

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation**

September 12, 2005

STATE CLAIM NUMBER: M119636

NAMES OF CLAIMANTS: Stefan and Ana Varga

MAILING ADDRESS: 28277 SE Highway 224
Eagle Creek, Oregon 97022

PROPERTY IDENTIFICATION: Township 2S, Range 4E, Section 30
Tax Lot 900
Clackamas County

DATE RECEIVED BY DAS: March 22, 2005

180-DAY DEADLINE: September 18, 2005

I. SUMMARY OF CLAIM

The claimants, Stefan and Ana Varga, seek compensation for an estimated \$2,000,000 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 subdivide their 48.28-acre property into five-acre parcels and to develop a dwelling on each parcel. The property is located at 28277 SE Highway 224 near Eagle Creek, 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 Stefan and Ana Varga's division of the 48.28-acre property into five-acre parcels and to the development of a dwelling on each parcel: Statewide Planning Goal 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780, and applicable provisions of OAR 660, division 33, enacted after December 30, 1992. These laws will not apply to the claimants only to the extent necessary to allow Stefan and Ana Varga a use of the property permitted at the time they acquired it in 1992. The department acknowledges that the relief to which the claimants are

entitled under Measure 37 will not allow the claimants to subdivide and develop the subject property into five-acre parcels as requested in the claim (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 31, 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, four written comments, evidence or information were received in response to the 10-day notice.

The comments are relevant to whether a state law restricts the claimants' use of the property. The comments have been considered by the department in preparing this report. (See the comment letters in the department's claim file.)

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 March 22, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's Exclusive Farm Use (EFU-80) zoning that restricts the use of the property 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 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, Stefan and Ana Varga, acquired the subject property on December 30, 1992, as reflected by a real estate sales contract. Information provided by the Clackamas County Clerk indicates that the claimants recorded a deed of transfer on the subject property on June 14, 1994, and that Stefan and Ana Varga remain the current owners of the subject property.

Conclusions

The claimants, Stefan and Ana Varga, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of December 30, 1992.

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 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 claim states that “EFU-80 limits RRF-5 subdivision” and requests “reversal from current EFU-80 zoning to RRF-5.”

The claim is based, in part, on Clackamas County’s current Exclusive Farm Use (EFU) Zone and the applicable provisions of state law that require such zoning. The claimants’ property is zoned EFU as required by Statewide Planning Goal 3 in accord with OAR 660, division 33, and

ORS 215 because the claimants' property is "Agricultural Land" as defined by Goal 3.¹ Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660, division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels smaller than 80 acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

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). 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 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. Subsequent amendments to comply with HB 3326 (Chapter 704, Oregon Laws 2001, and effective January 1, 2002) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

The property was initially zoned RRFF-5 by Clackamas County on June 28, 1976. On May 17, 1982, the property was rezoned by the county to EFU-20. When Mr. and Ms. Varga acquired the property in 1992, the property was zoned EFU-20, as authorized under OAR 660, division 33, and ORS 215 (1991 editions). Division of the property was subject to the Clackamas County EFU-20 Zone, which had 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. It is not clear whether the claimants could have constructed a dwelling on the subject property under those standards in effect when they acquired it on December 30, 1992. At no time during Mr. and Ms. Vargas' ownership history has the subject property been zoned RRFF-5, the zoning designation desired in the claim.

The applicable statutory and administrative rule standards for the approval of a farm dwelling in effect in 1992 are found in ORS 215.283(1)(f) (1991 edition) and OAR 660, division 5 (1986 edition, repealed August 7, 1993). Specifically, ORS 215.283(1)(f) provided standards for a "dwelling customarily provided in conjunction with farm use." OAR 660-05-030 further required that such a dwelling: (1) be located on a parcel large enough to satisfy the Goal 3

¹ The claimant's property is "Agricultural Land" because it contains NRCS (Natural Resources Conservation Service) Soils. The subject property is comprised of predominantly Type II and III soils including Conser silty clay loam (Map unit 22, Type IIIw), Wapato Silty clay loam (Map unit 84, Type IIIw), Salem silt loam (Map unit 76B, Type II_s), and Clackamas silt loam (Map unit 17, Type II_w).

minimum lot size standard, i.e. “appropriate for the continuation of the existing Commercial Agricultural Enterprise within the area” as explained in OAR 660-05-015; and (2) be situated on a parcel currently employed for farm use as explained in OAR 660-05-030(4). (See OAR 660, Division 5, 1986 edition.)

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were enacted after Mr. and Ms. Vargas’ acquisition of the subject property in 1992, and do not allow further division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired. In 1992, the property was subject to the requirements of the County’s EFU-20 zone, which was adopted pursuant to the provisions of Goal 3, OAR 660, division 5, and ORS 215 then in effect. The property was not zoned RRFF-5 as alleged in the claim and division of the property into five-acre lots was not allowed when the claimants acquired the property in 1992.

The claim does not establish the level of development that would have been allowed under the standards in effect when the claimants acquired the property and it is not clear whether the claimants would have qualified for the approval of any subdivision or dwellings on their property under the standards in effect when they acquired the property in December 30, 1992. However, OAR 660-033-0130 and 0135 clearly do not allow subdivision or placement of a dwelling on the subject property, whereas it is possible that at least one parcel could be created and a dwelling could be approved under the more general provisions in effect in 1992. Therefore, it is likely that laws enacted after the claimants acquired the property restrict the use of the property to some extent relative to uses permitted when they acquired it on December 30, 1992.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimants have identified. There may be other laws that currently apply to the claimants’ use of the property, and that may continue to apply to the claimants’ use of the property, that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any land use regulation 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 initial claim submittal does not include an estimate of reduction in the property's fair market value, in the absence of current regulations. The claim states, "We do not want money – we want to divide the land to RRFF-5." Subsequent materials submitted by the applicants indicate that the property is currently worth approximately \$1,000,000; if developed in two-acres or five-acres, the applicants estimate that the property's value would "triple" to between \$2,500,000 and \$3,000,000. Based on this information, staff concludes that the claimants' estimated reduction in value is approximately \$2,000,000.

Conclusions

As explained in Section V.(1) of this report, the current owners are Stefan and Ana Varga who acquired the property in 1992. Under Ballot Measure 37, Mr. and Ms. Varga are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimants acquired the property may restrict division of the subject property and limit the placement of dwellings. The claimants estimate the reduction in value due to the restrictions to be approximately \$2,000,000.

As explained under Section V.(2) of this report, it is not clear whether the claimants would have qualified for the approval of a subdivision or dwellings on their property under the standards in effect when they acquired the property on December 30, 1992. OAR 660-033-0130 and 0135 clearly do not allow subdivision or placement of a dwelling on the subject property but it is possible that at least one parcel could be created and a dwelling could be approved under the more general provisions in effect when the property was acquired in 1992.

Without an appraisal, and without verification of the uses permitted when the claimants acquired the property, it is not possible to substantiate a specific dollar amount the claimants may demand 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 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 is based on the Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its EFU zone. Provisions of Goal 3, ORS 215 and OAR 660, division 5, and ORS 215 in effect when the claimants acquired the property on December 30, 1992, are exempt under Section 3(E) of the Measure. Amendments to ORS 215 and provisions of OAR 660 division 33, enacted after December 30, 1992, are not exempt.

Conclusions

Without a specific development proposal for the property, 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 claimants' use of the property, and to the extent these laws were enacted after December 30, 1992, they are not exempt under Section 3(E) of Measure 37. Provisions of Goal 3, OAR 660, division 5, and ORS 215 in effect when the claimants acquired the property in 1992, are exempt under Section 3(E) of the Measure and will continue to apply to the property.

Other laws in effect when the claimants acquired the property are also exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the property that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under Section (3) of Measure 37 that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the property.

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 in order to allow the present owners to carry out a use of the property permitted at the time the current owners 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 claimants from creating the desired five-acre lots out of the subject property, or developing those lots for residential use because laws enacted after the claimants acquired the property prohibit lot sizes that small. The claim asserts that laws enforced by the Commission or department reduce the fair market value of the subject property by an estimated \$1,500,000 to \$2,000,000. However, because the claim does not provide an appraisal or other specific documentation to establish how the specified restrictions reduce the fair market value of the property, and because the level of development permitted when the claimants acquired the property in 1992, is unclear, 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 all or parts of certain land use regulations to allow Stefan and Ana Varga to use the subject property for a use permitted at the time they acquired the property on December 30, 1992.

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 State of Oregon will not apply the following laws to Stefan and Ana Varga's division of the 48.28-acre property or to the establishment of dwellings: applicable provisions of Statewide Planning Goal 3, ORS 215.283, 215.284 and 215.780, and OAR 660, division 33, enacted after 1992. These land use regulations will not apply to Stefan and Ana Varga's use of the property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on December 30, 1992.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property subject to the standards in effect on December 30, 1992. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3, OAR 660, division 5, and ORS 215 then in effect. The department acknowledges that the relief to which the claimants are entitled under Measure 37 will not allow the claimants to subdivide and develop the subject property into five-acre parcels as requested in the claim.
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 215.402 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 claimants under the terms of the order will remain 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 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.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the property, it may be necessary for them to 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 this order relieves the claimants 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 claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 19, 2005. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' 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.