

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

August 12, 2005

STATE CLAIM NUMBER: M119871

NAME OF CLAIMANTS: Walter and Beryl Gunn

MAILING ADDRESS: 15900 Thayer Road
Oregon City, Oregon 97045

IDENTIFICATION OF PROPERTY: Township 3S, Range 2E, Section 11
Tax Lots 600 and 604
Clackamas County

DATE RECEIVED BY DAS: February 22, 2005

180-DAY DEADLINE: August 21, 2005

I. CLAIM

The claimants, Walter and Beryl Gunn, seek compensation in the amount of \$3,000,000 for a 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 their property containing approximately 40 acres into forty (40) one-acre parcels, with each lot or parcel containing one single-family dwelling. The property is located at 15900 Thayer Road, near Oregon City in Clackamas County, Oregon. (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 this claim is valid. Department staff recommends, in lieu of just compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimants to allow them to divide the subject property into one-acre lots or parcels, and develop a dwelling on each lot or parcel: the applicable provisions of Statewide Planning Goals 3 and 14, ORS 215, and OAR 660, divisions 6 and 33, that took effect after June 27, 1978. These laws will not apply to the claimants' use of the subject property only to the extent necessary to allow them a use of the subject property permitted at the time they acquired it on June 27, 1978. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 3, 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 February 22, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County provisions that implement the requirements of Statewide Planning Goal 4 and OAR 660, divisions 6 and 33, with respect to the approval of land divisions and dwellings on lands zoned for agriculture and forest uses. 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 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 Sale Agreement to demonstrate that Walter R. Gunn and Beryl M. Gunn, husband and wife, acquired an ownership interest in Tax Lots 600 and 604 on June 27, 1978. Information from the Clackamas County Assessor’s office demonstrates that Walter and Beryl Gunn remain the current owners of the property. (See the department’s claim file.)

Conclusions

Walter A. Gunn and Beryl M. Gunn are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, and have owned the subject property since June 27, 1978.

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 cites several sections of OAR 660, divisions 6 and 33, and several sections of ORS 215. Specifically, the claim cites ORS 215.705, ORS 215.780 and OAR 660-006-0026 and 0027, regarding the minimum parcel size and the allowance of dwellings in Forest zones. The claimants also cite ORS 215.263, ORS 215.283 and OAR 660-033-0100 and 0130, which regulate the division of land and the placement of dwellings on lands zoned for agricultural use.

The claim also refers to “any other law, rule or ordinance changing the original zoning of RA-1 to create minimum lot size to site dwelling.”

The claim is based, in part, on Clackamas County’s current Agriculture/Forest (AG/F) Zone and the applicable provisions of state law that require such zoning. The claimants’ property is zoned AG/F as required by Statewide Planning Goals 3 and 4 in accord with OAR 660, divisions 6 and 33, and in accord with ORS 215, because the claimants’ property is “resource land” as defined by Goals 3 and 4.

Clackamas County's AG/F zone provisions were adopted to comply with Statewide Planning Goal 4 (Forest Lands), and the implementing provisions in OAR 660-006-0050 (effective February 5, 1990) and subsequently amended on March 1, 1994 to comply with the provisions of HB 3661 (chapter 792, Oregon Laws 1993).

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones which implements the 80-acre minimum lot size specified in ORS 215.780. In addition, Goal 14 generally prohibits urban uses of land outside of an urban growth boundary. The density of residential development desired by the claimants likely is prohibited by Statewide Land Use Planning Goal 14.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in Exclusive Farm Use (EFU) and Forest 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.

Under OAR 660-006-0050, all the uses permitted under Statewide Goals 3 and 4 are allowed, except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993. Clackamas County has provided information to the department that the predominant use of the property on January 1, 1993, was most likely farm use and thus, the property would be subject to the requirements for dwellings applicable under EFU zoning required by Statewide Goal 3 and OAR 660, division 33. This includes the farm dwelling "income test" asserted by the claimant as restricting the use of the property.

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.)

On June 27, 1978, the subject properties were zoned RA-1 Rural Agriculture, one-acre minimum lot size. In 1979, the property was rezoned by Clackamas County to Transitional Timber District (TT-20) with a 20-acre minimum parcel size. This zoning district was determined by the Commission to comply with the requirements of Statewide Goal 4 in 1981 and was fully acknowledged under ORS 197.250 and 197.251 on February 9, 1983.¹ In 1994, the property was rezoned to its current AG/F zoning in accordance with OAR 660, divisions 6 and 33.

When the claimants acquired the subject properties on June 27, 1978, Clackamas County's comprehensive plan has not yet been acknowledged by the Commission. Until the County's plan was acknowledged by the Commission in early 1983, the Statewide Planning Goals applied

¹ See Continuance Order dated December 31, 1981, and Acknowledgment Order 83-ACK-14 dated February 9, 1983, in the department's files.

directly to the property on a site-specific basis.² The specific Goals that applied to this property in 1978 include the versions of Goal 3 and Goal 14 then in effect.

Conclusions

The current provisions applicable to lands zoned for Agricultural/Forest use under OAR 660-006-050 to 055 relating to land divisions and dwelling standards adopted since the claimants acquired the property in 1978, restrict the use of the property relative to uses allowed when Walter and Beryl Gunn acquired the property in 1978. Under these current provisions, the claimants are restricted from further dividing or developing their property as they may have been able to when they acquired it.

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 use(s) that the claimant has 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 permit 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 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 subject property currently contains one dwelling. The claimants propose to create forty (40) one-acre dwelling sites. The claim includes an informal list of recent sales of similar properties near the subject parcels. The claimants apparently used the list of sales prices to estimate the reduction in value as a result of land use regulations enforced since 1978. The claim does not include an appraisal or other formal analysis of the property value to demonstrate reduction in value either before or with current land use regulations.

² Statewide Planning Goals 3 and 4 became effective on January 25, 1975 and were applicable to legislative land use decisions and some quasi-judicial land use decisions where site-specific goal provisions applied prior to the Commission's acknowledgment of the County's Planning program on March 10, 1983 (*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, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same in substance, the applicable rules must be interpreted and applied by the county in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

Conclusions

As explained in section V.(1) of this report, the Gunns are the current owners of the property. Under Ballot Measure 37, the Gunns 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, or another explanation of the reduction in fair market value, it is not possible to substantiate the amount of reduction in fair market value that has occurred as a result of the laws on which the claim is based. Furthermore, without a final determination of what use was permitted in 1978, the extent to which the use of the property has been restricted cannot be determined. It is clear that under current laws, the property cannot be divided and developed to the same extent as proposed, whereas under the standards in effect in 1978, it is more likely than not that the property could have been divided, and it is possible that at least one additional home site could be approved. Therefore, 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 claim identifies the County's Agriculture/Forest zone, as authorized under applicable sections of ORS 215 and OAR 660, divisions 6 and 33, as restricting the use of the subject property relative to what would have been allowed in 1978 when the property was acquired. To the extent that the County's current AG/F zoning and applicable portions of state laws were enacted after the Gunns acquired the property in 1978, these laws are not exempt under subsection 3(E) of Ballot Measure 37.

While not directly raised by the claimants, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding Forest Lands. Section 3 (B) of Measure 37 specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes..." To the extent they may be applicable under OAR 660-006-0050, the department finds that siting standards for dwellings in forest zones under ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under subsection (3) of Measure 37.

Conclusions

Those current laws, including the applicable provisions of Goals 3 and 4 and ORS 215, enacted prior to the claimants' acquisition of the property in 1978 are exempt. The siting requirements of ORS 215.730, Goal 4 and its implementing rules related to dwelling siting standards based on health and safety will also continue to apply. 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.

There may be other laws that continue to apply to the claimants' use of the property because they were not 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 an owner of property seeks 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 use(s) 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. Claimants should be aware that the less information they provide 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 to allow the present owners to carry out a use of the property permitted at the time the present owners 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 conclusions set forth in this report, laws enforced by the Commission or the department prevent the subject property from being divided into one-acre parcels and developed as home sites. These laws more likely than not have reduced the fair market value of the subject property to some extent. The claim asserts this amount to be \$3,000,000. However, because the claim does not provide a specific explanation for how the specified restrictions reduce the fair market value of the property from what they could have done under the regulations in place at the time the claimants acquired the property in 1978, 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, Measure 37 authorizes the department to modify, remove or not apply one or more land use regulations to the extent necessary to allow Walter and Beryl Gunn to use the subject property for a use permitted at the time they acquired the parcels on June 27, 1978.

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 the Gunns' to allow them to divide the subject property into one-acre lots or parcels, and develop a dwelling on each lot or parcel: the applicable provisions of Statewide Planning Goals 3 and 14, ORS 215, and OAR 660, divisions 6 and 33, that took effect after June 27, 1978. These land use regulations will not apply to the Gunns' use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the subject property on June 27, 1978.
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 June 27, 1978. On that date, the property was subject to Statewide Goals 3 and 14 and applicable provisions of ORS 215 and ORS 92 (1977 editions).
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 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 July 18, 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.