

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

September 8, 2005

STATE CLAIM NUMBER: M120193

NAMES OF CLAIMANTS: Robert McKee and Leann McKee

MAILING ADDRESS: 24903 SW Perrydale Road
Amity, Oregon 97101

PROPERTY IDENTIFICATION: Township 5S, Range 4W, Section 31
Tax Lot 300
Yamhill County

OTHER INTEREST IN THE PROPERTY: 30-foot-wide access easement for Tax Lot
301 along the southwest corner

DATE RECEIVED BY DAS: March 17, 2005

180-DAY DEADLINE: September 13, 2005

I. SUMMARY OF CLAIM

The claimants, Robert McKee and Leann McKee, seek compensation in the amount of \$75,000 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 develop the 78.4-acre property with a single-family dwelling. The property is located on Perrydale Road, in Yamhill 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 that, in lieu of just compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Mr. and Ms. McKees' development of the property with a single-family dwelling: applicable provisions of ORS Statewide Planning Goal 3 (Agricultural

Lands) ORS 215.263 and 215.284 and OAR 660, division 33, enacted after April 3, 1990. These laws will not apply to Mr. and Ms. McKee only to the extent necessary to allow the claimants a use of the subject property permitted at the time they acquired it on April 3, 1990. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

On March 24, 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 March 17, 2005, for processing under OAR chapter 125, division 145. The claim identifies Yamhill County's Exclusive Farm Use (EF-80) zoning and state laws that restrict the division and 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 of 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, Robert and Leann McKee, acquired an interest in the subject property on April 3, 1990.¹ In a March 16, 2005, Planning Director’s Recommendation on Mr. and Ms. McKees’ Yamhill County Measure 37 claim involving this property, Yamhill County confirms that Mr. and Ms. McKee currently own the subject property.

Conclusions

The claimants, Robert and Leann McKee, are “owners” of the subject property as that term is defined in Section 11(C) of Ballot Measure 37, as of April 3, 1990.

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 cites “House Bill 3661 mandated November 3, 1993” and “Ordinance 310 amendment March 1, 1994” (Yamhill County’s adoption of OAR 660-033-0135) as the laws that restrict use of the property and reduce its fair market value.

The claim is based, in part, on Yamhill County’s current EF-80 Zone and the applicable provisions of state law that require such zoning. The claimants’ property is zoned EFU as required by Statewide Planning Goal 3 in accordance with OAR 660, division 33 and ORS 215

¹ The McKees acquired a ½ interest and Steve Goffena acquired the other ½ interest in the parent parcel of the subject property in 1990. On March 12, 1991, Yamhill County approved partition of the parent property into two parcels, Tax Lot 300 (78.4-acres, the subject property) and Tax Lot 301 (78.16-acres). According to the claim, at that time, the McKees’ took exclusive ownership of Tax Lot 300, and Mr. Goffena took exclusive ownership of Tax Lot 301 with an access easement across Tax Lot 300. According to the deeds submitted by the claimants, Mr. Goffena retained an interest in the subject Tax Lot 300 until February 17, 1995. (See copies of documents in the department’s claim file.)

because the claimants' property is "Agricultural Land" as defined by Goal 3.² Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal are zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, and 215.284 and OAR 660, division 33, as applied by Goal 3, do not allow the subject property to be developed with a farm or non-farm dwelling.

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), including the requirement of \$80,000 in gross annual sales on high-value farm land that is referenced in the claim as "the \$80,000 test."

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, 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 April 3, 1990. At that time, the property was zoned by Yamhill County as EF-40 (Exclusive Farm Use with a 40-acre minimum lot size) and AF-20 (Agriculture/Forestry with a 20-acre minimum lot size.) The claim does not provide information to establish whether the claimants' desired dwelling complies with the approval standards for dwellings at the time they acquired the property on April 3, 1990.

Conclusions

The current dwelling standards established by ORS 215 and OAR 660, division 33, in accord with Statewide Planning Goal 3, were enacted after Mr. and Ms. McKee acquired ownership of the subject property in April 1990, and do not allow construction of a single-family dwelling, thereby restricting the use of the property relative to the uses allowed when Mr. and Ms. McKee acquired the property in 1990. In 1990, the property was subject to the requirements of Goal 3 (Agricultural Lands), ORS chapter 215 and OAR 660, then in effect. It is unclear whether the claimants could qualify for a dwelling under the standards in effect in 1990.

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

² The claimants' property is "Agricultural Land" because it contains Amity silt loam (Class IIw-2), Cove silty clay loam (Class IIIw-2), Dupee silt loam (Class IIIe-6), and Woodburn silt loam (Class IIw-6 and IIe-4). See USDA Soil Conservation Service Soil Survey of Yamhill Area, Oregon, January 1974, Sheet #50, Guide to Mapping Units, and pp. 45, 48, and 50. Also, Yamhill County has determined that the subject property is "high-value farmland" under OAR 660-033-0020(8). (See March 16, 2005 Yamhill County Planning Director's Recommendation on claimants' County Measure 37 claim, copy in the department's claim file.)

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 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 \$75,000 as a result of land use laws enacted after the claimants acquired the property in 1990. This is based on the claimants’ statement that: “The County Assessor could agree a building site is worth \$150,000 according to another case he reviewed.”³ The claim does not estimate the current fair market value of the property with land use restrictions, but the alleged reduction amount of \$75,000 can be inferred from the estimated value of the property if buildable: \$150,000, minus the estimated \$75,000 reduction in value due to regulations. There is no certified appraisal to substantiate the claimed values either before or with state land use regulations.

Conclusions

As explained in section V. (1) of this report, the current owners are Robert and Leann McKee, who acquired the property on April 3, 1990. Under Ballot Measure 37, Mr. and Ms. McKee 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, land use laws adopted since 1990 restrict the use of the subject property.

Without an appraisal or other specific explanation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. In addition, it is unclear whether the claimants could qualify for a dwelling under the standards in effect in 1990. Nevertheless, because the claimants do not qualify for a dwelling under the laws currently in effect, and

³ The Yamhill County Assessor agrees that the property’s value would increase by \$150,000 if it were a “buildable” site. However, the county staff report to the Board of County Commissioners on the claimant’s Yamhill County Measure 37 claim provides a qualification:

“The difficulty in determining value in this case is that approval of the Measure 37 claim does not automatically qualify the property for a dwelling. What a successful claim would do is allow the current property owner to apply for a farm dwelling without having to comply with the \$80,000 gross sales requirement. However, because there would still be the process that was in place in 1990 to go through and criteria to be addressed, it is possible that the property still may not qualify for a dwelling. If the property could not qualify for a dwelling under the 1990 criteria, then there would be no loss of value and the property owner would not be entitled to compensation. If the property could qualify for a dwelling under the 1990 criteria, the applicant would be entitled to compensation of \$150,000.”

(See copy of March 16, 2005 Yamhill County Planning Director’s Recommendation on Measure 37 Claim, in the department’s claim file.)

because it is possible that the claimants could qualify for a dwelling based on the standards in effect in 1990, 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 Yamhill County's EF-80 zone and the related provisions of state law that have restricted use of the property relative to what would have been allowed in 1990, when Mr. and Ms. McKee acquired the property. These provisions include applicable provisions of ORS chapter 215 and OAR 660, division 33. The specific state land use regulations on which the claim is based were enacted after the claimants acquired the property in 1990, and restrict the use of the property in a manner that likely reduces its fair market value. With the exception of provisions of Goal 3, ORS 215 and OAR 660, in effect when the claimants acquired the property, none of the laws identified in the claim are exempt, under Section 3(E) of Ballot 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 appears that the general statutory, goal and rule restrictions on the residential development and use of Agricultural Land apply to the claimants' use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37. The provisions of Goal 3, ORS 215 and OAR 660 in effect when the claimants acquired the property in 1990, are exempt and therefore will continue to apply to the property.

Other laws in effect when the claimants acquired the property are also exempt under Subsection 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(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. 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 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 set forth in this report, laws enforced by the Commission or the department restrict the development of a dwelling on the subject property. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$75,000. However, 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, and because it is unclear whether a dwelling would have been permitted when the claimants acquired the property, a specific amount of compensation cannot be determined. Nevertheless, because the claimants do not qualify for a dwelling under the laws currently in effect, and it is possible that the claimants could qualify for a dwelling based on the standards in effect in 1990, the department acknowledges that it is more likely than not that the laws on which the claim is based 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, Ballot Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain land use regulations to allow Mr. and Ms. McKee to use the subject property for a use permitted at the time they acquired the property on April 3, 1990.

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 Mr. and Ms. McKees' establishment of a single family dwelling on the property: applicable provisions of Statewide Planning Goal 3, ORS 215.263 and 215.284 and OAR 660, division 33, enacted after April 3, 1990. These land use regulations will not apply to Mr. and Ms. McKees' use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on April 3, 1990.

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 April 3, 1990. On that date, the property was subject to applicable provisions of Statewide Planning Goals 3 and ORS 215 and OAR 660, in effect at that time.

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 215.412 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 Yamhill County or other jurisdiction 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 Yamhill County or other 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 August 3, 2005. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' 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.