

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

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

September 15, 2005

STATE CLAIM NUMBER: M120267

NAMES OF CLAIMANTS: Richard D. and Nina A. Stephens

MAILING ADDRESS: 14400 Rock Creek Lane
Haines, Oregon 97833

PROPERTY IDENTIFICATION: Township 6S, Range 38E, Section 33,
Tax Lot 600
Baker County

DATE RECEIVED BY DAS: March 23, 2005

180-DAY DEADLINE: September 19, 2005

I. SUMMARY OF CLAIM

The claimants, Richard and Nina Stephens, seek compensation in the amount of \$455,000 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.¹ The claimants desire compensation or the right to subdivide the 155.06-acre property into 40-acre parcels and to develop a dwelling on each parcel. The property is located at 64976 Anthony Lakes Highway, near the City of Haines, in Baker 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 Mr. and Ms. Stephens' division of the property for residential development: Statewide Planning Goal 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780, and

¹ Materials submitted with the claim indicate that the reduction in value is estimated to be \$320,000. Subsequent conversation with the claimant amends that estimate to \$455,000. The claimant stated in a phone conversation on August 10, 2005, that the property is currently valued at \$320,000 but that, in the absence of certain land use regulations, the property could be valued at \$5,000 per acre, or \$755,000, thereby yielding a reduction in value of \$455,000.

applicable provisions of OAR 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow Mr. and Ms. Stephens a use of the property permitted at the time they acquired it in 1989. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 25, 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, two written comments were received in response to the 10-day notice.

The comments do 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 letters in department 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 23, 2005, for processing under OAR 125, division 145. The claim identifies OAR 660-033-0135, as the law that restricts the use of the property and is 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 claimants, Richard and Nina Stephens, acquired the subject property on December 14, 1989, as reflected by a Memorandum of Sale included with the claim. Baker County records indicate that Richard and Nina Stephens remain the current owners of the subject property as of August 8, 2005.

Conclusions

The claimants, Richard and Nina Stephens, are current “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of December 14, 1989.

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 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 claimant or a family member acquired the property.

Findings of Fact

The claim cites OAR 660-033-0135 as regulation that restricts the use of the property. The claim however does not include a description of how that regulation restricts the use of the property, or a description of the claimants’ desired use of the property. A conversation with Mr. Stephens indicates the claimants’ intent to restore the zoning that was in place at the time the claimants acquired the property. Specifically, Mr. Stephens indicated a desire to subdivide the 155.06-acre property into 40-acre parcels and to place a single-family home on each new parcel, as he asserts was permitted in 1989.

The claim is based on Baker County’s current Exclusive Farm Use (EFU) Zone and the applicable provisions of state law that require such zoning. The County’s EFU zone establishes criteria for the placement of dwellings on lands zoned EFU, including a 160-acre minimum

parcel size for the establishment of any dwellings. The claimants' property is zoned EFU as required by Statewide Planning Goal 3 in accord with OAR 660, division 33, and ORS 215 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 be zoned EFU pursuant to ORS 215.

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 smaller than 160 acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 established a 160-acre minimum size for designated rangeland 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 660-033-0135 requires for the approval of a dwelling "customarily provided in conjunction with farm use" on non high-value farmland that the owner demonstrate, in part, that the owner's farm operation produced at least \$80,000 in gross annual income from the sale of farm products in the last two or three, of the last five years.

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 December 14, 1989, prior to the establishment of current standards for land division and the placement of dwellings in EFU zones. However, both the Statewide Planning Goals and Baker County's EFU zoning applied to the subject property in 1989, including the standards for subdivisions and the placement of homes in an EFU zone. No evidence has been submitted to demonstrate that the property could have been divided into 40-acre parcels or that a home could have been placed on the property in 1989, as asserted by the claimants.

It is not clear whether the claimants could have constructed a dwelling on the subject property under the standards in effect when they acquired it on December 14, 1989. The applicable statutory and administrative rule standards for the approval of a farm dwelling in effect on that date are found in ORS 215.283(1)(f) (1991 edition) and OAR 660, division 5 (1986 edition, repealed August 7, 1993). Specifically, ORS 215.283(1)(f) provided standards for a "dwelling customarily provided in conjunction with farm use." OAR 660-05-030 further required that such a dwelling: (1) be located on a parcel large enough to satisfy the Goal 3 minimum lot size

² The claimant's property is "Agricultural Land" because the property is comprised predominantly of Wingville Silt Loam (0-2% slopes), a Type IIIw soil suitable for Commercial Agricultural production.

standard, i.e. “appropriate for the continuation of the existing Commercial Agricultural Enterprise within the area” as explained in OAR 660-05-015; and (2) be situated on a parcel currently employed for farm use as explained in OAR 660-05-030(4). (See OAR 660, division 5, 1986 edition.)

Conclusions

Certain requirements of the current 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 enacted after Richard and Nina Stephens acquired ownership of the subject property in December 1989, and do not allow the division of the subject property into 40-acre parcels or the development of dwellings on the property. In 1989, the property was subject to the requirements of the County’s EFU zone, which were adopted pursuant to the provisions of ORS 215 and OAR 660, division 5, then in effect. It is not clear whether the claimants’ intended use of the property would have been permitted when they acquired the property in 1989. However, because current regulations prohibit the division of the subject property into 40-acre parcels, whereas under the regulations in effect in 1989 it is possible that the claimants could have divided the property into one or more parcels, it is more likely than not that regulations enforced since they acquired the property restrict the use of the property relative to the uses allowed when they acquired it.

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 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 \$455,000 as the reduction in the property’s fair market value, due to current land use regulations (\$755,000 estimated potential value less \$320,000 estimated current value). This amount is based on the claimants’ estimate of the current market value of the property as compared with sales figures of other properties in the area.

Conclusions

As explained in Section V.(1) of this report, the current owners are Richard and Nina Stephens who acquired the property on December 14, 1989. Under Ballot Measure 37, Richard and Nina Stephens are 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) of this report, laws adopted since the claimants acquired the property restrict division and development of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$455,000.

Without an appraisal or other documentation, and without evidence regarding whether the requested level of development would have been allowed when the claimants acquired the property, 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 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 cites OAR 660-033-0135 as the regulation that restricts the division of the property into the desired 40-acre lots. Additional laws regulating division and development of the property include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Baker County has implemented through its EFU zone. Provisions of Goal 3, ORS 215, and OAR 660, division 5, adopted before December 14, 1989, are exempt under Section 3 (E) of the Measure, which exempts laws in effect on the date the claimants acquired the property. Laws enacted after the claimants acquired the property on December 14, 1989 are not 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 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. These laws are not exempt under Section 3 (E) of Measure 37 to the extent they were enacted after the claimants acquired the property on December 14, 1989. Provisions of Goal 3, ORS 215, and OAR 660, division 5, in effect when the claimants acquired the property in 1989 are exempt under Section 3 (E) of the Measure and will continue to apply to the property.

Other laws in effect when the claimants acquired the property are also 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 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 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 40-acre parcels, and the use of the property for residential purposes. The claim asserts that laws enforced by the Commission or department reduce the fair market value of the subject property by \$455,000. 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, and because it is not clear whether the requested level of development would have been allowed when the claimants acquired the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, 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 compensation, Ballot Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Richard and Nina Stephens to use the subject property for a use permitted at the time they acquired the property on December 14, 1989.

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. Stephens' division and development of the subject 155.06-acre property: applicable provisions of Statewide Planning Goal 3, ORS 215.263, 215.284 and 215.780, and OAR 660, division 33, enacted after December 14, 1989. These land use regulations will not apply to Mr. and Ms. Stephens' use of the property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on December 14, 1989.
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 December 14, 1989. On that date, the property was subject to the applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 5, 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 August 24, 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.