

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

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

August 19, 2005

STATE CLAIM NUMBER: M119957

NAME OF CLAIMANT: Richard V. Cronk

MAILING ADDRESS: 2755 Southwest Fairmont Drive
Corvallis, Oregon 97333

PROPERTY IDENTIFICATION: Township 11S, Range 4W, Section 35
Tax Lot 200
Linn County

OTHER INTEREST PROPERTY: Benton Habitat for Humanity (Agent)

DATE RECEIVED BY DAS: February 28, 2005

180-DAY DEADLINE: August 27, 2005

I. CLAIM

The claimant, Richard Cronk, seeks compensation in the amount of \$230,000 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 claimant desires compensation or the right to partition his property, containing approximately 37.35-acres, into two parcels: one parcel of approximately four acres with one dwelling and one parcel of approximately 33 acres with two dwellings. The property is located on the east side of Oakville Road, near the City of Albany, Linn 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 claimant to allow him to divide the subject property into one parcel of approximately four acres with one dwelling, and a second parcel of approximately 33 acres with two dwellings: Statewide Planning Goal 3 and applicable provisions of ORS 215 and OAR 660, division 33, that were enacted after August 17, 1977. These laws will not apply to the claimant's use of the

subject property only to the extent necessary to allow Mr. Cronk a use of the subject property permitted at the time he acquired it on August 18, 1977. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On March 3, 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 28, 2005, for processing under OAR 125, division 145. The claim identifies Exclusive Farm Use (EFU) zoning as restricting the claimant's 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 claimant, Richard Cronk, acquired the subject property on August 18, 1977 (see Warranty Deed in the department’s claim file). Information provided by the Linn County Assessor’s office indicates that Richard Cronk remains the current owner of the subject property as of July 12, 2005.

Conclusions

The claimant, Richard Cronk, is an “owner” 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 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

According to a Measure 37 claim for compensation filed by the claimant with Linn County and made available to the department, the claimant indicated an intent to partition the 37-acre subject property into two parcels for residential development. The claim to Linn County requests one 4-acre parcel with one single-family dwelling and one 33-acre parcel with two single-family dwellings. The property is currently vacant Agricultural Land and is not actively farmed by the claimant.

The claim is based, in part, on Linn County’s EFU zone and the applicable provisions of state law that require such zoning. The claimant’s property is zoned EFU as required by Goal 3 in accord with OAR 660, division 33, because the claimant’s 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 and 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 placement of farm and non-farm dwellings.

ORS 215.780 establishes 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 (containing standards applicable to farm dwellings) 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) (containing standards 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.)

Mr. Cronk acquired the property on August 18, 1977, when it was zoned Suburban Residential (SR) by Linn County. Under the SR zone, the property was subject to a one-acre minimum parcel size for the creation of new residential lots or parcels. However, the County's SR 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 Linn County Comprehensive Plan and land use regulations as complying with the Statewide Planning Goals on June 20, 1985 (EFU zoning adopted locally on September 2, 1980). Since the Commission had not acknowledged Linn County's comprehensive plan and land use regulations, including the EFU zone, when Richard Cronk acquired the property on August 18, 1977, Statewide Planning Goal 3 applied directly to property on the date of acquisition.¹

In 1977, the state standard for a land division involving "Agricultural Land" where the local zoning was not acknowledged was that the resulting parcels must be of a size that is "appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area" (Statewide Planning Goal 3).

In 1977, the state standard for the construction of dwellings on "Agricultural Land" in Goal 3 was that the use not have significant adverse effects on accepted farm or forest practices.

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 in 1985 (*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).

No information has been provided showing that the claimant's request for one 4-acre parcel with one dwelling and one 33-acre parcel with two dwellings would comply with either the Goal 3 standard for lot size for farm parcels, or with the Goal 3 standard in 1977 for farm and non-farm uses of agricultural land (1975 Edition).

Conclusions

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 claimant acquired the property in 1977, do not allow the division of the property into parcels smaller than 80-acres and limit the claimant's ability to establish dwellings on the property relative to what may have been possible in 1977. The County's EFU zone is based on the standards required by Goal 3 (effective on January 25, 1975), ORS 215 and OAR 660, division 33. Land use laws adopted since 1977 restrict the use of the property from what could have been done when the property was acquired by the claimant in 1977. However, it is unclear whether the claimant's requested partition and development complies with the standards in effect when he acquired the property on August 18, 1977.

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and that may continue to apply to the claimant's 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 a claimant seeks 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 \$230,000 as a result of land use laws enacted after the claimant acquired the property in 1977. A limited appraisal submitted with the claim indicates that the subject property is valued at approximately \$130,000 under current land use regulations.

The claimant has not provided information regarding the value of the property based on the assumed value if partitioned and developed as proposed. (See claim for compensation submitted to Linn County and included in the department's claim file.) Nevertheless, based on the conclusion in part V.(2) of this report that state laws restrict the claimant's use of the property, the department infers that those laws also have reduced the fair market value of the property to some extent.

Conclusions

As explained in section V.(1) of this report, Richard Cronk is the current owner of the subject property as of August 18, 1977. Under Ballot Measure 37, Mr. Cronk is 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 claimant acquired the property restrict division and development of the subject property. The 37-acre parcel cannot be partitioned as the claimant indicates was allowed when he acquired the property in 1977. While it is unclear whether the standards in effect when the claimant acquired the property would permit his requested level of development, the department acknowledges that laws adopted since 1977 and currently in effect reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$230,000. However, without an appraisal or other substantiating documentation, and without verification of the uses allowed when the claimant acquired the property, it is not possible to substantiate the specific dollar amount the claimant demands 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 Linn 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. The County's EFU zone, and specific amendments to state laws requiring such zoning, were enacted after the claimant acquired the property in 1977, and do restrict the use of the property in a manner that likely reduces its fair market value. With the exception of provisions of Goal 3 and ORS 215 in effect when the claimant acquired the property, laws identified in the claim are not exempt, either on their face or as applied to the subject property, under Section 3 of Ballot Measure 37.

Information provided by Linn County indicates that the subject property is designated within the flood plain and the floodway of the Calapooia River. To the extent that the subject property may be regulated to protect public health and safety, or under provisions required by federal law, regulations enacted to protect public health and safety and regulations required by federal law are exempt under Section 3 of Measure 37, and will continue to apply to the property.²

² Statewide Planning Goal 7 requires local governments to identify areas of natural hazards and to adopt ordinances to protect people and property from such hazards. Local ordinances adopted to comply with Goal 7 may be exempt under section 3 (B) of Measure 37.

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 claimant's 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, OAR 660 and Statewide Planning Goal 3 in effect when the claimant acquired the property in 1977 are exempt under subsection 3(E) of the measure and will continue to apply to the claimant's use of the property.

There may be other laws that continue to apply to the claimant's 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 claimant 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 uses that the claimant has 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 claimant 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 likely prohibit the division of the subject property into two parcels with three dwellings. To the extent that current land use regulations restrict the use of the property, these restrictions reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$230,000. It is unclear, however, what level of development would be allowed under the laws in effect in 1977 when the claimant acquired the property. Although the claim provides no explanation about how specific restrictions reduce the fair market value of the

property or about the estimated value of the property before land use regulations were enacted, a limited appraisal has been submitted apparently 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 Mr. Cronk to use the subject property for a use permitted at the time he acquired the property on August 18, 1977.

As explained in Section V.(2) of this report, the claimant acquired the property on August 18, 1977. At that time, the property was zoned Suburban Residential by Linn County but was subject to Statewide Planning Goal 3 and the applicable goal and statutory standards for new farm and non-farm parcels and dwellings as explained further in that section of this report.

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 Richard Cronk's division of the property to create one parcel of approximately four acres with one dwelling, and a second parcel of approximately 33 acres with two dwellings: Statewide Planning Goal 3 and applicable provisions of ORS 215.263, 215.780 and 215.284 and OAR 660, division 33, that were enacted after August 18, 1977. These land use regulations will not apply to Richard Cronk's use of the property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property on August 18, 1977.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property subject to the standards in effect on August 18, 1977. On that date, the property was subject to Statewide Planning Goal 3 (1975 edition). (See endnote.¹)
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 215.402 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 claimant 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 claimant to use the property, it may be necessary for him 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 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 July 25, 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.

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

1. The Goal 3 minimum lot size standard for farm parcels (1975 edition). For guidance, this provision 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 locally on September 2, 1980, in order to comply with Statewide Goal 3 and specifically the Goal 3 minimum lot size standard; and
3. The applicable standard for uses of agricultural land under Goal 3 (1975 edition).