

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

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

September 27, 2005

STATE CLAIM NUMBER: M120480

NAMES OF CLAIMANTS: Robert and Pamela Baldwin

MAILING ADDRESS: 3564 Ridgeway Drive SE
Turner, OR 97392

PROPERTY IDENTIFICATION: Township 9S, Range 2W, Section 5, 6, and 7
Tax Lot 700
Marion County

DATE RECEIVED BY DAS: April 6, 2005

180-DAY DEADLINE: October 3, 2005

I. SUMMARY OF CLAIM

The claimants, Robert and Pamela Baldwin, seek compensation in the amount of \$90,549 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 subdivide their 6.29 acre property into two parcels of 1.5 and 4.79-acres. They also want to place a new dwelling on the new 1.5-acre parcel. The property is located at 3564 Ridgeway Dr. SE, near Turner, in Marion 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 Baldwin's' division of their property for residential development: applicable provisions of Statewide Planning Goal 3 (Agricultural Land) and Goal 14 (urbanization) and ORS 215 and OAR 660, division 33 enacted after October 24, 1977. These laws will not apply to the claimants only to the extent necessary to allow Mr. and Ms. Baldwin a use of their property permitted at the time they acquired it on October 24, 1977. (See the complete recommendation in Section VI. of this report.) The department acknowledges that the relief provided may not allow the use described in the Baldwin's claim.

III. COMMENTS ON THE CLAIM

Comments Received

On May 16, 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 was received in response to the 10-day notice.

The comment is relevant to when the claimant became the present owner of the property. The letter states that “the partition and development requested by the claimant was prohibited by the statewide planning goals at the time of acquisition, including Goals 3 and 14”. 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 April 6, 2005, for processing under OAR 125, division 145. The claim identifies Exclusive Farm Use (EFU) zoning, as the law that restricts 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, Robert and Pamela Baldwin, acquired the subject property on October 24, 1977, as reflected by a Warranty Deed included with the claim.¹ A copy of a Title Report dated March 3, 2005 included with the claim and confirmation on July 26, 2005 from the Marion County Assessor’s office indicate that Robert and Pamela Baldwin are the current owners of the subject property.

Conclusions

The claimants, Robert and Pamela Baldwin, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of October 24, 1977.

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 mentions only Marion County Special Agriculture (SA) Zone 137.020.050 as the basis for their claim. Based on their Marion County claim, the claimants would like to divide a 6.29-acre parcel into two parcels of 1.5 and 4.79 acres with a new dwelling placed on the new 1.5-acre parcel.

The claim is based, in part, 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 SA 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. 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.

¹ The claim form stated that the acquisition date of the property was September, 1977. However, the deed to the claimants shows that they acquired the property on October 24, 1977. In addition, the claim form submitted to the state listed on Robert Baldwin as a claimant, but the Baldwin’s clarified in a subsequent letter to the state that they intended both Robert and Pamela to be claimants.

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 less 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) establishes 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 interprets 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, and effective January 1, 2002) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

Statewide Planning Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses and also became effective on January 25, 1975.

The claimants acquired the subject property on October 24, 1977. At that time the property was zoned RA (Rural Agriculture). At that time, the statewide goals were adopted but the County's plan and zoning were not acknowledged. Because the Commission had not acknowledged Marion County's plan and land use regulations in 1977, including the RA zone when Mr. and Ms. Baldwin acquired the property in 1977, Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization) applied directly to the property, as did certain provisions of ORS 215.²

In 1977, 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).

² 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 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. denied, 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985)). After the County's plan and land use regulations were acknowledged by Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions, (*Byrd v. Stringer* 295 Or 311, (1983)). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same in substance, the 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).

Thus, the opportunity to divide the property when Mr. Baldwin acquired it in 1977 was limited to land divisions done consistent with Goal 3, that required the resulting farm or non-farm parcels to be: (1) “appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area;” and (2) shown to comply with the legislative intent set forth in ORS 215.243. (See endnoteⁱ)

In addition, on the date the claimants acquired the property, Goal 14 prohibited urban uses of land outside of an urban growth boundary. The establishment of a residence on a 1.5 acre parcel may be an urban use.

Finally, on the date the claimants acquired the property, Goal 3 and ORS 215.213 also contained standards for the establishment of dwellings on agricultural lands. Under Goal 3 and ORS 215.213, a new farm dwelling had to be “customarily provided in conjunction with farm use.” Under ORS 215.213, a new non-farm dwelling was allowed only if it met a series of standards in ORS 215.213(3) (1977 ed.).

No information has been provided showing that the claimant's request to divide the subject 6.29 acre property and establish a new dwelling complies with the standards in Goal 3, Goal 14 or ORS 215.213 for land divisions or new dwellings.

Conclusions

The land division and dwelling standards in Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization) and ORS 215 were in effect at the time Robert and Pamela Baldwin acquired ownership of the subject property. Land division and dwelling standards established by provisions applicable to agricultural land in ORS 215 and Goals 3 and 14 were all enacted before they acquired ownership of the subject property October 1977 and may not have allowed the use the Baldwins describe in their claim. However, subsequent amendments to ORS 215 and the adoption of additional standards for land divisions and dwellings in OAR 660, division 33 prohibit the division of the Baldwins’ property or the establishment of an additional dwelling altogether, thereby restricting the use of the property relative to the uses allowed when the property was acquired by them in 1977.

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 \$90,549 as the property’s fair market value, in the absence of current regulations. This estimate is based on comparison of the subject property with similar property and the value of the property from the Marion County Tax Report submitted with claim

Conclusions

As explained in Section V.(1) of this report, the current owners are Robert and Pamela Baldwin who acquired the property on October 24, 1977. Under Ballot Measure 37, the claimants, Robert and Pamela Baldwin, 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 restrict division of the subject property. While it appears unlikely that the standards in effect in 1977, allow the form of development requested in the claim, the department acknowledges that laws adopted since 1977, and currently in effect, prohibit additional division or residential development altogether, and likely have reduced the fair market value of the subject property to some extent. The claimants estimate the reduction in value due to the restrictions to be \$90,549.

Without an appraisal based on the value of two lots (1.5 acre and 4.79 acres) or other explanation, 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.

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

Under subsection 3(E) of Measure 37, laws in effect when the claimants acquired the property are exempt. Statewide Planning Goals 3 and 14 and provisions of ORS 215 were in effect on October 24, 1977, and are therefore exempt.

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 that some of these laws are not exempt under Section 3(E) of Measure 37. Provisions of ORS 215 and Goals 3 and 14 in effect when the claimants acquired the property in 1977 are exempt under subsection 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 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. 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 division of the subject property into parcels or lots, and the use of the property for residential purposes. Current law does not permit the claimants to subdivide or develop the 6.29-acre lot for residential use. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$90,549. However, because the claim does not provide an appraisal or other specific explanation 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 Robert and Pamela Baldwin to use the subject property for a use permitted at the time they acquired the property on October 24, 1977. At that time, the property was zoned RA (rural agriculture) and subject to Goal 3 and the applicable goal standards for new farm and on-farm parcels and dwellings explained in Section V.(2).³

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 Robert and Pamela Baldwins' division of the 6.29-acre property into two parcels or the establishment of one dwelling on the new parcel: applicable provisions of ORS 215, Goals 3 and 14, and OAR 660, division 33 that took effect after October 24, 1977. These land use regulations will not apply to Mr. and Ms. Baldwins' use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on October 24, 1977.
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 October 24, 1977. On that date, the property was subject to Statewide Planning Goals 3 and 14 and applicable provisions of ORS 215 then in effect. (See endnote.ⁱⁱ)
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

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

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 claimant to use the property, it may be necessary for him 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 September 12, 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.

Endnotes

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 acknowledgment 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*, *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).

ii To comply with the department's decision to not apply those land use regulations that restrict the claimants' use of their property, to allow the claimants to apply to Marion County for a use permitted at the time they acquired the subject property, Marion County may directly apply:

1. The Goal 3 land division standards and ORS 215.213 dwelling standards, and Goal 14 case law concerning what uses are rural and what uses are urban (1975 edition). For guidance, these provisions were interpreted by OAR 660, division 5, specifically rules 15 and 20 effective July 21, 1982, and as amended June 7, 1986; or

2. For the purpose of determining an appropriate minimum lot size under Goal 3, the County may rely on its acknowledged EFU zone adopted May 20, 1982, (Ordinance No. 18) in order to comply with Statewide Goal 3 and specifically the Goal 3 minimum lot size standard.