

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

July 1, 2005

STATE CLAIM NUMBER: M119218

NAME OF CLAIMANT: Doris J. Huff

MAILING ADDRESS: 2573 Quartz Street N.
Salem, Oregon 97303

IDENTIFICATION OF PROPERTY Township 6S, Range 3W, Section 24B
Tax Lots 100 and 600
Marion County

DATE RECEIVED BY DAS: January 10, 2005

180-DAY DEADLINE: July 9, 2005

I. CLAIM

Doris J. Huff, the claimant, seeks compensation in the amount of \$2,000,000 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 claimant desires compensation or the right to divide property into 1.5-acre lots. The property is located at 2573 Quartz Street N near the City of Salem. (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 laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimant to allow her to divide and establish residential dwellings on the property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780 and OAR 660, Division 033, the extent necessary to allow Doris J. Huff a use of the property permitted at the time she was acquired it on May 12, 1975. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 9, 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, there were 19 written comments, evidence or information received by DAS in response to the 10-day notice. One comment supported compensation or waiver of the regulations. The others generally expressed opposition to development of the property. These comments did not relate to the evaluation criteria in Measure 37. Because no funds are available to pay compensation, comments regarding the possible impact of the proposed or intended development of the claimant's property are not relevant to the evaluation and determination of the claimant's Ballot Measure 37 claim, and cannot be considered by the department.

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

The claim was submitted to DAS on January 10, 2005, for processing under OAR 125, Division 145. The claim identifies Exclusive Farm Use (EFU) zoning (Goal 3) 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 to “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

Doris J. Huff states in a letter dated January 7, 2005, that she or a family member has owned the subject property since 1964. She bases this claim on her now deceased husband’s (Lewis Huff) acquisition of the subject property with his father on March 4, 1964, doing business as the Huff Ranch. Mrs. Huff did not have any ownership interest in the subject property at that time. In 1975 Lewis Huff and his father dissolved their partnership, and on May 12, 1975, they conveyed the subject property (with other property not part of this claim) to Lewis Huff and Doris Huff, as equal tenants in common. On March 15, 2000, Doris J. Huff transferred the property to the Doris J. Huff Trust, a revocable living trust, with Doris J. Huff Trustee.

Conclusions

Doris J. Huff is an “owner” the subject property, as that term is defined in section 11(C) of Meausre 37 as of May 12, 1975. Her family ownership began on March 4, 1964, when her husband Lewis Huff 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 states that limitations in lot sizes and uses in the Marion County Zoning Ordinance Chapter 136, Exclusive Farm Use (EFU) Zone, “as required by the State of Oregon”, “are so severe as to not allow any additional lots to be created on the subject property.” The claim further indicates an intent to divide the subject property and to develop it with lots “averaging 1.5 acres in size.”

The subject property is currently designated Primary Agriculture in the Marion County Comprehensive Plan, and correspondingly zoned EFU in the Marion County Rural Zoning Ordinance (MCRZO). The minimum lot size for a farm parcel partition is 80 acres.

When the claimant’s family acquired the subject property in 1964, some provisions of ORS 215 applied to the property. However, current land use regulations enacted since 1964, particularly Statewide Planning Goal 3, and the statutory and administrative rule standards for the approval

of a farm or non-farm dwelling found in ORS 215.263, 215.284, 215.780 and in OAR 660, Division 33, do not allow the subject property to be divided into parcels less than 80 acres, and restrict the placement of dwellings on the subject property.

Conclusions

The minimum lot size and dwelling standards established by ORS 215.263, 215.284 and ORS 215.780, as applied by Goal 3 and OAR 660, Division 33, were all adopted after the property was acquired by the claimant's family in 1964, and do not allow the division of the property or the placement of dwellings on them as was possible in 1964, thereby restricting the use of the property relative to the uses allowed when the property was acquired in 1964 by Lewis Huff.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any laws 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 for compensation is \$2,000,000. No additional detail or explanation for the requested compensation amount is indicated in the claim other than a general statement on the increased value due to the division of the property and the ability to add dwellings. A Marion County Hearing's Officer report, on a Measure 37 claim filed with the county, cites the assessed real market value for subject property in 2004 as \$589,460. (See the department's claim file.)

Conclusions

As explained in section V. (1) of this report, Doris J. Huff is an owner of the property and acquired the property on May 12, 1975. The claimant's family member acquired the property in 1964. Thus, under Ballot Measure 37, Doris Huff is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value.

The claim for compensation is for \$2,000,000. However, without an appraisal based on the value of the proposed development or other substantiating documentation, 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 restriction of the use of the property and 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 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 includes both specific reference to particular County EFU zoning, and a general claim based on state land use regulations that restrict the use of the property relative to what would have been allowed in 1964 when Lewis Huff first acquired the property. These provisions include requirements of Statewide Planning Goal 3, ORS 215 and OAR 660, Division 33, relating to land divisions and the establishment of farm or non-farm dwellings, all of which are “land use regulations” under the Measure. With the exception of some provisions of ORS 215, these regulations were adopted after a family member acquired the property in 1964. Those provisions of ORS 215 that were adopted prior to the family’s acquisition of the subject property, are exempt under Section 3(E) of the Measure.

Conclusions

It appears that the general statutory, goal and rule restrictions on land division of agricultural land apply to the claimant’s anticipated use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37. Provisions of ORS 215 that were adopted prior to the family’s acquisition of the property in 1964 are exempt from the Measure. 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 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, Measure 37 allows the department to 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 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 1.5 acre lots. The claimant cannot create the desired small lots out of the subject 20-acre property and sell or develop those lots for residential use. 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 \$2,000,000. The claim provides no specific explanation about how the specified restrictions reduce the fair market value of the property. No appraisal or other substantiating documentation was submitted, and it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the current record for this claim, the department finds that the laws on which the claim is based more likely than not 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, Measure 37 authorizes the department to modify, remove or not apply one or more land use regulations to allow Doris J. Huff to use the subject property for a use permitted at

the time she acquired it on May 12, 1975.

When Doris J. Huff acquired the property on May 12, 1975, it was zoned AR-5 by Marion County. Under this zone, there was a five-acre minimum parcel size for the creation of new lots or parcels, which may have allowed division of the property into two lots on each parcel. However, Marion County's AR-5 Zone that applied to the property at that time had not been 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 acknowledged the Marion County Comprehensive Plan in 1982. Because the Commission had not acknowledged Marion County's comprehensive plan and land use regulations, including the AR-5 Zone in effect when the property was acquired by the Mrs. Huff on May 12, 1975, Statewide Planning Goal 3 applied directly to property on the date of acquisition.² Until Marion County's land use regulations were acknowledged by the Commission, the use of the subject property was subject to both the County's ordinances and the applicable Statewide Planning Goals.

In 1975, the state standards for a land division involving property where the local zoning was not acknowledged, in this case the AR-5 zone, required 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 3.³ 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).⁴ Thus, the opportunity to divide the property when Mrs. Huff acquired it in 1975, was limited to land divisions done consistent with the requirements of Goal 3 that the resulting parcels be either: (1) "appropriate for the

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 prior to the Commission's acknowledgment of the County's comprehensive plan in December, 1984. (See *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 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, the applicable statutes continue to apply, and insofar as the local implementing provisions are materially the same as the rules, the local provisions must be interpreted consistent with the substance of the rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

³ 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*, 36 Or App 699 (1978); *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 (81).

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 015 and 020 effective July 21, 1982).

continuation of the existing commercial agricultural enterprise in the area;” or (2) shown to comply with the legislative intent set forth in ORS 215.243.

As for dwellings allowed under EFU zoning as required by Goal 3 on the date of acquisition in 1975, farm dwellings were allowed if determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1973 edition) and non- farm dwellings were subject to ORS 215.213(3) (1973 edition).⁴

Conclusion

Based on the record, the department, 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 Doris J. Huff to allow her to divide the subject property and establish residential dwellings on the resulting parcels: applicable provisions of Goal 3, ORS 215.263, ORS 215.780, ORS 215.284 and OAR 660-033-100 enacted on or after May 12, 1975, to the extent necessary to allow the claimant a use of the property permitted at the time she acquired it on May 12, 1975.
2. The action by the State of Oregon provides the State’s authorization to the claimant to use the property subject to the standards in effect on May 12, 1975. On that date, the property was subject to Goal 3 and the minimum lot size standards specified therein (effective January 25, 1975), as well as the standards then in effect ORS 215. These statutory provisions require that the resulting parcels or lots be either: (1) “appropriate for the continuation of the existing commercial agricultural enterprise in the area; or (2) shown to comply with the standards for the creation of non-farm parcels under ORS 215.213 (1973 Edition).
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 215.412 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 claimant remains subject to the following laws: (a) those state laws not specified in (1) above; (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.
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 her to obtain a decision under Measure 37

⁴Under the version of ORS 215.213 in effect when the claimant acquired the property, a farm dwelling could be established on agricultural land, only if the farm use to which the dwelling relates is existing, (*Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) *affirmed without opinion*, 70 Or App 179 (September 14, 1984) and *Newcomer v. Clackamas County*, 92 Or App 174, modified 94 Or App 33, November 23, 1988).

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 claimant 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 claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on June 17, 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.