

**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: M119935

NAME OF CLAIMANTS: Dallas and Elaine Marckx

MAILING ADDRESS: 5035 Howell Prairie Road SE
Aumsville, Oregon 97325

PROPERTY IDENTIFICATION: Township 8S, Range 2W, Section 12
Tax Lot 600
Marion County

DATE RECEIVED BY DAS: February 24, 2005

180-DAY DEADLINE: August 23, 2005

I. CLAIM

The claimants, Dallas and Elaine Marckx, seek compensation in the amount of \$975,000 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 65 acres into lots of approximately five acres, each lot with one single-family dwelling. The property is located at 5035 Howell Prairie Road, near the city of Aumsville in Marion 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 this claim is valid. Department staff recommends, in lieu of 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 their property into lots of approximately five acres each and develop each lot with one single-family dwelling: the applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33, that took effect after November 6, 1975. These laws will not apply to the claimants' use of the property only to the extent necessary to allow them a use of the subject property permitted at the time they acquired it on November 6, 1975. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On March 2, 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, two written comments, evidence or information were received in response to the 10-day notice. The comments do not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law. (See comment letter 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 February 24, 2005, for processing under OAR 125, division 145. The claim identifies Marion County's Exclusive Farm Use (EFU) zoning and state laws that restrict 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 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 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, Dallas and Elaine Marckx, acquired the subject property by contract on November 6, 1975. A Warranty Deed was issued to the Marckx on January 9, 1979. A title report prepared on January 24, 2005, and submitted with the claim indicates that Dallas and Elaine Marckx are the current owners of the subject property.

Conclusions

The claimants, Dallas and Elaine Marckx, are “owners” of the subject property as that term is defined in Section 11 (C) of Ballot Measure 37.

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

A formal appraisal report, included with the claim, states:

“The subject is currently zoned EFU by Marion County. The purpose of this appraisal is directly tied to the change in land use that occurred in October of 1979. Prior to that time, the subject [sic] carried an AR-5 zoning designation. For the purpose of this appraisal, both zoning designations will be discussed.”

The claim also includes a copy of Marion County’s denial of a subdivision application submitted by the Marckx in 1975. The County’s denial is based on the standards under Goal 3, including soil compatibility and the criteria for development on agricultural lands.

The claim is based, in part, on Marion County’s 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 Goal 3 in accord with OAR 660, division 33, because the claimants’ property is “Agricultural Land” as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU. Land that is zoned EFU

also is subject to restrictions based on certain provisions of ORS 215. Current land use regulations, particularly ORS 215.263, 215.284, 215.780, along with Goal 3 and OAR 660, division 33, do not allow the subject property to be divided into parcels smaller than 80-acres and establish standards for the establishment of farm and non-farm dwellings.

ORS 215.780 contains 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 (1993 HB 3661)). ORS 215.263 contains standards for the creation of new parcels for farm uses, non-farm uses and dwellings allowed in an EFU zone; and became effective on October 5, 1973. ORS 215.263 was amended in 2001 by HB 3326 to provide new standards for the creation of new parcels for non-farm dwellings as well as the non-farm dwellings themselves.

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 Marckxs acquired the property on November 6, 1975, when it was zoned Acreage Residential (AR-5). Under the AR-5 zone, there was a five-acre minimum parcel size for the creation of new lots or parcels. However, the County's AR-5 zone that applied to the property at that time was not 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 and land use regulations as complying with the Statewide Planning Goals on May 20, 1982. Since the Commission had not acknowledged Marion County's comprehensive plan and land use regulations, including the AR-5 zone, when the Marckx's acquired the property on November 6, 1975, Statewide Planning Goal 3 applied directly to property on the date of acquisition.¹ In 1975, the State standards for a land division involving property where the local zoning was not acknowledged were 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).

Thus, the opportunity to divide the property when the Marckx's acquired it in 1975 was limited to land divisions done consistent with Goal 3, that required the resulting farm or non-farm parcels to be: (1) "appropriate for the continuation of the existing Commercial Agricultural

¹ 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 where site specific goal provisions applied prior to the Commission's acknowledgment of the County's Goal 3 program on May 20, 1982 (*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 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).

Enterprise in the area;” and (2) shown to comply with the legislative intent set forth in ORS 215.243. (See endnote¹.)

No information has been provided showing that the claimants’ request for 5-acre parcels complies with the Goal 3 standard for lot size for farm parcels

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by amendments to Statewide Planning Goal 3, amendments to ORS 215, and OAR 660, division 33, adopted since the claimants acquired the property in 1975, do not allow the division of the property into lots smaller than 80 acres in size or allow the approval of dwellings, as may have been possible to a limited extent in 1975. 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 1975 restrict the use of the property from what could have been done when the property was acquired by the claimants in 1975. However, it is unclear whether the claimants’ requested level of development complies with the standards for land divisions under Goal 3, in effect when they acquired the property on November 6, 1975. It appears that the claimants may have been able to divide their property to a limited extent when they acquired it. As a result, the department finds that the laws listed above restrict the claimants’ use of the property relative to what was permitted on November 6, 1975.

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 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 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 states that the fair market value of the subject property has been reduced by \$975,000 as a result of land use laws enacted after they acquired the property in 1975. The claimants have provided information regarding the value of the property based on what is allowed under current land use regulations as compared with the assumed value if developed into 5-acre residential parcels under the County’s former AR-5 zoning. The claim includes a certified appraisal to substantiate the claimed values both before and with state land use regulations.

Conclusions

As explained in section V.(1) of this report, Dallas and Elaine Marckx are the current owners of the subject property as of November 6, 1975. Under Ballot Measure 37, the Marckx 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, laws adopted since the claimants acquired the property restrict division of the subject property. The 65-acre parcel cannot be partitioned into five-acre parcels, as the claimants say was allowed when they acquired the property in 1975.

While it appears unlikely that the standards in effect when the claimants acquired the property would permit this requested level of development, the department acknowledges that the laws adopted since 1975, and currently in effect, reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$975,000. However, without verification of the uses allowed when the claimants acquired the property, 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 Marion County's EFU 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) and applicable provisions of ORS 215, and OAR 660, division 33. With the exception of provisions of Goal 3 and ORS 215 in effect on November 6, 1975, when the claimants acquired the property, none of the laws identified in the claim are exempt under subsection 3(E) of Ballot Measure 37.

Conclusions

It appears that the general statutory, goal and rule restrictions on the division, residential development and use of agricultural land apply to the owners' use of the property, and for the most part these laws are not exempt under subsection 3(E) of Measure 37. Provisions of ORS 215 and Statewide Planning Goal 3, in effect on November 6, 1975, when the claimants acquired the property are exempt under Section 3(E) of the Measure and will continue to apply to the property. 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.

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 the claimants seek building or development permits 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 the owners 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, 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 division of the subject property into 5-acre lots with one dwelling on each lot created. These restrictions reduce the fair market value of the subject property to some extent, though it is unclear what level of development would be allowed under the laws in effect in 1975 when the claimants acquired the property. The claim asserts this amount to be \$975,000. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, including a professional appraisal, 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 more than likely 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 all or parts of certain state land use regulations to allow the Marckx's to use the subject property for a use permitted at the time they acquired the property in 1975.

As explained in Section V.(2) of this report, the claimants acquired the property on November 6, 1975. At that time, the property was zoned AR-5 subject to Statewide Planning

Goal 3 and the applicable goal standards for new farm and non-farm parcels and dwellings as explained in that section.²

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 Dallas and Elaine Marckx's division of their property or to the establishment of a single-family dwelling on each lot or parcel created: applicable provisions of Statewide Planning Goal 3 that took effect after November 6, 1975; applicable provisions of ORS 215.263, 215.780 and 215.284 enacted after November 6, 1975; and applicable provisions of OAR 660, division 33, enacted after November 6, 1975. These land use regulations will not apply to Dallas and Elaine Marckx's use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property.
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 November 6, 1975. On that date, the property was subject to Statewide Goal 3 (1975 edition). (See endnote.ⁱⁱ)
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.

² An indication of how these land division and dwelling standards applied to the property when it was acquired and that comply with the Goal 3 minimum lot size standard, ORS 215.263 and the farm and non-farm dwelling standards under ORS 215.213 are the land division and dwelling standards in the County's acknowledged EFU zone. The acknowledged EFU zone for Marion County established an 80-acre minimum for new parcels and required that farm and non-farm dwellings comply with the applicable standards under ORS 215.213.

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.

Endnotes

ⁱ As noted, Goal 3 "Agricultural Lands" became effective on January 25, 1975, and was applicable to legislative land use decisions and some quasi-judicial land use decisions where site specific goal provisions apply prior to acknowledgement of a jurisdiction's comprehensive plan and land use regulations. After the local plan and land use regulations are acknowledged by the Commission, the Statewide Planning Goals and implementing rules no longer directly apply to such local land use decisions. However, after acknowledgment, interpretation of the local county code provisions must be consistent with the goal and rule standards with which they were acknowledged to be in compliance.

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*, *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 (1981).

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 15 and 20 effective July 21, 1982).

For further guidance on the interpretation and application of this standard and rule see *Kenagy v. Benton County*, 6 Or LUBA 93 (7/16/82); *Goracke v. Benton County*, 8 Or LUBA 128 (6/8/83); 68 Or App 83 (5/9/84); 12 Or LUBA 128 (9/26/84); 13 Or LUBA 146 (4/4/85); 74 Or App 453 (7/1785), rev. denied 300 Or 322 (11/26/85); and OAR 660-05-015 and 020 as amended effective June 7, 1986 (repealed effective August 7, 1993).

The 1982 administrative rule (OAR 660-05-015 and 020) was further amended to incorporate the holdings of these cases (effective June 7, 1986, and repealed effective August 7, 1993).

ⁱⁱ To comply with the department's decision to not apply those land use regulations that restrict the claimants' use of their property, to allow the claimants to apply to Marion County for a use permitted at the time they acquired the subject property, Marion County may directly apply:

1. The Goal 3 minimum lot size standard for farm parcels (1975 edition). For guidance, this provisions was interpreted under OAR 660, division 5, specifically rules 15 and 20 effective July 21, 1982, and as amended June 7, 1986; or
2. For the purpose of determining an appropriate minimum lot size under Goal 3, the county may rely on its acknowledged EFU zone adopted May 20, 1982 (Ordinance No. 18), in order to comply with Statewide Goal 3 and, specifically, the Goal 3 minimum lot size standard.