

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

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

September 2, 2005

STATE CLAIM NUMBER: M120135

NAME OF CLAIMANT: Marcella Etzel, Trustee of the Etzel Family Trust¹

PROPERTY IDENTIFICATION: Township 9S, Range 1W, Section 1
Marion County

OTHER CONTACT INFORMATION: James D. Vick
Vick and Conroyd
698 12th Street SE, Suite 200
Salem, OR 97301

OTHER INTEREST IN PROPERTY: Peter A. Etzel
Theodore M. Etzel
Vincent J. Etzel

DATE RECEIVED BY DAS: March 14, 2005

180-DAY DEADLINE: September 10, 2005

I. SUMMARY OF CLAIM

The claimant, Marcella T. Etzel, Trustee of the Etzel Family Trust (Etzel Family Trust), seeks compensation in the amount of “in excess of \$600,000” 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 claimant desires compensation or the right to divide the 180-acre property to create an additional five, two-acre parcels and to develop a home site on each new parcel. The property is located on Fern Ridge Road in Marion County. (See claim.)

¹ The claim was filed in the name of the Etzel Family Trust, Albin G. Etzel and Marcella T. Etzel Trustees, on March 14, 2005. However, it appears that Albin G. Etzel passed away in January, 2005. There is no information in the file as to whether a successor trustee has been appointed to replace Albin G. Etzel. For purposes of this staff report, this claim is evaluated based on the presumption that the death of Albin Etzel did not affect the continuity of the Trust as to Marcel T. Etzel, that the subject property remains in the Trust, and that Marcella T. Etzel continues as a Trustee of the Trust.

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 Etzel Family Trust's division of the property to create an additional five, two-acre parcels, for home sites: Statewide Planning Goals 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780, and applicable provisions of OAR 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow the Etzel Family Trust a use of the property permitted at the time it was acquired by Marcella Etzel, Trustee of the Etzel Family Trust, on December 31, 1974. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 21, 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, one comment was received in response to the 10-day notice.

The comment does 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 March 14, 2005, for processing under OAR 125, division 145. The claim indirectly identifies Goal 3, provisions of ORS 215, and provisions of OAR 660, division 33 as 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 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 subject property was originally acquired on December 28, 1948 by Theodore M. Etzel, Albin G. Etzel, Vincent J. Etzel and Peter A. Etzel. One of the trustees of Etzel Family Trust, Albin G. Etzel, had a continuous interest in the property since the 1948 original acquisition date until his death in January, 2005. Claimant Marcella T. Etzel, Albin Etzel’s wife, has had a continuous interest in the property since December 31, 1974, when the property was partially conveyed to her. Albin G. Etzel and Marcella T. Etzel conveyed the property to The Albin G. Etzel and Marcella T. Etzel Family Trust on June 28, 1991. Transfer of the property to a revocable trust does not create a new acquisition date for purposes of this Measure 37 claim review. Marcella Etzel remains a Trustee of the Trust. The transfers of ownership are documented by deeds provided by the claimant. (See the department’s claim file.)

Conclusions

Marcella Etzel, Trustee of the Etzel Family Trust, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. Trustee Marcella Etzel has been an owner since December 31, 1974. Albin Etzel is a family member as to Marcella Etzel. The family has owned the subject property since December 28, 1948.

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 does not specifically indicate which state laws or regulations reduce the fair market value of the property. The application materials do indicate that the 180-acre agriculturally zoned property can not be subdivided for residential uses that would include the proposed five two-acre lots.

The claim is based on Marion County's current Exclusive Farm Use (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 and ORS 215 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 pursuant to ORS 215.

Current land use regulations, particularly ORS 215.213, 215.263, 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.

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.

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

The Etzel family first acquired the subject property in 1948. At that time, Statewide Planning Goal 3 and implementing statutes and administrative rules were not in effect and did not restrict the use of the subject property.

Conclusions

The zoning requirements, minimum lot size 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 Etzel family first acquired ownership of the subject property in December, 1948, and do not allow the division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired.

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 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 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.

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 claim includes an informal estimate of \$600,000 as the property's reduction in fair market value, due to current regulations. No supporting information has been provided to document the estimated reduction in fair market value of the subject property.

Conclusions

As explained in section V. (1) of this report, Marcella Etzel, Trustee of the Etzel Family Trust, is a current owner of the property, whose family first acquired the property on December 28, 1948. Under Ballot Measure 37, the claimant is due compensation for land use regulations 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), state land use laws restrict the use of the subject property relative to how it could have been used in 1948. The claimant estimates the reduction in fair market value due to the restrictions at \$600,000.

Without an appraisal based on the value of the subject property with five new two-acre homesites or other substantiating documentation, 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 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 any state land use regulations that restrict the use of the property relative to what would have been allowed in 1948 when the property was acquired by the Etzel family. These provisions include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Marion County has implemented through its EFU zone. None of these laws are exempt under Section 3(E) of Ballot Measure 37, which exempts laws enacted prior to the claimant's family ownership of the property.

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 the use of farm land apply to the claimant's use of the property, and for the most part these laws are not exempt under section 3 of Measure 37.

Laws in effect when the claimant acquired the property are exempt under Section 3(E) of Measure 37, 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 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 subject property into parcels or lots, and the use of the property for residential purposes. The claimant cannot create five two-acre residential lots, as requested in the claim. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$600,000. Because the claim does not provide an appraisal or other substantiating documentation 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 the Etzel Family Trust to use the subject property for a use permitted at the time Marcella Etzel acquired an interest in it on December 31, 1974.

As explained above, Marcella Etzel first acquired the property on December 31, 1974, after the 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 preparation, revision, adoption or implementation of any comprehensive plan prior to the effective date of the statewide planning goals (see *Petersen v. Klamath Falls*, 279 Or 249 (1977)).

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 Marcella Etzel, Trustee of the Etzel Family Trust's division of an approximately 180-acre property to create an additional five parcels for two-acre home sites: applicable provisions of Statewide Planning Goal 3, ORS 215.263, 215.284 and 215.780, and OAR 660, division 33, effective after Marcella Etzel acquired an interest in the property in December 31, 1974. These land use regulations will not apply to the claimant's use of the property only to the extent necessary to allow Marcella Etzel, Trustee of the Etzel Family Trust, a use permitted at the time she acquired the property on December 31, 1974.
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 when Marcella Etzel, Trustee of the Etzel Family Trust, acquired the property. As a result, the claimant's use of the property is subject to the laws in effect on December 31, 1974. As described above, on that date, the property was subject to the interim land use goals set forth in ORS 215.515 (1973 edition).

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 the Etzel Family Trust 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 August 2, 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.