

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

June 7, 2005

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| STATE CLAIM NUMBER: | M118923 |
| NAME OF CLAIMANTS: | Janice M. Turner and David J. Turner |
| MAILING ADDRESS: | 22235 Bear Creek Road Bend, Oregon 97701 |
| IDENTIFICATION OF PROPERTY: | 22235 Bear Creek Road Township 18S, Range 13E, Section 6 Tax lot 400, Deschutes County |
| OTHER INTERESTS IN PROPERTY to transport water Dee and Jean D. Boyle subject property; easement for the benefit and David Turner. | Three -foot-wide easement for flume across the abutting property of Orval for the benefit of the owners of the Utility easement and access of Doug Clevenger, Les Hamilton, |
| DATE RECEIVED BY DAS: | December 10, 2004 |
| 180-DAY DEADLINE: | June 8, 2005 |

I. CLAIM

Janice M. Turner and David J. Turner, the claimants, seek compensation in the amount of \$950,000 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 divide their 9.75-acre lot into eight lots of approximately 1.2 acres each. The property is located at 22235 Bear Creek Road, in Deschutes County, Oregon. The Deschutes County Tax Assessor describes the property as T18S, R13E, section 6, tax lot 400 (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 Statewide Planning Goal 3 (Agricultural Lands), ORS Chapter 215, and OAR 660, Division 33 not apply to the subject property to the extent necessary to allow the Turners a use of the property permitted at the time they acquired the property that is the subject of this claim. As a result, the Turners' use will be subject to the versions of those specified laws in effect in April, 1999. The department acknowledges that the relief recommended in this report will not allow the claimants to use their property in the manner set forth in their claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

On February 10, 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, no written comments, evidence, or information were received in response to the 10-day notice.

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 December 10, 2004 for processing under OAR 125, Division 145. The claim identifies generally "all land use laws enacted after 1957, which were put in place in 1971 or 1972." 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 enacted 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, David J. Turner and Janice M. Turner, acquired the property from Earl R. and Arla B. Frazier by warranty deed on April 15, 1999. Earl and Arla Frazier are Janice Turner’s parents. The Fraziers acquired the property in 1957 (See deeds in Claim file). The real property is described as “a portion of Lot Two, being the NW ¼ of the NE ¼” of Section 6, T18S, R13E, also identified as tax lot 400. Deschutes County Tax Assessor’s records confirm that David J. Turner and Janice M. Turner are the current owners of the subject property.

Conclusions

The claimants, David and Janice Turner, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. The department also finds that the claim sufficiently demonstrates ownership by family members of Janice M. Turner and David J. Turner since January 1957.

2. The Laws that are the Basis for the Claim

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

Findings of Fact

The claim states:

“Since 1957, the State of Oregon has enacted land use laws which have placed restrictions upon the use of the property described above. All the restrictions enacted by the State of Oregon since 1957 that restrict the use of the property are affected by this claim. The current designation of EFU with restrictions on subdivision are in force and effect as of the date of this letter [December 7, 2004].”

The EFU (exclusive farm use) zoning referenced in the letter is based on Statewide Planning Goal 3 (Agricultural Lands) (OAR 660-015-0000(3)) and required provisions applicable to land zoned exclusive farm use (EFU) in ORS Chapter 215 and OAR 660, Division 33. These laws restrict the zoning, use, and division of the subject property. Goal 3 became effective on January 25, 1975 and required that agricultural land as defined by the Goal be zoned EFU pursuant to ORS Chapter 215 (see OAR 660-015-0000(3)). ORS 215.780, which restricts EFU lot size, became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-033-0100(1), effective August 7, 1993, established an 80-acre minimum size for the creation of new lots or parcels in EFU zones. The claimants' property is "agricultural land" as defined by Deschutes County and as required under Goal 3. According to information from the Deschutes County Assessor's office, the subject property is currently zoned Exclusive Farm Use-Tumalo/Redmond/Bend (EFU-TRB).

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) (OAR 660-015-0000(3)) and provisions applicable to land zoned exclusive farm use in ORS Chapter 215 and OAR 660, Division 33 were all enacted after family members of claimants David and Janice Turner acquired ownership of the subject property in January 1957 and do not allow the division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by Turner family members in 1957.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any law(s) 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

An August 2, 2004 appraisal of tax lot 400 estimated the property's market value at \$325,000. The claim states that if the property were divided into eight lots, seven vacant lots would be worth \$150,000 each, and the eighth lot with the existing house would be worth \$225,000, for a total of \$1,275,000. The claim bases these figures on Deschutes County Tax Assessor's information and other information available to the claimants regarding properties located at 61849 Dobbin Road, 61939 Dobbin Road, 21755 Old Red Road, and 21277 Bear Creek Road. The claimants subtracted the current value of the undivided lot (\$325,000) from the estimated value after subdivision (\$1,275,000), to arrive at the requested compensation amount of \$950,000. There is no certified appraisal that substantiates the value of the property without current restrictions on subdivisions.

Conclusions

As explained in section V.(1) of this report, David and Janice Turner are the current owners of the property. They acquired the property on April 15, 1999 from Mrs. Turner's parents, Earl and Arla Frazier. The Fraziers are "family members" as defined in Measure 37 Section 11(A) and they acquired the subject property in 1957. The Turners are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value.

Without an appraisal based on the value of seven vacant lots and one lot with an existing dwelling, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, including information from the Deschutes County Tax Assessor's office, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

4. Exemptions under Section 3 of Measure 37

Ballot Measure 37 does not apply to certain laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The claim includes a general reference to any state land-use regulations that restrict the use of the property relative to what would have been allowed in 1957 when the property was acquired by the Janice Turner's parents. These provisions include Statewide Planning Goal 3 (Agricultural Lands), ORS Chapter 215 (specifically ORS 215.780), and OAR 660, Division 33, which Deschutes County has implemented through applying its EFU-TRB zone to the property. None of these laws appear to be exempt, either on their face or as applied to the subject property, under Section 3 of Ballot Measure 37.

Conclusions

Without a specific proposed use or a specific listing of laws that are the basis for the claim, 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 owner's anticipated use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure, or because they are laws that are not covered by the Measure to begin with.

VI. FORM OF RELIEF

Section 1 of Measure 37 requires 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 a 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 conclusion 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. The claimant cannot create the desired 8 lots of approximately 1.2 acres each (seven vacant lots for residential development and one with an existing dwelling) and sell or develop those lots. The laws enforced by the Commission or the department reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$950,000. However, because the claim does not provide a 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 one or more land use regulations to allow the claimants to use the subject property for a use permitted at the time they acquired the property on April 15, 1999.

Conclusions

Based on the record before the department, the claimants, David and Janice Turner, have established that they are entitled to relief. Therefore, department staff recommends not applying land use regulations enforced by the Commission or the department to the extent necessary to allow the claimants a use of the property permitted at the time they acquired it in April 1999. Specifically, department staff recommends not applying provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS Chapter 215, and OAR 660, Division 33 enforced by the Commission or the department since April, 1999, to the extent necessary to allow the Turners a use of the property permitted at the time they acquired the property that is the subject of this claim. As a result, the Turners' use of the property will be subject to the versions of those specified laws in effect in April, 1999. The department acknowledges that the relief recommended in this report will not allow the claimants to use their property in the manner set forth in their claim.

Any use of the property by the claimants remains subject to the following laws:

(a) those laws not specified in this claim to the State of Oregon, dated December 15, 2004; (b) any laws 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.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on May 5, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's 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.