

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM)	FINAL ORDER
FOR COMPENSATION UNDER)	CLAIM NO. M118337
BALLOT MEASURE 37 (CHAPTER 1,)	
OREGON LAWS 2005) OF)	
George McKibben, CLAIMANT)	

Claimants: George McKibben, Ila Snyder, Janet Olson, Joan Henley (the Claimants)

Property: Tax Lot 1800, T.1N, R.3W, Sections 30 and 31, W.M., Washington County

Claim: The demand for compensation and any supporting information received from the Claimants by the State of Oregon (the Claim).

Claimants submitted the Claim to the State of Oregon under Ballot Measure 37 (2004) (Oregon Laws 2005, Chapter 1) (hereafter, Measure 37). Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and 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 claimants' division and development on the subject property: the applicable provisions of Statewide Planning Goal 3, ORS 215.213, 215.263 and 215.780 and OAR 660, division 33 enacted after August 29, 1983. These land use regulations will not apply to the claimants' use of their property only to the extent necessary to allow them a use permitted at the time they acquired the property.
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 August 29, 1983. On that date, the property was subject to Statewide Goal 3 and applicable then-existing provisions of ORS 215 (1981 edition) and OAR 660, division 5.

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

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

October 12, 2005

STATE CLAIM NUMBER: M118337

NAMES OF CLAIMANTS: George McKibbin, Ila Snyder, Janet Olson
and Joan Henley¹

MAILING ADDRESS: 775 Hodgdon Road
Tillamook, Oregon 97141

IDENTIFICATION OF PROPERTY: Township 1N, Range 3W, Sections 30 & 31
Tax Lot 1800
Washington County

OTHER CONTACT INFORMATION: Ila Snyder
17675 Rolling Hill Lane
Beaverton, Oregon 97006

Janet Olson
818 Sandy Bend Road
Castle Rock, Washington 98611

Joan Henley
1245 SE 34th
Hillsboro, Oregon 97123

DATE RECEIVED BY DAS: April 20, 2005

180-DAY DEADLINE: October 17, 2005

I. CLAIM

The claimants, George McKibbin, Ila Snyder, Janet Olson and Joan Henley, seek compensation in the amount of \$1,000,000 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

¹ Although the claim form only lists George McKibbin as the claimant, all four individuals listed above hold an undivided interest in the property and have signed the claim form. The department is treating them all as claimants for the purposes of this report.

desire compensation or the right to divide the 30-acre property into six, five-acre parcels for residential use. The property is located at the geographical coordinates listed above, in Washington County. No street address has been provided for the property. (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, in lieu of compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimants to allow them to develop their property for residential use: the applicable provisions of Statewide Planning Goal 3, ORS 215.213, 215.263 and 215.780, and OAR 660, division 33 enacted after August 29, 1983. These laws will not apply to the claimants' use of the property only to the extent necessary to allow the claimants a use of the subject property permitted when they acquired it on August 29, 1983. (See the complete recommendation in Section VI. of this report).

III. COMMENTS ON THE CLAIM

On April 20, 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 April 20, 2005, for processing under OAR 125, division 145. The claim identifies ORS 215.780 and certain provisions of OAR 660, divisions 4 and 33, as the state 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 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’ family (grandparents) acquired the subject property on February 14, 1905. The claimants’ parents then acquired the property in 1956. The claimants then each acquired an “undivided one-fourth interest” in the property on August 29, 1983. A Title Report dated March 9, 2005, confirms these dates of ownership and confirms that the claimants are current owners of the subject property. (See the department’s claim file).

Conclusions

The claimants’ grandparents acquired the subject property on February 14, 1905, and are “family members” of the claimants as that term is defined in Section 11(A) of Ballot Measure 37. George McKibbin, Ila Snyder, Janet Olson and Joan Henley are “owners” of the subject property as that term is defined in Section 11 (C) of Ballot Measure 37, as of August 29, 1983.

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 it is based on “subdividing our 30 acres into six 5 acre building sites.” Specifically, the claim lists ORS 215.780 and the applicable provisions of OAR 660, division 33 regarding land divisions and dwellings in farm zones as well as OAR, 660 division 4 regarding the application of Goal 14 (Urbanization of Rural Areas).²

The claim is based on Washington 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 3.³ Goal 3 became effective on January 25, 1975, and requires 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 215.213 on high-value farmland.⁴

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

OAR 660, division 4 regarding the application of Goal 14 (Urbanization of Rural Areas) is applicable to lands zoned for rural residential use and is not applicable to this claim.

² The department is considering this claim a request to divide the subject property into building sites rather a request for just a dwelling. Even though the Washington County decision for this claim dated June 8, 2005, (Claim No. 37CL0023) authorizes just “one farm dwelling,” the claim form submitted to the County states that the claimants “wish to sell property with as many approved building sites possible as per Measure 37.” The county request is consistent with the request to the state.

³ The claimant’s property is “Agricultural Land” because it contains NRCS (Natural Resources Conservation Service) Capability Class I – IV Soils. (See NRCS Web Soil Survey: www.websoilsurvey.nrcs.usda.gov.)

⁴ The subject property is composed of “high-value farmland” soils: www.websoilsurvey.nrcs.usda.gov

The claimants' family first acquired the subject property in 1905, prior to the adoption of the Statewide Planning Goals and their implementing statutes and rules. At that time, the property was not zoned by Washington County.

Conclusions

Lot size and dwelling standards established by amendments to Statewide Planning Goal 3, ORS 215.213, 215.263 and 215.780, as well as OAR 660, division 33 adopted since the claimants' family first acquired the property in 1905, do not allow the division of the property or approval of dwellings as may have been possible in 1905. Washington County's EFU zone is based on the standards required by Statewide Planning Goal 3, ORS 215 and OAR 660, division 33. Land use laws adopted since 1905, restrict the use of the property from what could have been done when the property was acquired by the claimants' family in 1905.

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 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 \$1,000,000 as a result of land use laws enacted after their family acquired the property in 1905. The claim states that it is based on "subdividing our 30 acres into six 5-acre building sites. Each undeveloped site we believe would easily sell for \$200,000. Total potential value would therefore be \$1,200,000. Current value of this 30 acre EFU parcel is \$6000/\$7000 an acre or approximately \$200,000." The claim states that the above figures are based on information collected in the past year in preparation for selling the property. None of this supporting information was submitted with the claim.

There is no certified appraisal or other documentation to substantiate the claimed values either before or with state land use regulations.

Conclusions

As explained in Section V.(1) of this report, the claimants' family acquired the subject property in February 1905. Thus, under Ballot Measure 37, the claimants 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, laws adopted since the claimants' family acquired the property do not allow the division of the subject property for residential use. The claim asserts the reduction in value due to the restriction to be \$1,000,000. However, without an appraisal or other 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 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 Washington County's EFU zone and the related provisions of state law that have restricted use of the property and reduced its fair market value, including Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33.

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.

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 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 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 in this report, laws enforced by the Commission or the department restrict the division of the property into six, five-acre parcels for residential use. The claim asserts these restrictions reduce the fair market value of the subject property by \$1,000,000. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, no appraisal or other documentation was submitted and it is unclear what level of development would be allowed under the laws in effect in 1905 when the claimants' family acquired the property. Therefore, it is not possible to substantiate the specific dollar amount that the claimants demand for compensation. Nevertheless, the department acknowledges that state land use laws 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, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow the claimants as the current owners to use the subject property for a use permitted at the time they acquired the property on August 29, 1983.

The claimants acquired the property on August 29, 1983, when it was zoned EFU, a qualified zone under ORS 215. However, the County's EFU 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. The Commission acknowledged the Washington County Comprehensive Plan and land use

regulations as complying with the Statewide Planning Goals on July 30, 1984 (Acknowledgment Order 84-ACK-103). Since the Commission had not acknowledged Washington County's comprehensive plan and land use regulations, including the EFU zone, when the claimants acquired the property on August 29, 1983, Statewide Planning Goal 3 applied directly to property on the date of acquisition.⁵

In 1983, the State standards for a land division involving property where the local zoning was not acknowledged, were that the resulting parcels must be of a size that are "appropriate for the continuation of the existing commercial agricultural enterprise in the area" (Statewide Planning Goal 3 and OAR 660, division 5). Further, ORS 215.263 (1981 edition) required that all divisions of land subject to the provisions for EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). In 1981, ORS 215.263 did not provide for the creation of a small parcel for a non-farm dwelling separate from these provisions.⁶

Thus, the opportunity to divide the property when the claimants acquired it in 1983 was limited to land divisions consistent with Goal 3 and OAR 660, division 5 that required the resulting farm or non-farm parcels to be: (1) "appropriate for the continuation of the existing commercial agricultural enterprise in the area"; and (2) shown to comply with the legislative intent set forth in ORS 215.243. (See endnote.¹)

As for dwellings allowed in an EFU zone, in 1983, ORS 215 and EFU zoning required by Goal 3 allowed farm dwellings if determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(f) (1981 edition). Before a farm dwelling could be established on Agricultural Land, the farm use to which the dwelling relates must "be existing."⁷ Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use and if on existing parcel, the dwelling had to be on a parcel appropriate for the continuation of the existing commercial agricultural enterprise within the area under OAR 660, division 5. ORS 215.213(3) (1981 edition) authorized a non-farm dwelling only where the

⁵ 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. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). 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); *Kenagy v. Benton County*, 115 Or App 131 (1992).

⁶ Compare ORS 215.263 (1981 edition) with the current version of ORS 215.263.

⁷ *Newcomer v. Clackamas County*, 92 Or App 174, modified 94 Or App 33 (1988); *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984), affirmed without opinion 70 Or App 179 (1984).

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.⁸

No information has been provided showing that the claimants' request to divide the property into six, five-acre parcels for residential use complies with either of the applicable partition or dwelling standards under Statewide Planning Goal 3, ORS 215.213 (1981 edition) or OAR 660, division 5 in effect at the time the claimants acquired the property in 1983.

Conclusions

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 claimants' division and development on the subject property: the applicable provisions of Statewide Planning Goal 3, ORS 215.213, 215.263 and 215.780 and OAR 660, division 33 enacted after August 29, 1983. These land use regulations will not apply to the claimants' use of their property only to the extent necessary to allow them a use permitted at the time they acquired the property.
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 August 29, 1983. On that date, the property was subject to Statewide Goal 3 and applicable then-existing provisions of ORS 215 (1981 edition) and OAR 660, division 5.
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

⁸ 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).

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 September 23, 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.

ⁱ As noted, Goal 3 (Agricultural Lands) became effective on January 25, 1975, and was applicable to legislative land use decisions and some quasi-judicial land use decisions where site specific goal provisions apply prior to acknowledgement of a jurisdiction's comprehensive plan and land use regulations. After the local plan and land use regulations are acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly apply to such local land use decisions. However, after acknowledgment, interpretation of the local county code provisions must be consistent with the goal and rule standards with which they were acknowledged to be in compliance.

The Goal 3 standard for the review of land divisions or the establishment of a minimum lot size states:

“Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area.”

On August 20, 1977, the Commission distributed a policy paper explaining the meaning of the Goal 3 minimum lots size standard (see “Common Questions about Goal #3; Agricultural Lands”, August 30, 1977, as revised and added to July 12, 1979). Further interpretation of the Goal 3 minimum lot size standard can be found in *Meeker v. Clatsop County*, 287 Or 665 (1979); *Jurgenson v. Union County*, 42 Or App 505 (1979); *Alexanderson v. Polk County*, 289 Or 427, *rev den* 290 Or 137 (1980); and *Thede v. Polk County*, 3 Or LUBA 335 (1981).

In 1982, the policy paper and court decisions were incorporated into an administrative rule to guide the interpretation and application of the Goal 3 minimum lot size standard (see OAR 660, division 5, specifically rules 15 and 20 effective July 21, 1982).

For further guidance on the interpretation and application of this standard and rule see *Kenagy v. Benton County*, 6 Or LUBA 93 (1982); *Goracke v. Benton County*, 8 Or LUBA 128 (1983), *rev den and remanded*, 68 Or App 83 (1984), *on remand* 12 Or LUBA 128 (1984); *Goracke v. Benton County*, 13 Or LUBA 146 (1985), *affirmed* 74 Or App 453 (1985), *rev den* 300 Or 322 (1985); and OAR 660-05-015 and- 020 as amended effective June 7, 1986 (repealed effective August 7, 1993).

The 1982 administrative rule (OAR 660-05-015 and- 020) was further amended to incorporate the holdings of these cases (effective June 7, 1986, and repealed effective August 7, 1993).