

**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: M119977

NAME OF CLAIMANTS: James Hinze and
Geraldine Hinze

MAILING ADDRESS: PO Box 254
Gaston, Oregon 97119

PROPERTY IDENTIFICATION: Township 1S, Range 3W, Section 31
Tax Lot 1900
Washington County

DATE RECEIVED BY DAS: March 1, 2005

180-DAY DEADLINE: August 28, 2005

I. SUMMARY OF CLAIM

The claimants, James and Geraldine Hinze, seek compensation of an unspecified amount for the reduction in fair market value of property as a result of certain land use regulations that are alleged to restrict their use of the property. The claimants desire compensation or the right to divide the 30.08-acre property into three parcels and establish single-family dwellings on each of them. The property is located on the east side of Southwest Hardback Road just north of its intersection with SW Spring Hill Road in Washington County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimants' division of the property into three ten-acre parcels and establish single family dwellings on each of them: the applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33, enacted after November 6, 1981. These land use regulations will not apply to the Hinze's use of the property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on November 6, 1981. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 4, 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, 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 March 1, 2005, for processing under OAR 125, division 145. The claim is based on a change in the county zoning from AF-10 to AF-20, which restricts the claimants' ability to divide the property and build residential dwellings on the property. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37 are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulations adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

Ballot Measure 37 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in the Measure. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimants, James and Geraldine Hinze, acquired the subject property on November 6, 1981, as reflected by a Warranty Deed included with the claim (Washington County Records 81037872, recorded November 9, 1981.) A copy of a Title Report from First American Title Insurance Company of Oregon, indicates that James Hinze and Geraldine Hinze are the current owners of the subject property.

Conclusions

The claimants, James and Geraldine Hinze, are the “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of November 6, 1981.

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 states that “zoning changed from AF-10 to AF-20” and that, as a result, the property is “not buildable.”

The claim is based, in part, on Washington County’s current Agriculture and Forestry District (AF-20) and the applicable provisions of state law that require such zoning. The claimants’ property is zoned AF-20 as required by Goal 3 in accord with ORS 215 and OAR 660, division 33 because the claimants’ property is “Agricultural Land” as defined by Goal 3.¹ The AF-20 District is an exclusive farm use zone (EFU) zone. Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU pursuant to ORS 215.

¹ The claimant’s property is “Agricultural Land” because it is composed of NRCS (Natural Resources Conservation Service) Class II and III Soils. Property is located on Sheet #42 and contains Melbourne (31B, 31C and 31D) and Helvetia soils (19C) (Soil Survey of Washington County, Oregon, July 1982).

Current land use regulations, particularly ORS 215.213, 215.263 and OAR 660, division 33 as applied by Goal 3, establish standards for development of a farm or non-farm dwelling on an existing parcel.

ORS 215.780 established an 80-acre minimum parcel size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.213.

OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993.

The claimants acquired the subject property in 1981 when it was zoned by the County as Agriculture and Forestry District (AF-10) and had a ten-acre minimum parcel size requirement for the creation of new lots or parcels (adopted January 1, 1974). However, at the time, the County's AF-10 zone was not acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 215.250 and 197.251. Because the Commission had not acknowledged Washington County's comprehensive plan and land use regulations, including the AF-10 zone that applied to the subject property, certain site-specific Goal provisions, including Statewide Planning Goal 3, applied directly to the property when the claimants acquired it in 1981.

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 prior to the Commission's acknowledgment of local plans.² Washington County's AF-20 (Agriculture and Forestry District) zone was acknowledged on July 30, 1984. Until the County's land use regulations were acknowledged by the Commission, the use of the subject property was subject to both the county's ordinances and the applicable Statewide Land use Planning Goals.³ Statewide Goal 3 "Agricultural Lands," as adopted in 1975, required that Agricultural Land be "preserved and zoned for Exclusive Farm Use (EFU) pursuant to ORS 215."

² See *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (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 (See *Byrd v. Stringer*, 295 Or 311 (1983). However, the applicable statutes continue to apply and insofar as the local implementing provisions are materially the same as the rules, the local provisions must be interpreted consistent with the substance of the rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

³ The subject property was zoned AF-10 until it was ultimately rezoned on July 5, 1982 to AF-20, about eight months after the claimants purchased the property. On April 27 and May 31, 1984, the Commission determined that the County's AF-10 Zone complied with Statewide Planning Goal 3 (LCDC Acknowledgment Order, 84-ACK-103, issued July 30, 1984).

As for the dwellings allowed under EFU zoning as required by Goal 3, on the date of acquisition in 1981,, farm dwellings were allowed if determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(f) (1981 edition) and non-farm dwellings were subject to ORS 215.213(3) (1981 edition).

Conclusions

The currently applicable zoning requirements, land division and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted after the claimants acquired ownership of the subject property in November, 1981, and do not allow the development of a dwelling on the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimants in 1981. In 1981, the property was subject to both the county’s ordinances and the requirements of Goal 3 and ORS 215 then in effect.

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 that the claimant 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 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 land use regulation described in Section V.(2) of this report must have “the effect of reducing the fair market value of the property, or any interest therein.”

Findings of Fact

The original claim does not include an estimate of the property’s fair market value, in the absence of current regulations. However, supplemental information provided to the department by the claimants on July 27, 2005, includes an informal estimate of \$300,000 as the property’s fair market value, in the absence of current regulations. This estimate is based on the value of the subject 30.08-acres being divided into three ten-acre parcels each with a dwelling minus the value of the property as vacant land (\$200,000).

Conclusions

As explained in section V.(1) of this report, James and Geraldine Hinze are the current owners of the subject property as of November 6, 1981. Under Ballot Measure 37, the Hinzes are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value.

Without an appraisal based on the value of the property as three 10 acre residential lots or other explanation, 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 enacted or 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 includes a general reference to state land use regulations that restrict the use of the property relative to what would have been allowed in 1981 when the property was acquired by the claimants. These provisions include Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33, which Washington County has implemented through its AF-20 zone. Those provisions of Statewide Planning Goal 3 and ORS 215 in effect on November 6, 1981 are exempt under Section 3(E) of Measure 37. Provisions of these laws enacted or adopted after the claimants acquired the property are not exempt under Section 3(E) 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 claimants' use of the property, and except for those provisions in effect on November 6, 1981, these laws are not exempt under section 3(E) of Measure 37.

Laws in effect when the claimants acquired the property, including those provisions of Goal 3 and ORS 215 in effect at that time, 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 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 that the claimants have identified. Similarly, this report only addresses the exemptions provided for under section (3) of Measure 37 that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the

greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the property.

VI. FORM OF RELIEF

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the current 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 set forth in this report, laws enforced by the Commission or the department restrict the division of the property into three ten-acre parcels and establishment of single-family dwellings on each of them. The claimants cannot partition and develop the property for residential use because laws enacted after the claimants acquired the property prohibit development. The claim asserts this amount to be \$300,000. However, because the claim does not provide an appraisal or other specific explanation for how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Ballot Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow James and Geraldine Hinze to use the subject property for a use permitted at the time they acquired in on November 6, 1981.

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 Hinze's division of the property into three ten-acre parcels and establishment of single family dwellings on each of them: applicable provisions of Statewide Planning Goals 3, ORS 215, and OAR 660, division 33, enacted after November 6, 1981. These land use regulations will not apply to the Hinze's use of the property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on November 6, 1981.
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, 1981. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3 and ORS 215 then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit; a land use decision; a permit as defined in ORS 215.402 or ORS 227.160; other permits or authorizations from local, state or federal agencies; and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under section (3) of the Measure.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the property it may be necessary for them to obtain a decision under Measure 37 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under Measure 37 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on July 27, 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.