

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

June 21, 2005

STATE CLAIM NUMBER: M119075

NAME OF CLAIMANT: Randy and Jill Fery

MAILING ADDRESS: 41391 Kingston-Jordan Road SE
Stayton, Oregon 97838

IDENTIFICATION OF PROPERTY: Township 9S, Range 1W, Section 14
Tax lots 400, 500, 600, and 700
Linn County

Township 9S, Range 1W, Section 23
Tax lot 100, Linn County

**OTHER CONTACT INFORMATION
FOR CLAIMANT:** Daniel B. Atchison
Wallace W. Lien, P.C.
1775 32nd Place NE
Salem, Oregon 97303

OTHER INTEREST IN PROPERTY: Hendricks Farms Inc.

DATE RECEIVED BY DAS: December 27, 2004

180-DAY DEADLINE: June 25, 2005

I. CLAIM

Randy and Jill Fery, the claimants, seek compensation 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 and develop the property that is the subject of this claim. The property is 158.31 acres, located on the east side Kingston Jordan Road, approximately 1.5-miles south of the City of Stayton. (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, in lieu of compensation, not applying certain state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, specifically those provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660 Div. 033 that restrict the division of the property or the establishment of a dwelling. The proposed action would not apply these laws only to the extent necessary to allow the claimants a use of the property permitted when they acquired it on March 30, 1995. Claimants would still need to apply to the county for a determination of whether a specific land division and/or residential use complies with the laws in effect on the date they acquired the property. The department acknowledges that the relief recommended in this report likely will not allow the claimants to use their property in the manner set forth in their claim. (See Section VI of this report for the complete recommendation.)

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 owners of surrounding properties. According to DAS, there were four written comments, evidence or information 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, dated December 21, 2004, was submitted to DAS for processing under OAR 125, Division 145. The claim includes a list of land use regulations, 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

Randy and Jill Fery, the claimants state that they are the owners of 158.31 acres located in Linn County. The claimants state that they took ownership of the property in 1995, and that the property has been continuously owned by the Fery family since 1933. To substantiate the claim, the claimants included deeds from John and Regina Dolzer to John C. Fery, dated March 2, 1933; from John C. Fery to the John C. Fery Family Trust, dated July 30, 1990; and from the John C. Fery Family Trust to the claimants, Randy and Jill Fery, dated March 30, 1995.

Conclusions

John C. Fery is a “family member” and the claimants, Randy and Jill Fery, are “owners” of the subject property as of March 30, 1995 as those terms are defined by Section 11 of 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 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 Fact

According to the claim, “The applicable statewide planning goals in conjunction with ORS 197 and 215 serve to limit the use of the subject property to agricultural use.” A

December 21, 2004 letter to Linn County from the claimants' attorney, included with the claim, states:

“The proposed use - The Ferys propose to partition the subject property into two, 1.5 acre residential lots. The dwellings will have wells and septic systems in compliance with Linn County and DEQ (Department of Environmental Quality) regulations. One lot will abut Kingston Jordan Road to the west, and the other lot will have access via an easement across the western lot. See, Exhibit ‘C.’ The proposed development will require waiver of the partitioning rules on EFU land found in LCC 924.600, 924.200-210 and 924.250 and waiver of the lot of record provisions for HVFL-1 soils of LC 933.705 and 933.708. Because the Fery’s family ownership of the property predates any Linn County land use regulation, they are requesting a waiver of all land use regulations, not otherwise exempt from the statute, that were not in effect in 1933.”

The claim is based on the Linn County Exclusive Farm Use (EFU) Zone. The County zoning is 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 to be zoned EFU pursuant to ORS 215. (See also OAR 660-015-0000(3).)

Current land use regulations, particularly ORS 215.263, ORS 215.283, 215.284, 215.780 and Goal 3 as implemented by OAR 660, Division 33, do not allow the subject property to be divided into parcels less than 80 acres. These provisions also establish standards for farm and non-farm dwellings on the existing or any proposed parcel(s).

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). (See also OAR 660-033-0100(1) – Minimum Parcel Size Requirements.) 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 exclusive farm use 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. (See citations of administrative rule history for OAR 660-033-0130 and 0135.)

Conclusions

The minimum lot size and dwelling standards established by Statewide Planning Goal 3, ORS 215, and OAR 660, Division 33, all adopted since the claimants’ family acquired the property in 1933, do not allow the division of the property into parcels less than 80 acres in size or allow the approval of dwellings as was possible in 1933. Linn County’s EFU zone is based on the standards required by Goal 3, ORS 215 and OAR 660,

Division 33. The current land use laws, all adopted since 1933, restrict the use of the property relative to the uses allowed when the property was acquired by the claimants' family in 1933.

The claimants acquired the subject property on March 30, 1995, after the effective date of the statutory provisions that restrict the creation of a non-farm parcel in the Willamette Valley under ORS 215.263(4), and the restriction in the Willamette Valley on the approval of a non-farm dwelling under ORS 215.284(1) (Chapter 792, Oregon Laws 1993 (HB 3661)).

The claimants also allege that Goal 14 and ORS 197 restrict the use of the subject property. The use they seek includes creating two parcels of 1.5 acres each, for residential development. To the extent that the level of development claimants seek is an urban use, their use may be restricted by Goal 14 and its implementing rules. As a general matter, however, ORS 197 establishes requirements for cities and counties under the State's planning program, and does not in itself restrict the use of real property. Without more information, the department is unable to determine that ORS 197 restricts the use of claimant's property. The Goal 14 restriction on urban use became effective on January 25, 1975, and applied to the claimants' property when it was acquired in 1995.

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 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

Although the claimants' attorney provided information to show that the fair market value of the property may have been reduced as a result of land use regulations applied today compared to the regulations that applied to the property when the claimants' family purchased the property in 1933, an estimate of the reduction in fair market value was not provided in the claim.

Conclusions

As explained in section V.(1) of this report, the current owners are Randy and Jill Fery who inherited and acquired the property on March 30, 1995 from his grandfather, Mr. John Fery, a "family member" under section (11)(A) of the Measure. Mr. John Fery acquired the property in 1933. Under Ballot Measure 37, the Ferys 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 the proposed smaller residential lots, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department

determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

4. Exemptions under Section 3 of Measure 37

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

Findings of Fact

The state laws subject to this claim include Statewide Planning Goal 3, provisions of ORS 215 and OAR 660, Division 33, that restrict the division of land and the establishment of dwellings. All of these land use laws were enacted after 1933. 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 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

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. The claimants cannot create the desired two, 1.5-acre residential lots out of the subject property. The laws enforced by the Commission or department reduce the fair market value of the property to some extent. 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, the department acknowledges that the laws on which the claim is based 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 the extent necessary to allow the present owners, Randy and Jill Fery, to use the subject property for a use permitted when they acquired the property on March 30, 1995.

Conclusions

Based on the record before the department, Randy and Jill Fery have established that they are entitled to relief. Therefore, department staff recommends not applying the following land use regulations enforced by the Commission or the department to the claimants' division of the property into two parcels and the establishment of a dwelling on each parcel: Statewide Land Use Planning Goal 3 and its implementing rules, and ORS 215. Only those provisions of these laws that restrict the claimant's ability to create two new parcels and the establish a dwelling on each are proposed to not apply. Further, the proposed decision will only allow claimants a use of their property permitted at the time they acquired it. In order to determine if the claimant's proposed partition of the property and establishment of two dwellings was permitted at the time they acquired it, they will need to apply to Linn County for approval of a development application for a use permitted at the time they acquired the property on March 30, 1995. Because it is unlikely that the creation of two parcels of 1.5 acres each, and the establishment of a dwelling on each was permitted on March 30, 1995, the department acknowledges that the relief proposed likely 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 their claim to the State of Oregon, dated December 21, 2004; (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.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on June 3, 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.