2002. At that time, the property was subject to Marion County’s acknowledged EFU zone and the state laws currently in effect. No state laws have been enforced since 2002 that restrict the use of the property relative to the uses allowed when she acquired an interest in the property in 2002.

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

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).

⁸ Compare ORS 215.263 (1973 edition) with the current version of ORS 215.263.

⁹ *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) *affirmed without opinion* 70 Or App 179 (1984) and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33 (1988).

¹⁰ When determining whether land is “generally unsuitable for the production of farm crops and livestock” under ORS 215.213(3), the entire parcel or tract must be evaluated rather than a portion thereof. See *Smith v. Clackamas County*, 313 Or 519 (1992).

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 \$924,222 as the reduction in the property's fair market value due to current regulations, based on the following estimated amounts and calculations:

“\$952,872 value if divided, based on an average assessed value of nearby properties at \$43,710 per acre times 21.8 acres,¹¹ Minus \$28,560 current market value per Marion County according to claimants,¹² Equals \$924,222.”

The claim includes no appraisal to substantiate these amounts.

Conclusions

As explained in Section V.(1) of this report, Michael Gerig and Ann Marie Gerig are current owners of the subject property. Michael Gerig acquired ownership on April 19, 1978, and Ann Marie Gerig acquired ownership on February 5, 2002. Under Ballot Measure 37, Michael and Ann Marie Gerig are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value relative to uses permitted when the Gerig family appears to have acquired the property. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the Gerigs acquired the subject property appear to restrict the division and residential development of the property. The claim estimates the reduction in fair market value due to restrictions to be \$924,222.

Without an appraisal or other documentation, 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 enacted or enforced by the Commission or the department.

¹¹ Department staff calculates this number to be \$952,878.

¹² Marion County Assessor records show a current real market value of \$246,700, substantially more than the \$28,560 in the claim. (See claim file.)

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 generally identifies the Statewide Planning Goals, ORS 197, ORS 215, and OAR 660 as laws that “restrict development and use of EFU zoned property.” Those provisions that do restrict the use of the property include Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33, which Marion County has implemented through its EFU zone. Goal 3 and some applicable provisions of ORS 215 in effect in 1978 and 2002 and therefore are exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimants’ acquired the property.

Comments Received

Several comments state that soil and groundwater conditions would not support the additional wells and septic systems needed for each new parcel. To the extent that regulations “restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations,” apply to development of the subject property, they are exempt from compensation or waiver under Subsection (3)(B) of Ballot Measure 37.

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 general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimants’ use of the property, and some of these laws are exempt under Section 3(E) of 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. In addition, laws for the protection of the public health and safety are exempt under Section 3(B) of Measure 37. 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 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 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 division of the subject property into approximately three-acre parcels and the development of those parcels with single-family residences. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$924,222. However, because the claim does not provide an appraisal or other documentation to establish 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 Michael and Ann Marie Gerig to use the subject property for a use permitted at the time Michael Gerig acquired an interest in the property on April 19, 1978, and at the time Ann Marie Gerig acquired an interest in the property on February 5, 2002.

When Michael Gerig acquired the property on April 19, 1978, it was zoned EFU by Marion County. 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. The Commission did not acknowledge Marion County's Comprehensive Plan until 1983. Since the Commission had not acknowledged Marion County's comprehensive plan and land use regulations when Michael Gerig acquired the property on April 19, 1978, Statewide Planning Goal 3 applied directly to property on the date of acquisition.¹³

¹³ Statewide Planning Goal 3 was applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the County's Goal 3 program on July 30, 1984. (*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

In 1978, 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 are “appropriate for the continuation of the existing commercial agricultural enterprise in the area” (Statewide Planning Goal 3). Further, ORS 215.263 (1973 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). ORS 215.263 did not provide for the creation of a small parcel for a non-farm dwelling separate from the provisions just noted.¹⁴ Thus, the opportunity to divide the property when Michael Gerig acquired it in 1978 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 enterprise in the area;” and (2) shown to comply with the legislative intent set forth in ORS 215.243. (See endnoteⁱⁱ.)

As for dwellings allowed in an EFU zone, in 1978, ORS 215 and EFU zoning required by Goal 3 allowed farm dwellings if determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1973 edition). Before a farm dwelling could be established on Agricultural Land, the farm use to which the dwelling relates must “be existing.”¹⁵ Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use. ORS 215.213(3) (1973 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) (1973 edition).)¹⁶

No information has been provided showing that the claimants’ requested use of the property complies with either of the applicable division or dwelling standards under Goal 3 or ORS 215.213 (1973 edition) in effect at the time Michael Gerig acquired the property in 1978.

Ann Marie Gerig acquired the subject property on February 5, 2002. At that time, the property was subject to Marion County’s acknowledged EFU zone and the state laws currently in effect. No state laws have been enforced since 2002 that restrict the use of the property relative to the uses allowed when she acquired an interest in the property in 2002.

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, 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).

¹⁴ Compare ORS 215.263 (1973 edition) with the current version of ORS 215.263.

¹⁵ *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) *affirmed without opinion* 70 Or App 179 (1984), and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33 (1988).

¹⁶ When determining whether land is “generally unsuitable for the production of farm crops and livestock” under ORS 215.213(3), the entire parcel or tract must be evaluated rather than a portion thereof. See *Smith v. Clackamas County*, 313 Or 519 (1992).

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 Michael and Ann Marie Gerig's division and development of the 21.8 acre property: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, enacted after the claimants each acquired their interests in the property. These laws will not apply to Michael Gerig's use of the property only to the extent necessary to allow him a use permitted at the time he acquired the property on April 19, 1978. These laws will not apply to Ann Marie Gerig's use of the property only to the extent necessary to allow her a use permitted at the time she acquired the property on February 5, 2002. The department acknowledges that the relief to which Ann Marie Gerig is entitled under Measure 37 will not allow Ann Marie Gerig to use the property in the manner set forth in this claim.
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 the date each acquired the property. When Michael Gerig acquired the property on April 19, 1978, the property was subject to applicable provisions of Goal 3 and ORS 215 in effect at that time. When Ann Marie Gerig acquired the property on February 5, 2002, the property was subject to the provisions of Goal 3, ORS 215, and OAR 660, division 33, currently 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 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 September 1, 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.

ⁱ As noted, Goal 3 "Agricultural Lands" became effective on January 25, 1975, and was applicable to legislative land use decisions and some quasi-judicial land use decisions where site specific goal provisions apply prior to acknowledgement of a jurisdiction's comprehensive plan and land use regulations. After the local plan and land use regulations are acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly apply to such local land use decisions. However, after acknowledgment, interpretation of the local county code provisions must be consistent with the goal and rule standards with which they were acknowledged to be in compliance.

The Goal 3 standard for the review of land divisions or the establishment of a minimum lot size states:

"Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area."

On August 20, 1977, the Commission distributed a policy paper explaining the meaning of the Goal 3 minimum lots size standard (see "Common Questions about Goal #3; Agricultural Lands", August 30, 1977, as revised and added to July 12, 1979). Further interpretation of the Goal 3 minimum lot size standard can be found in *Meeker v Clatsop County*, 287 Or 665 (1979), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, *rev den* 290 Or 137 (1980), and *Thede v. Polk County*, 3 Or LUBA 336 (1981).

In 1982, the policy paper and court decisions were incorporated into an administrative rule to guide the interpretation and application of the Goal 3 minimum lot size standard (see OAR 660, Division 5, specifically rules 15 and 20 effective July 21, 1982).

For further guidance on the interpretation and application of this standard and rule see *Kenagy v. Benton County*, 6 Or LUBA 93 (7/16/82); *Goracke v. Benton County*, 8 Or LUBA 128 (6/8/83); 68 Or App 83 (5/9/84); 12 Or LUBA 128 (9/26/84); 13 Or LUBA 146 (4/4/85); 74 Or App 453 (7/17/85), *rev den* 300 Or 322 (1985); and OAR 660-05-015 and 020 as amended effective June 7, 1986 (repealed effective August 7, 1993).

The 1982 administrative rule (OAR 660-05-015 and 020) was further amended to incorporate the holdings of these cases (effective June 7, 1986, and repealed effective August 7, 1993).

ⁱⁱ As noted, Goal 3 "Agricultural Lands" became effective on January 25, 1975, and was applicable to legislative land use decisions and some quasi-judicial land use decisions where site specific goal provisions apply prior to acknowledgement of a jurisdiction's comprehensive plan and land use regulations. After the local plan and land use regulations are acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly apply to such local land use decisions. However, after acknowledgment, interpretation of the local county code provisions must be consistent with the goal and rule standards with which they were acknowledged to be in compliance.

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"Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area."

On August 20, 1977, the Commission distributed a policy paper explaining the meaning of the Goal 3 minimum lots size standard (see "Common Questions about Goal #3; Agricultural Lands", August 30, 1977, as revised and added to July 12, 1979). Further interpretation of the Goal 3 minimum lot size standard can be found in *Meeker v Clatsop County*, 287 Or 665 (1979), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, *rev. denied*, 290 Or 137 (1980) and *Thede v. Polk County*, 3 Or LUBA 336 (1981).

In 1982, the policy paper and court decisions were incorporated into an administrative rule to guide the interpretation and application of the Goal 3 minimum lot size standard (see OAR 660, Division 5, specifically rules 15 and 20 effective July 21, 1982).

For further guidance on the interpretation and application of this standard and rule see *Kenagy v. Benton County*, 6 Or LUBA 93 (7/16/82); *Goracke v. Benton County*, 8 Or LUBA 128 (6/8/83); 68 Or App 83 (5/9/84); 12 Or LUBA 128 (9/26/84); 13 Or LUBA 146 (4/4/85); 74 Or App 453 (7/17/85), *rev. denied* 300 Or 322 (11/26/85); and OAR 660-05-015 and 020 as amended effective June 7, 1986 (repealed effective August 7, 1993).

The 1982 administrative rule (OAR 660-05-015 and 020) was further amended to incorporate the holdings of these cases (effective June 7, 1986, and repealed effective August 7, 1993).