

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

June 16, 2005

STATE CLAIM NUMBER: M119050

NAME OF CLAIMANT: Harry & Jean Yost

MAILING ADDRESS: 16830 Springwater Road S.
Oregon City, Oregon 97045

IDENTIFICATION OF PROPERTY: Township 2S, Range 3E, Section 29
Tax Lot 00100, Clackamas County

DATE RECEIVED BY DAS: December 22, 2004

180-DAY DEADLINE: June 20, 2005

I. CLAIM

Harry and Jean Yost, the claimants, seek compensation in the amount of \$416,500 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 property into smaller parcels for residential development and the right to place a residential dwelling on each lot. The property is located in the SE ¼ of Section 29, T2S, R3E, at 16830 Springwater Road S., Oregon City, Oregon, Tax Lot 23E29D 00100, 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 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 subject property in order to allow the Yosts a use of the property permitted at the time they acquired it: ORS 215.263(1), 215.780(1)(a), 215.283(1)(f); OAR 660-033-0100(1) and OAR 660-033-0130(3)(a). (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On February 10, 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, one written comment was received in response to the 10-day notice. The letter includes comments regarding the possible impact to the neighbors' property from the development of additional homes on the Yost property. (See claim file for a copy of the letter.) Without funding to pay claims, the possible impact of the development of the claimants' property on neighboring properties is not relevant to the evaluation and determination of the claimants' Ballot Measure 37 claim.

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, dated December 6, 2004, was submitted to DAS for processing under OAR 125, Division 145. The claim, as supplemented, includes a list of land use regulations (see claim form and additional claim documentation) all of which were enacted prior to December 2, 2004, the effective date of Measure 37. (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, Harry and Jean Yost, acquired an interest in the subject property on June 8, 1966. (See claim file for a copy of the deed.) A copy of the Real Property Tax Statement from Clackamas County for the time period July 1, 2004 to June 30, 2005 shows that the claimants are currently listed as owners of the subject property.

Conclusions

The claimants, Harry and Jean Yost, are “owners” of the property subject to this claim, as that term is defined by Section 11(C) of Ballot Measure 37.

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 claimants or a family member acquired the property.

Findings of Fact

The initial claim filed with DAS identified several statutory and administrative rule provisions as preventing the claimants from further dividing the property. None of the provisions identified in the original claim involved land use regulations. Department staff wrote a letter requesting additional information from the claimants to help identify the nature of the laws and rules affecting the claimants’ ability to use the property that are the basis of the claim. (See claim file for letter dated February 18, 2005.) The claimants contacted staff by phone on February 22, 2005 after receiving the department’s letter and also provided information in writing. (See claim file for March 2, 2005, correspondence from the claimants.)

The letter from the claimants identifies several statutory and administrative rule provisions related to agricultural land that restrict the use and reduce the value of the property from what was permitted on June 8, 1966, the date they acquired the property. The letter includes a list of Oregon Revised Statutes (ORS) and Oregon Administrative Rules (OAR) that claimants state were enacted subsequent to their acquisition of the property, and which restrict the use and reduce the value of the property. The laws that are listed are: ORS 215.263(1), 215.780(1)(a), 215.283(1)(f); OAR 660-033-0100(1) and

OAR 660-033-0130(3)(a). The listed provisions of ORS 215 pertain to the uses and dwellings allowed in Exclusive Farm Use (EFU) zones, and the minimum lot sizes required for land divisions in such a zone (ORS 215.780(1)(a), ORS 215.263(1), and ORS 215.283(1)(f)). The listed administrative rules deal with dwellings and minimum lot size (OAR 660-033-0100(1) and OAR 660-033-0130(3)(a)). Each of these applicable land use regulations was enacted after the Yosts acquired the property on June 8, 1966.¹

The claimants' parcel is "agricultural land" as defined under Statewide Planning Goal 3 because it is composed of NRCS Class II and III soils. (See soils map for property from "Soil Survey of Clackamas County Area, Oregon, Sheet # 15" USDA/NRCS.) The parcel is also defined as "high-value farmland" in OAR 660-033-0020(8)(a)(A) because it is made up of NRCS Class II soil (Bornstedt silt loam, 0 – 8% slopes) and also a Class III soil (Powell silt loam, 0 – 8% slopes), as listed in OAR 660-033-0020(c)(A)-(C).

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

Additional information furnished by the claimants state that the present fair market value of the property, consisting of 31.5 acres, is approximately \$17,000 per acre (\$518,500 for the entire property) plus another \$350,000 for buildings on the site, for a total of \$860,500.² The claimants state that the fair market value of the subject property has been reduced by land use regulations that prevent further division of the site. The reduction in fair market value and the compensation due is estimated by the Yosts at \$416,500. No breakdown of how this compensation figure was reached was included by the claimants. (See letter of claimants dated March 2, 2005.)

As explained in section V.(2) of this report, ORS 215.263(1), 215.780(1)(a), 215.283(1)(f); OAR 660-033-0100(1) and OAR 660-033-0130(3)(a) restrict the division of the subject property and the extent to which dwellings may be placed on the property. No information regarding annual gross farm income of the existing parcel was included

¹ Statewide Planning Goal 3 (Agricultural Lands), (OAR 660-015-0000(3)) and the required provisions applicable to land zoned for exclusive farm use under ORS 215 and OAR 660-033-0090, including ORS 215.780, restrict the zoning, use and partition of the subject property. Goal 3 became effective on January 25, 1975, and required agricultural land as defined by the goal to be zoned EFU pursuant to ORS 215 (see citations to statutory and rule history under OAR 660-015-0000(3)). ORS 215.780 became effective on November 4, 1993 (Chapter 792, Or Laws 1993). Specifically, ORS 215.780(1) establishes an 80-acre minimum size for the creation of a new parcel in an EFU zone. Other provisions of state law, generally cited by the claimant as ORS 215, establish the standards for the approval of dwellings on land zoned EFU. These include ORS 215.283, 215.284 and 215.705.

² The County tax assessor's map indicates the site includes a total of 32.61 acres.

with the claim, but it is more likely than not that any smaller lots to be created would likely not be able to generate sufficient income to meet the \$80,000 annual gross sales farm income test.

Conclusions

As explained in section V.(1) of this report, the owners are Harry and Jean Yost, who acquired the property on June 8, 1966. Under Ballot Measure 37, the Yosts 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 to establish the reduction in value of the property and the value of the proposed smaller residential lots, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department concludes 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 list of Oregon Revised Statutes (ORS) and Oregon Administrative Rules (OAR) and asserts that they “were enacted subsequent to the acquisition date of the parcel (June 8, 1966), [and] restrict the use and reduce the value of the property” (see claim form and March 2, 2005 letter). These include provisions of ORS 215 pertaining to the uses and dwellings allowed in Exclusive Farm Use (EFU) zones, and the established minimum lot sizes required for land divisions in such a zone, and provisions of OAR 660-033 pertaining to dwellings and minimum lot size. All of these land use regulations were enacted after 1966 (see citations of statutory history of the Oregon Revised Statutes). On their face, and as they apply to the subject property, none of these regulations appear to relate to any of the exemptions listed in Section 3 of Ballot Measure 37.

Conclusions

It appears that the general statutory, goal and rule restrictions on residential development and the use of agricultural land apply to the owners’ 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 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 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 claimants cannot create smaller lots out of the subject property and develop those lots for residential use. 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 \$416,500. 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 current 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 the Yosts to use the subject property for a use permitted at the time they acquired the property on June 8, 1966.

Conclusion

Based on the record before the department, Harry and Jean Yost have established that they are entitled to relief. Therefore, department staff recommends not applying the following land use regulations to the claimants' use of the property in order to allow them a use of the property permitted at the time they acquired it: ORS 215.263(1), 215.780(1)(a), 215.283(1)(f); OAR 660-033-0100(1) and OAR 660-033-0130(3)(a).

Any use of the property by the claimants remains subject to the following laws: (a) those laws not specified in the claim to the State of Oregon (as supplemented) or in this report; (b) any laws enacted or enforced by a public entity other than the Commission or department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempt 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 26, 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.