

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

July 13, 2005

STATE CLAIM NUMBER: M119386

NAME OF CLAIMANT: Kenneth F. Cairy

MAILING ADDRESS: 28615 Southwest Burkhalter Road
Hillsboro, Oregon 97123

IDENTIFICATION OF PROPERTY: Township 1S, Range 2W, Section 30
Tax Lot 301
Washington County

DATE RECEIVED BY DAS: January 20, 2005

180-DAY DEADLINE: July 19, 2005

I. CLAIM

Kenneth F. Cairy, the claimant, seeks compensation in the amount of \$325,000 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 partition one non-farm parcel and construct a dwelling on the property located at 28615 Southwest Burkhalter Road, near Hillsboro in Washington 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 laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimant to allow him to partition the property to create one parcel and develop one non-farm residence on the subject property: the applicable provisions of ORS 215.263, 215.284, 215.780; OAR 660-33-0090, 660-033-0100, 660-033-0130(4), 660-033-0135, and Statewide Planning Goal 3 (Agricultural Lands). These laws will not apply to the claimant's use of the subject property only to the extent necessary to allow Mr. Cairy a use permitted when he acquired the property on February 22, 1983. (See Section VI. of this report for the complete recommendation.)

III. COMMENTS ON THE CLAIM

Comments Received

On February 23, 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 no 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

The claim was submitted to DAS on January 20, 2005 for processing under OAR 125, Division 145. The claim identifies Washington County Exclusive Farm Use (EFU) zoning and House Bill 3661 as restricting the subject property. 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. Section 11 (C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claim includes a Warranty Deed documenting the transfer of the subject property to Kenneth F. Cairy on February 22, 1983.¹ According to a current Washington County Tax Statement included in the claim, Kenneth Cairy remains the current owner of property described in the claim.

Conclusions

Kenneth Cairy is an “owner” of the subject property as that term is defined in Section 11 (C) of the measure, as of February 22, 1983.

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 claimant states that Washington County EFU zoning, authorized by OAR 660, Division 033, and House Bill 3661, enacted in 1993, preclude him from dividing his property into two parcels and building one additional non-farm dwelling on the resulting new parcel. According to the claim, the property is 6.72 acres in size.

Current land use regulations, including Goal 3, require that the property be planned and zoned for exclusive farm use. ORS 215.263, 215.284, 215.780 and OAR 660, Division 33, require that lands zoned for exclusive farm use, not be divided into parcels less than 80 acres, and prohibit the establishment of farm or non-farm dwellings on the subject property.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones, effective November 4, 1993 (chapter 792, Oregon Laws 1993) as applied by

¹ The claim also includes a Warranty Deed transferring an interest in the property from a Barbara Davis to Kenneth Cairy on April 23, 1990. It is not clear from the deed what interest Ms. Davis held in the property and the claim does not establish a family relationship between Mr. Cairy and Barbara Davis.

OAR 660-06-0100. ORS 215.263 also contains standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone. OAR 660, Division 33, establishes standards for the approval of farm and non-farm dwellings, among others, for lands zoned EFU. Specifically, OAR 660-033-0135 requires that for the approval of a dwelling “customarily provided in conjunction with farm use,” the owner demonstrate, in part, that the owner’s farm operation produced a certain gross farm annual income from the sale of farm products in the last two or three of the last five years.

OAR 660-033-0135(1)(a) (applicable to farm dwellings on non-high-value farmland) became effective on March 1, 1994, and implements 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. (See citations of administrative rule history for OAR 660-033-0130 and 0135.)

The claimant’s property is “agricultural land” as defined by Goal 3 because it contains NRCS Class III Woodburn soils. The parcel is also demonstrated to contain Class VII(S) soils which are generally considered less suitable than Class III soils for agricultural use. For a non-farm dwelling, ORS 215.284(4) as applied by OAR 660-033-0130(4) requires, in part, that a non-farm dwelling may only be established on a parcel predominately composed of Class IV to VIII soils. The subject property is composed of Class III and Class VII soils and may therefore be eligible for a non-farm dwelling.

ORS 215.700 and ORS 215.705 establish criteria for approval and siting of “lot-of-record” dwellings on land designated for farm or forest use. The criteria apply to the establishment of one single-family dwelling and do not apply to the division of land or to the establishment of multiple dwellings. The subject property contains one existing single-family dwelling and is not eligible for additional dwellings under ORS 215.705(1)(b).

The claimant acquired the subject property on February 22, 1983. On that date, the property was zoned EFU by the County under ORS 215. However, the County’s EFU 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 that the county’s comprehensive plan and land use regulations as complying with the statewide goals on May 31, 1984.

Because the Commission had not acknowledged Washington County’s comprehensive plan and land use regulations, including the EFU zone in effect at the time, Statewide Planning Goal 3, applied directly to property on the date of acquisition.² Until the 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 1983, the state standards for a land division involving property where the local zoning was not acknowledged required that the resulting parcels be “appropriate for the continuation of the

² See *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), and *Alexanderson v. Polk*

existing commercial agricultural enterprise in the area” under ORS 215.263 as applied by Goal 3.”³ The applicable statutory and administrative rule standards for the approval of a farm or non-farm dwelling in effect on that date are found in ORS 215.283(1)(f) and ORS 215.283(3) (1981 edition) and OAR 660, Division 5 (1982 Edition, repealed August 7, 1993).

ORS 215.283(1) (f) (1981 edition) provided standards for a “dwelling customarily provided in conjunction with farm use.”⁶ OAR 660-05-025 further required that such a dwelling be located on a parcel large enough to satisfy the Goal 3 minimum lot size standard, that is, “appropriate for the continuation of the existing commercial agricultural enterprise within the area” as explained in OAR 660-05-015. (See OAR 660, Division 5, 1982 edition.) Non- farm dwellings were subject to ORS 215.283(3) (1981 edition).

Information has not been provided showing that the development desired by the claimant complies with either the minimum lot size standard for farm parcels under Goal 3 and ORS 215.263 (1981 edition), the standards for new non-farm parcels under ORS 215.263 (1981 edition) or the approval standards for dwellings under ORS 215 283(1)(f) (1981 edition), in effect at the time Mr. Cairy acquired the property in 1983.

Conclusions

Mr. Cairy’s claim is based on the assumption that the County’s EFU zone that applied to the property when he acquired the property in 1983 was the governing land use regulation when he acquired the property. Because the County’s zone had not been acknowledged by the Commission at the time the claimant acquired the property, the Goal 3 “commercial” standard for farmland divisions and the standards for new parcels under ORS 215.263 (1975 edition) applied to the property, it is not clear what uses would have been permitted at the time the claimant acquired the property in 1983.

However, the current minimum lot size and dwelling standards established by ORS 215.263, 215.284, 215.700 to 705 and 215.780 as applied by Washington County’s EFU zone, authorized under Statewide Planning Goal 3 and OAR 660, Division 33, clearly restrict the division of the

³ *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 decision *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).

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).

property into parcels smaller than 80 acres. It is more likely than not that the current restrictions on the property restrict the claimant's use of the property relative to what was permitted when the claimant acquired the property in 1983.

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

Tax statements included in the claim indicate that the property's assessed value for 2004-2005 is \$290,820. The claimant cites verbal estimates from realtors, which indicate that one additional parcel would be worth approximately \$325,000. The claim does not include an appraisal of the fair market value of the property under current laws or under a use proposed by the claimant.

Conclusions

Based on the submitted information including claimant estimates of value, 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 laws enforced by the Commission or the department. Without an appraisal, it is not possible to substantiate the specific dollar amount the claimant demands for compensation.

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 identifies Washington County EFU zoning, authorized under ORS 215.700-705 and OAR 660-033-0135(1)(a) and HB 3661 as restricting the use of the subject property relative to what would have been allowed in 1983 when the property was acquired. These laws were enacted after Mr. Cairy acquired the property in 1983. However, ORS 215.283(1)(f) and much of Statewide Planning Goal 3, upon which these laws are based, were enacted before 1983. Current state laws that restrict the use of the property that were enacted prior to February 22, 1983 are exempt under section (3)(E) of Measure 37.

Conclusions

The general statutory, goal and rule restrictions on dividing the subject property for residential use, as cited in the claim, do not come under any of the exemptions in Measure 37. Laws enacted prior to the claimant's acquisition of the property are exempt under Measure 37(3)(E).

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, the department may choose to not apply the law to allow the present owner to carry out a use of the property allowed at the time the present owner acquired the property. The Commission has by rule 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 since the claimant acquired the subject property restrict the division of and placement of a dwelling on the property. The laws enforced by the Commission or the department reduce the fair market value of the subject property to some extent. The claim provides several estimates of the reduction in the property's fair market value. However, because the claim does not include 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 believes 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 Kenneth Cairy to use the subject property for a use permitted at the time he acquired the property on February 22, 1983.

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 department recommends that the requirements of the following laws enforced by the Commission or the department not apply to the claimant's use of the property, to allow him to divide the property to create an additional parcel and to establish a single family residence on each parcel: the applicable provisions of ORS 215.263, 215.284, 215.780; OAR 660-33-0090, 660-033-0100, 660-033-0130(4); 660-033-0135; OAR 660-33-0020; OAR 660-33-0130. These laws will not apply to the claimant's use of the property only to the extent necessary to allow him a use of the property permitted at the time he acquired it.

2. The action by the State of Oregon provides the state's authorization to the claimant to partition one additional parcel and to establish one dwelling on each parcel, subject to the standards in effect on February 22, 1983. Those standards include the provisions of ORS 215 and Statewide Planning Goal 3 that were in effect on that date.

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 claimant first obtains 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 laws not specified in (1), above; (b) any laws enacted or enforced by a public entity other than DLCDC; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under section (3) of Measure 37.

5. Without limiting the generality of the foregoing terms and conditions, for the claimant to use the property, it may be necessary 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 the order will relieve 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 24, 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.