

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

August 16, 2005

STATE CLAIM NUMBER: M119894

NAME OF CLAIMANTS: Walter L. Wright and Dorothy M. Wright

MAILING ADDRESS: 2280 Fernwood Circle
Lake Oswego, Oregon 97034

OTHER CONTACT INFORMATION: Dorothy S.Cofield, Attorney at Law
4248 Galewood Street, Suite 18
Lake Oswego, Oregon 97035

IDENTIFICATION OF PROPERTY: Township 4S, Range 1E, Section 22,
Tax Lot 1902
Clackamas County

DATE RECEIVED BY DAS: February 23, 2005

180-DAY DEADLINE: August 22, 2005

I. CLAIM

The claimants, Walter L. Wright and Dorothy M. Wright, seek compensation in the amount of \$187,158 for 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 develop the 10-acre property with a single-family dwelling. The property is located on the east side of the Canby-Marquam Highway, South of South Gribble Road, in Clackamas County, Oregon.

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 subject property to allow the claimants to develop the property with a single-family dwelling: the applicable provisions of Statewide Planning Goal 3, ORS 215, and

OAR 660, division 33, that became effective after April 30, 1974. These laws will not apply only to the extent necessary to allow Mr. and Ms. Wright a use of the property permitted at the time they acquired it on April 30, 1974. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On March 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, no written comments, evidence or information were 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 was submitted to DAS on February 23, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's Exclusive Farm Use (EFU) zoning and the following state laws as restricting the use of the property as the basis for the claim: ORS 215.284, ORS 215.780, OAR 660-033-0130 and OAR 660-033-0135. 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 claims has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulation 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 of 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, Walter and Dorothy Wright, acquired Tax Lot 1902 (10-acres) on April 30, 1974. A February 2, 2005, Status of Record Title report confirms Walter and Dorothy Wright as the current owners of the property.

Conclusions

The claimants, Walter and Dorothy Wright, are the current owners of the subject property as that term is used in Section 11(C) of Ballot Measure 37. They became the owners of Tax Lot 1902 on April 30, 1974.

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 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 cites ORS 215.284, 215.780, OAR 660-033-0130, and 660-033-0135 as the laws that restrict the use of the property. The claim states that the use of the property the claimants wish to carry out is to establish a single-family dwelling on the property.

The claimants’ property is zoned EFU-20 as required by Goal 3 in accordance 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 are zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.283, ORS 215.284, and OAR 660, division 33 as applied by Goal 3, established standards for allowing the existing or any proposed parcels or lots to have farm or non-farm dwellings on them.

¹ The subject property consists of Aloha silt loam (Class IIw) and Dayton silt loam (Class IVw) soils. See Soil Survey of Clackamas County Area, Oregon, USDA Soil Conservation Service, November 1985, Sheet #37 and pp. 16 and 46.) The predominant Aloha silt loam Class II soils are “high-value farmland” under ORS 215.710 and OAR 660-0020(8).

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interpreted 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, 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 Wrights acquired Tax Lot 1902 on April 30, 1974. At that time, the property was not subject to any zoning requirements by Clackamas County.² However, this acquisition occurred after adoption of SB 100 (chapter 80, Oregon Laws 1973, effective October 5, 1973), but before the adoption of the Statewide Planning Goals effective January 25, 1975. As such, ORS 197.175(1) and 197.280 (1973 edition) required, in addition to any local plan or zoning provisions, the application of Interim Land Use Goals set forth in ORS 215.515 (1973 edition) to the exercise of planning and zoning responsibilities prior to the effective date of the Statewide Planning Goals (*see Peterson v. Klamath Falls*, 279 Or 249 (1977)).

No information has been provided showing that the residential development proposed by the claimants complies with the Interim Planning Goals set forth in ORS 215.515 (1973 edition) in effect at the time that the claimants acquired the subject property in 1974.

On September 30, 1994, the claimants applied to Clackamas County for a farm dwelling based on ownership of more than 20 contiguous acres: Tax Lot 1902 (10-acres, the subject property) and Tax Lot 1903 (14.49-acres, acquired January 24, 1994, and not the subject of this claim). The Wrights withdrew their application when advised by County staff that approval required being able to meet the \$80,000 farm income standard. The property does not qualify for any other type of dwelling currently permitted in Clackamas County's EFU zone.³

Conclusions

Dwelling standards established by Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, adopted since the claimants acquired the property in 1974, do not allow the approval of a dwelling, as may have been possible in 1974. The County's EFU zone is based on the standards required by Goal 3, ORS 215, and OAR 660, division 33. Land use laws adopted since 1974 restrict the use of the property from what could have been done when the claimants acquired the property. However, it is unclear whether the claimants' requested use of their property complies with the standards in effect when they acquired it on April 30, 1974.

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. There may

² See June 15, 2005 Planning Staff Report to the Board of County Commissioners for file # ZCO38-05, copy in the department claim file.

³ See June 15, 2005 Planning Staff Report to the Board of County Commissioners for file # ZCO38-05, page 2 of the narrative in the State claim, and copy of the application included with the State claim..

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 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 estimates that the fair market value of the subject property has been reduced by \$187,158 as a result of land use laws enacted after the Wrights acquired the subject property in 1974, based on Clackamas County Assessor records that show a current value of 21,250 with land use restrictions, and a value of \$201,848 without the restrictions. There is no certified appraisal to substantiate the claimed values either before or with state land use regulations.

Conclusions

As explained in section V.(1) of this report, Walter and Dorothy Wright are the current owners of Tax Lot 1902 as of April 30, 1974, under section (11) of Measure 37. The Wrights are due compensation for land use laws 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, state land use laws restrict development of a single-family dwelling on the subject property relative to what was allowed when they acquired the property. These restrictions reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$187,158. However, without an appraisal or a more detailed analysis of the information submitted, it is not possible to substantiate the specific dollar amount the claimants 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 Clackamas County's EFU-20 zone and the related provisions of state law that have restricted use of the property and reduced its fair market value. These are Statewide Planning Goal 3: Agricultural Lands, ORS 215, and OAR 660, division 33. All of these

regulations, except for certain provisions of ORS 215 regarding EFU zones, were enacted after the claimants acquired Tax Lot 1902 in 1974. Most laws that qualify as “land use regulations” under the Measure were adopted after 1974 with the exception of ORS 215 and those provisions of Senate Bill 100 (1971). Laws that became effective after the claimants acquired Tax Lot 1902 in 1974 are not exempt under subsection 3(E) of Ballot Measure 37 as to the claimants’ use of that tax lot.

Conclusions

It appears that the general restrictions on the residential use of Agricultural Land apply to the owners’ anticipated use of the property, and for the most part these laws are not exempt under subsection 3(E) of Measure 37. Laws in effect when the claimants acquired the property are 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 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 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 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 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 of Fact

Based on the findings and conclusions in this report, laws enforced by the Commission or the department prohibit the development of the subject property with a single-family dwelling. Specifically, provisions of Statewide Planning Goal 3: Agricultural Lands, ORS 215, and OAR 660, division 33 restrict the placement of farm and non-farm dwellings on the subject property so that the property cannot be developed with a single-family dwelling. These restrictions reduce the fair market value of the subject property to some extent. The claim asserts

this amount to be \$187,158. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, an appraisal was not submitted, and it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, the department acknowledges that state land use laws 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 just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow the Wrights to use the subject property for a use permitted at the time they acquired the property on April 30, 1974.

Conclusions

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 Wrights' establishment of a single-family dwelling on Tax Lot 1902: the applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33 that took effect after April 30, 1974.
2. This action by the State of Oregon provides the state's authorization to the claimants to use Tax Lot 1902, subject to the standards in effect on April 30, 1974.
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 Clackamas County or other jurisdiction 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 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.