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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation
June 3, 2005

STATE CLAIM NUMBER:	M118910
NAME OF CLAIMANT:	Jerry and Renee Pearson
MAILING ADDRESS:	12587 South Union Hall Road Canby, Oregon 97013
IDENTIFICATION OF PROPERTY:	Township 4S, Range 2E, Section 6 Tax Lot 1700 Clackamas County
OTHER CONTACT INFORMATION FOR CLAIMANT:	Jill Gelineau and Joseph Schaefer 1211 SW Fifth Ave, Suite 160 Portland, Oregon 97204
OTHER INTEREST IN PROPERTY:	None identified
DATE RECEIVED BY DAS:	December 6, 2004
180-DAY DEADLINE:	June 4, 2005

I. CLAIM

The claimants, Jerry and Renee Pearson, seek compensation in the amount of $880,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to subdivide the property and develop it for residential uses. The property contains 79.10 acres of land located approximately three-miles east of the City of Canby on the north side of Union Hall Road on Tax Lot 1700, T.4S, R.2E, Section 6, (Tax Map 4 2E 6, dated March 16, 2005) in Clackamas County. (See claim, dated December 6, 2004 and addendum to claim.[1])

[1] Provided in a three-page letter submitted to DAS from Schwabe, Williamson & Wyatt, P.C., including exhibits A, B and C and a completed state M37 Claim Form.

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. The department finds that the use of the property has been restricted and the fair market value of the property purchased in 1979 may have been reduced as a result of the current land use regulations. Department staff recommends that, in lieu of compensation, the requirements of Statewide Planning Goal 3 (Agricultural Lands) and OAR 660-033-100 that preclude the division of the subject property not be applied to the subject property to the extent necessary to allow the Pearsons to apply to Clackamas County for the division of the property pursuant to the state land use laws for property division that were applicable to the property on January 1, 1979. (See Section VI. of this report for the complete recommendation.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 18, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. In response to the notice issued by DAS, Dan Sandberg provided general comments on the claimants' proposed land use that are not specific to the criteria required under Measure 37 to be used in the department's review of this claim. (See comment letter in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

Ballot Measure 37, Section 5, requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of the measure (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or

2. For claims arising from land use regulations enacted after the effective date of the measure (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

The claim was submitted to DAS on December 6, 2004 for processing under OAR Chapter 125, Division 145. The claim identifies the County's Exclusive Farm Use zone as restricting the ability to subdivide the property for residential developments as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the

effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulations enacted 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

According to the information provided in the claim, Jerry and Renee Pearson, the claimants, acquired the property on January 1, 1979. The claim includes a copy of a memorandum of agreement, which transferred ownership of the property to the claimants on January 1, 1979, as evidence of the date they acquired the property. A corrected special warranty deed, dated January 28, 1981, was also included in the claim. The deed states "This deed is a corrective deed to replace that deed given in fulfillment of that certain Agreement of Sale dated January 1, 1979…" There was no change in ownership as a result of the corrective deed. An addendum to the claim, dated March 16, 2005, includes a preliminary title report that lists the claimants as the current owners of the subject property.

Conclusions

Jerry and Renee Pearson are "owners" of the subject property, as that term is defined by Section 11(C) of Measure 37.

2. 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 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 Fact

According to an addendum provided by the claimants' attorney, they would like to create six lots ranging in size from 8 to 20 acres, with an average lot size of 13 1/3 acres. Clackamas County's Exclusive Farm Use (EFU) Zone implements Statewide Planning Goal 3 (Agricultural Lands) and OAR 660-33-0100. The subject property (79.10 acres) cannot be further divided into new farm or non-farm parcels under the current requirements of Goal 3, ORS 215.263, 215.780 and OAR 660-033-0100. However, it may be possible to site a non-farm dwelling on the existing parcel because the property is composed of predominately Class VI and VII soils (ORS 215.284(1)).[2]

According to the claimants' attorney, the State of Oregon did not have land use regulations in effect on January 1, 1979 that restricted use of this property in a way that would have prevented the proposed subdivision and residential development. The department disagrees for the reasons set forth below.

The claimant purchased the property in January 1979 when Clackamas County applied no zoning to the property. The property was thereafter zoned General Agriculture District (GAD) on August 23,1979, and later rezoned to Exclusive Farm Use in 1996 to implement HB 3361 (1993).[3]

Statewide Planning Goal 3 became effective on January 25, 1975 and was applicable to legislative land use decisions and certain quasi-judicial land use decisions prior to the Land Conservation and Development Commission's (the Commission) acknowledgment of local plans.[4] Clackamas County's EFU-20 and GAD zones were acknowledged on December 31, 1981. Until the County's land use regulations were acknowledged by the Commission, the use of the subject property was subject to both the County's ordinances and the applicable statewide land use planning goals.[5]

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[2] The minimum parcel size for the creation of new farm parcels is 80 acres (ORS 215.780). Because the property is located in the Willamette Valley it cannot be divided to allow a non-farm dwelling under ORS 215.263(4). (Soils Survey of Clackamas County, property located on Sheets # 28 and 33. Soil map units 36B, 36C, 70B and 92F found on pages 51-53, 89, 113 and 114, November 1985.)

[3] Based on personal communication of March 22, 2005, between Doug White (DLCD) and Jennifer Hughes (Clackamas County Planning).

[4] See *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), and *Alexanderson v. Polk County*, 289 Or 427, *rev. denied*, 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1, (1985). After the local plan and land use regulations are acknowledged by LCDC, the statewide planning goals and implementing rules no longer directly apply to such local land use decisions, *Byrd v. Stringer* 295 Or 311, (1983). However, insofar as the state and local provisions are materially the same in substance, the applicable statutes and rules must be interpreted and applied by the county in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

[5] The subject property was not zoned at all until August 23, 1979 when it was zoned General Agriculture District (GAD). In 1981, the County revised the GAD zone to comply with a Commission order that directed the county to bring its EFU-20 and GAD zones into compliance with Goal 3. On

The opportunity to divide the property when the claimants acquired it in 1979 was limited to land divisions that were consistent with Goal 3, which required the resulting parcels to be either: (1) "appropriate for the continuation of the existing commercial agricultural enterprise in the area;" or (2) shown to comply with the standards for the creation of non-farm parcels under ORS 215.263 (1975 Edition).

Information has not been presented in the claim to establish that the potential six-lot development cited by the claimant was permitted under the "commercial" standard for farm parcels under Goal 3 or the standards for non-farm parcels under ORS 215.263 (1975 Edition). [6]

Conclusions

The Pearson's claim is based on the assumption that a "rural" plan designation applied to the property and was the governing land use regulation when they acquired the property on January 1, 1979. Because the Clackamas County plan and zoning of the property had not been acknowledged by the Commission at the time the claimants acquired the property, the Goal 3 "commercial" standards for farmland divisions and the standards for non-farm parcels applied to the property along with the county's "rural" plan designation.

Based on the state land use regulations that applied to land divisions when the Pearsons acquired the property in 1979, it is possible that some new parcels could be created, which is more than Goal 3 and OAR 660-033-0100 currently allow.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that the 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

According to the claimants, the inability to divide their 79.10-acres into six lots because of current restrictions under the EFU Zone, results in a fair market value reduction of $880,000. The attorneys representing the claimants state that they have engaged a licensed appraiser to assist in determining the amount of just compensation due pursuant

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December 11, 1981, the Commission determined that the County's revised GAD Zone complied with Goal 3 because the County included the proper standards for land divisions (Land Conservation and Development Commission Continuance Order, December 31, 1981, Department of Land Conservation and Development, October 23, 1981 Report, pp. 9-13).

[6] An indication of what land division of the property was permitted when the Pearsons acquired it in 1979 and that complied with the Goal 3 minimum lot size standard in Clackamas County are the land division standards in the County's later-acknowledged GAD Zone which provided for the creation of new farm parcels on a case-by-case basis.

to Measure 37. An appraisal of the property was not included in the submitted claim or addendum to the claim.

However, as explained in Section V.(2) of this report, at the time the Pearsons purchased the property in 1979, partitioning of the subject property was subject to Goal 3, not the County's rural plan designation. The claim does not include information to demonstrate that the proposed division into six lots would be authorized under the Goal 3 standard that applied at the time of the Pearson's purchase. All that can be determined is that because the potential to further divide the property existed in 1979, it is more likely than not that there has been some reduction in fair market value of the property since no new parcels are allowed under the laws currently in place.

Conclusions

The claimants have not provided specific information to show that the Goal 3 standards resulted in a reduction in the fair market value. This is because a reduction in the fair market value provided in the claim was incorrectly based on the County's unacknowledged plan and zoning and not on the requirements for farmland divisions under Goal 3 and for non-farm parcels under ORS 215.263 (1977 Edition) that applied at the time the Pearsons purchased the property in 1979.

Until it is determined whether additional parcels could have been created in 1979 under the Goal 3 standard, the specific amount of any reduction in the fair market value of the property cannot be determined. However, since the property cannot be divided at all under current standards, but could possibly have been divided under the Goal 3 standard in effect at the time of purchase in 1979, the department believes (based on the current record for this claim) that it is more likely than not that there has been some reduction in the fair market value of the subject property.

4. Exemptions under Section 3 of Measure 37

Ballot Measure 37 does not apply to certain laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The regulation subject to this claim is Statewide Planning Goal 3 (Agricultural Lands), ORS 215.283 and OAR 660, Division 33. These laws were adopted after 1979. Furthermore, none of the laws identified in the claim appear to be exempt, either on their face or as applied to the subject property, under Section 3 of Ballot Measure 37.

Conclusions

The versions of ORS 215.283, Goal 3, and relevant sections OAR 660 relating to agricultural lands in place before January 1, 1979, the date the claimant acquired the property, are exempt from this claim. Other applicable regulations cited in the claim do

not appear, either on their face or as applied to the subject property, to be exempt under Section 3 of Ballot Measure 37. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure, or because they are laws that are not covered by the Measure to begin with.

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 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 a 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 conclusion set forth in this report, certain laws enforced by the Commission or the department restrict the division of the property into parcels or lots, and the use of the property for residential purposes. The claimants cannot create the desired six lots from the 79.10-acre property that is the subject of this claim. Laws enforced by the Commission or department reduce the fair market value of the subject property to some extent. The claim asserts this amount to be $880,000 dollars. However, because the amount identified by the claimants is not based on the correct development standard and because the claim does not provide a specific explanation for how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the current record for this claim, the department believes 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 one or more land use regulations to the extent necessary to allow the Pearsons to use the subject property for a use permitted at the time they acquired the property on January 1, 1979.

Conclusions

Based on the record before the department, the Pearsons have established that they are entitled to relief. Therefore, department staff recommends not applying land use regulations enforced by the Commission or the department, to the extent necessary to allow the Pearsons a use of the property permitted at the time they acquired it on January 1, 1979.

On January 1, 1979, the property was subject to Statewide Goal 3 and the minimum lot size standard specified therein and in OAR 660-05-015 and 020 (effective July 21, 1982, both repealed August 7, 1993). Therefore, staff recommends that the department not apply the current provisions of Statewide Goal 3 and OAR 660, Division 33 to authorize the Pearsons to apply to Clackamas County for the division of the subject property to the extent permitted by state laws applicable at the time the Pearsons purchased the property on January 1, 1979 including, but not limited to the Goal 3 minimum lot size standard and ORS 215.263 (1975). (See endnote [i].)

Any use of the property by the claimants remain subject to the following laws: (a) those laws not specified in their claim to the State of Oregon, dated December 6, 2004 or identified in this report; (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 excepted under section (3) of the Measure.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on May 11, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

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[i] An indication of what the Goal 3 standard may have permitted is set forth in the County's GAD Zone acknowledged by LCDC in 1981. The GAD Zone revised in 1981 included the following review criteria (County Order 81-1268):

> "A. Principle Use: Lot divisions proposed for principal uses may be permitted by the Planning Director, subject to review with notice pursuant to subsection 1305.02, when the applicant provides a farm management plan, as provided under 402.10.A, and other evidence as necessary to demonstrate that all of the following criteria are satisfied:
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> 1. All lots created are as large as the acreage supporting the typical commercial farm unit in the area (area is defined for purposes of Section 402.09 as the line within a one-mile radius of the subject property);
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> 2. The proposed principle use stated in the farm management plan is appropriate for the area, considering such factors as climate, water availability, soils, marketing capabilities and delivery systems;
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> 3. The lot size will be sufficient to adequately support the proposed principle use stated in the farm management plan, considering the following factors:
>
> a. Soil type, topography, and existing buildings or improvements,

b. Cultivation, irrigation, harvesting, spraying, fertilizing, and other farm practices associated with the proposed principle use;

4. The lot division will not adversely affect or limit the existing or potential commercial farm uses in the area; and

5. The lot division will not reduce the agricultural productivity of the area.

The Oregon State University Extension Service shall be notified of and asked to comment on all application filed pursuant to Section 401.09A.

Lot divisions for principle uses shall be described and recorded as approved by the Planning Director at the time when the property is transferred.

Lots less than a "typical commercial farm unit in the area" can also be approved subject to the following criteria (Section 402.09(I)):

I. Principle Use Lot Size Variance: A variance from the lot size requirements, for principle uses under 402.09A and 402.093D, may be granted by the Hearings Officer after a hearing conducted pursuant to Section 1300 when the applicant provides a farm management plan for intensive commercial farm uses, as provided under 402.10.A, and other evidence as necessary to demonstrate that all of the following criteria are satisfied:

1. The hardship asserted as a ground for the variance must arise out of this section of the Zoning Ordinance.

2. The undersized lot(s) is particularly suitable for intensive commercial farm uses considering characteristics such as soil type, geographic location, lot size, topography, location of compatible and complimentary commercial farm uses in the area, and location of buildings and other improvements on the property.

3. Alternative locations, such as rural areas and existing undersized lots in the area have been considered and are not available or suitable for the use.

4. The granting of the variance does not allow the property to be used in a manner that is incompatible with, or limits farm use.

5. Allowing the variance of the overall land use pattern in the area, assuming a principal dwelling may be allowed on the lot.

The Oregon State University Extension Service shall be notified of a request to comment on all application filed pursuant to this provision.

Lot divisions for principle uses shall be described and recorded as approved by the Hearings Officer prior to any development occurring on the lots.

A “commercial” and “non-commercial” farm have been defined as follows (Section 202 as amended by Order 81-1268):

> “FARM, COMMERCIAL: A farm unit with all of the following characteristics:
>
> (a) The land is used for the primary purpose of obtaining a profit in money from activities described in Sections 401.03A and B, and 402.03A and B;
> (b) The net income derived from farm products is significant; and
> (c) Products from the farm unit contribute significantly to the agricultural economy, to agricultural processors and farm markets.
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> FARM, NON-COMMERCIAL: A parcel where all or part of the land is used for production of farm products for use or consumption by owners or residents of the property, or which provides insignificant income.”