

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

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

September 16, 2005

STATE CLAIM NUMBER: M120289

NAMES OF CLAIMANTS: Leland E. Dundas
Elizabeth L. Dundas

MAILING ADDRESS: 15680 NE Yamhill Road
Yamhill, Oregon 97148

PROPERTY IDENTIFICATION: Township 3S, Range 1W, Section 31,
Tax Lot 700
Clackamas County

OTHER INTEREST IN PROPERTY: Alan and Vicky Peters¹
16855 NE Mt. Home Road
Sherwood, Oregon 97140

DATE RECEIVED BY DAS: March 24, 2005

180-DAY DEADLINE: September 20, 2005

I. SUMMARY OF CLAIM

The claimants, Leland E. and Elizabeth L. Dundas, seek compensation in the amount of \$150,000 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 desires compensation or the right to build a house on their property. The property is located on Wilsonville Rd., 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 Mr. and Ms. Dundas' development of a dwelling on the subject property: Statewide

¹ The Peters have an option to purchase the subject property. They are not claimants for purposes of this Measure 37 claim.

Planning Goal 3 (Agricultural Lands), ORS 215 and applicable provisions of OAR 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow Leland E. and Elizabeth L. Dundas a use of the property permitted at the time they acquired it on July 9, 1975. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 2, 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 24, 2005, for processing under OAR 125, division 145. The claim identifies the County's Exclusive Farm Use (EFU) zone 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, Leland E. and Elizabeth L. Dundas, acquired the subject property on July 9, 1975, as reflected by a Warranty Deed included with the claim. According to the claim, the property was transferred to a revocable living trust, created by Leland E. and Elizabeth L. Dundas, on April 29, 1996 with Leland and Elizabeth Dundas as trustees. Transfer of the property to a revocable trust does not constitute a change in ownership for purposes of reviewing this Measure 37 claim. A copy of a Title Report dated March 22, 2005, indicates that Leland E. and Elizabeth L. Dundas, Trustees, are the current owners of the subject property.

Conclusions

The claimants, Leland E. and Elizabeth L. Dundas, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of July 9, 1975.

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 “minimum lot size EFU-80 restricts building a house on this lot.”

The claim is based on Clackamas County’s current Exclusive Farm Use (EFU 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 accord 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.

Current land use regulations, particularly ORS 215.284 and OAR 660, division 33, as applied by Goal 3 establish standards for establishing a farm or non-farm dwelling on an existing or proposed parcel.

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 July 9, 1975, after the establishment of the Statewide Planning Goals. At that time the property was zoned Agricultural Single Family Residential (RA-1). RA-1 had a one-acre minimum with single-family dwellings as a primary use. However, Clackamas County's RA-1 zone that applied to the property at that time was not acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251. Since the Commission had not acknowledged Clackamas County's comprehensive plan and land use regulations, including the RA-1 zone, when the claimants acquired the property on July 9, 1975, Statewide Planning Goal 3 applied directly to property on the date of acquisition.² Accordingly, the State standards for a dwelling in an EFU zone required by Goal 3 allowed farm dwellings if determined to be "customarily provided in conjunction with farm use" under the provisions of ORS 215.213(1)(e) then in effect. Before a farm dwelling could be established on Agricultural Land, the farm use to which the dwelling relates must "be existing."³ Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use. At that time, ORS 215.213(3) authorized a non-farm dwelling only where the dwelling was compatible with farm uses, consistent with the intent of ORS 215.243, did not interfere seriously with accepted farming practices on adjacent lands, did not materially alter the stability of the land use pattern for the area, and was situated on land generally unsuitable for production of farm crops and livestock.⁴

² Statewide Planning Goal 3 was applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the County's Goal 3 program on July 30, 1984. (*Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (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 den 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 Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions, (*Byrd v. Stringer* 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same in substance, the applicable rules must be interpreted and applied by the county in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Knaggy v. Benton County*, 115 Or App 131 (1992).

³ *Mateo v. Polk County*, 11 Or LUBA 259, 263 (1984) affirmed without opinion 70 Or App 179 (1984) and *Newcomer v. Clackamas County*, 92 Or App 174, modified 94 Or App 33 (1988).

⁴ When determining whether land is "generally unsuitable for the production of farm crops and livestock" under ORS 215.213(3), the entire parcel or tract must be evaluated rather than a portion thereof. *Smith v. Clackamas County*, 313 Or 519 (1992).

No information has been provided establishing whether the claimants' request for a dwelling complies with either of the applicable standards for a farm or non-farm dwelling under ORS 215.213 in effect at the time the claimants acquired the subject property.

Conclusions

The zoning requirements and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) were enacted before Leland E. and Elizabeth L. Dundas acquired the property on July 9, 1975. However, the current 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 and do not allow the establishment of a dwelling.

In 1975, the property was subject to the requirements of Statewide Planning Goal 3 and dwelling standards in ORS 215.213 then in effect. It is unclear whether the claimants' proposed dwelling complies with the standards in effect when they acquired the property in July 1975. However, because current provisions prohibit the establishment of a dwelling, whereas it is possible that a dwelling could be approved under the standards in effect when the claimants acquired the property, it is more likely than not that land use laws adopted since 1975 restrict the use of the property relative to uses allowed when the claimants acquired the property on July 9, 1975.

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. 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 \$150,000 as the property's reduction in fair market value as a result of current regulations. This estimate is based on the claimants' research of the market value of current buildable lots. No documents were submitted on how the amount was established.

Conclusions

As explained in Section V.(1) of this report, Leland E. and Elizabeth L. Dundas acquired the property on July 9, 1975. Under Ballot Measure 37, Mr. and Ms. Dundas 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 finding and conclusions in Section V. (2) of this report, laws adopted since the claimants acquired the property more likely than not restrict their ability to establish a dwelling.

Without an appraisal on the value of the subject property or other documentation, and without verification that the requested dwelling 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 includes a general reference to any state land use regulations that restrict the use of the property relative to what would have been allowed on July 9, 1975, when the property was acquired by Leland E. and Elizabeth L. Dundas. These provisions include Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its EFU zone. These laws are not exempt under Section 3(E) of Ballot Measure 37 to the extent they were enacted after the claimants acquired the property. Those provisions of ORS 215 and Goal 3 adopted before July 9, 1975, are exempt under Section 3(E) of the Measure.

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 for the most part these laws are not exempt under Section 3(E) of Measure 37. Provisions of ORS 215 and Goal 3 in effect when the claimants acquired the property in 1975 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 establishment of a dwelling on the subject property. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$150,000. However, because the claim does not provide an appraisal or other specific documentation to establish how the specified restrictions reduce the fair market value of the property, and without verification that the requested dwelling would have been allowed under the standards in effect 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 the laws on which the claim is based more likely than not 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 Mr. and Ms. Dundas to use the subject property for a use permitted at the time they acquired the property on July 9, 1975.

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 Leland and Elizabeth Dundas' use of their property: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33, enacted after July 9, 1975. These land use regulations will not apply to Leland and Elizabeth Dundas' use of their property only to the extent necessary to allow them a use permitted at the time they acquired the property on July 9, 1975.
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 July 9, 1975. On that date, the property was subject to applicable provisions of ORS 215 and Goal 3 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 25, 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.