

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

August 26, 2005

STATE CLAIM NUMBER: M120040

NAME OF CLAIMANTS: Jesse R. Moore
Evangeline Moore

MAILING ADDRESS: 28550 Southeast Davis Road
Estacada, Oregon 97023

IDENTIFICATION OF PROPERTY: Township 3S, Range 4E, Section 14
Tax Lot 1
Clackamas County

DATE RECEIVED BY DAS: March 7, 2005

180-DAY DEADLINE: September 3, 2005

I. CLAIM

Jesse and Evangeline Moore, the claimants, seek compensation in the amount of \$550,000 for the 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 subdivide and develop their 19.92-acre property. The property is located at 28550 Southeast Davis Road near Estacada in Clackamas 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 to allow them to subdivide and develop their property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780, and OAR 660, division 33, all of which were enacted after February 18, 1960. These laws will not apply to the claimants' use of the property only to the extent necessary to allow the Moores a use of the property permitted at the time they acquired the property on February 18, 1960. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 16, 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 7, 2005, for processing under OAR 125, division 145. The claim includes specified provisions of ORS 215 and OAR 660 (see claim) all of which were enacted prior to December 2, 2004, the effective date of Measure 37. (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, Jesse and Evangeline Moore, acquired the subject property on February 18, 1960. (See copy of deed in department claim file.)¹ The claim includes a copy of Clackamas County Tax Assessor’s records establishing that the Moores are the current owners of the property.

Conclusions

The claimants, Jesse and Evangeline Moore, are “owners” of the subject property as that term is defined under Section 11(C) of Ballot Measure 37, as of February 18, 1960.

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 states that regulations enacted after the claimants acquired the property “Limits lot size; Limits dwellings; Limits division of property.” (See Qualifying Statement by the claimants included with claim.) The claim identifies ORS 215.263, 215.283, 215. 705, 215.780, and applicable provisions of OAR 660, divisions 33 and 6, related to minimum lot sizes and dwellings, that the claimants assert restrict the use of the subject property.

The property is currently zoned Exclusive Farm Use (EFU) by Clackamas County, in accord with the applicable provisions of state law that require such zoning. The claimants’ property is zoned EFU 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. 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 Claimant Jesse Moore states that he has owned the property since 1957. There is no documentation in the claim to verify that acquisition date. The deed included in the claim specifies that Jesse and Evangeline Moore acquired the subject property from William R. Coats and Elizabeth Spindler Coats, on February 18, 1960.

Current land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660, division 33 as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80-acres and establish standards for allowing the existing or any proposed parcel(s) to have farm or non farm dwellings on them. The property is not zoned for Forest Use. Therefore, as they relate to uses in forest zones, the applicable statutes and provisions of OAR 660, division 6, cited by the claimants, do not restrict the use of the property.

ORS 215.780 established 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). 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 215.283(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 claimants acquired the subject property on February 18, 1960, prior to the adoption of Statewide Land use Goals and implementing statutes and regulations.

Conclusion

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3, ORS 215.263, 215.284, and 215.780, and applicable provisions of OAR 660 division 33, were all adopted after the claimants acquired the subject property in 1960 and restrict the use of the subject property relative to the uses allowed when the claimants acquired the property on February 18, 1960.

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 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 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 law(s) 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 claimants assert a reduction of value of \$550,000. No documentation has been provided to substantiate this amount. The claim includes copies of property tax records of nearby properties to establish reduction in value. However, examination of the records provided does not establish a reduction in value of the subject property, but rather indicates that the subject property is currently worth more than nearby properties.

Conclusions

As explained in section V.(1) of this report, the current owners of the subject properties are Jesse and Evangeline Moore, who acquired the property in 1960. Thus, under Ballot Measure 37, the claimants are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. As discussed in section V.(2), laws enforced by the Commission or the department have reduced the value of the subject property to some extent. The claim states that the reduction in value is \$550,000.

Without an appraisal or other substantiating documentation, 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 laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The claim references several state land-use regulations that restrict the use of the property relative to what would have been allowed in 1960 when the claimants acquired the property, including applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33. None of these laws are exempt under Section 3(E) of Ballot Measure 37, which exempts laws enacted prior to the claimants’ acquisition of the property.

Conclusions

It appears that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimants' anticipated use of the property, and these laws are not exempt under Section 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 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 to apply to the property based on the uses 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 a 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, that 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 subject property. The claim asserts laws enforced by the Commission or the department reduce the fair market value of the subject property by \$550,000. However, no appraisal or other substantiating documentation was submitted and it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, 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 the Moores to use the subject property for a use permitted at the time they acquired the property on February 18, 1960.

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 Moores' use of their property: applicable provisions of Statewide Planning Goal 3, ORS 215.263, 215.284 and 215.780; and applicable provisions of OAR 660, division 33, all of which were enacted after February 18, 1960. These land use regulations will not apply to the Moores' use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on February 18, 1960.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property subject to the laws in effect on February 18, 1960.
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 26, 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.