

**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: M119114

NAME OF CLAIMANT: Charles Hoff

MAILING ADDRESS: 21557 Southwest 91st Avenue
Tualatin, Oregon 97062

IDENTIFICATION OF PROPERTY: Township 2S, Range 1E, Section 22
Tax lot 100, Clackamas County

OTHER INTEREST IN PROPERTY: Colleen Jensen Merrill

DATE RECEIVED BY DAS: December 30, 2004

180-DAY DEADLINE: June 28, 2005

I. CLAIM

Charles Hoff, the claimant, seeks compensation in the amount of \$11,600,000 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 divide and develop the subject property. The property contains 52.86 acres of land located outside of the City of West Linn's Urban Growth Boundary (UGB) to the west on Rosemont Road. (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 the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of certain state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, specifically Statewide Planning Goal 3 (Agricultural Lands) and OAR 660, Division 33, not apply to the subject property to the extent necessary to allow Mr. Hoff a use of the property permitted at the time he acquired it. As a result, Mr. Hoff's use of the property will be subject to those specified laws in effect on March 1, 1997. (See Section VI. of this report for the complete recommendation.)

III. COMMENTS ON THE CLAIM

Comments Received

On February 16, 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, the following individuals provided general comments that are not specific to the criteria required under Measure 37 for the department's review of this claim. (See comment letters 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 30, 2004 for processing under OAR 125, Division 145. The claim identifies Clackamas County's exclusive farm use zoning, Goal 3, OAR 660, Division 33 and land use laws that restrict the use of the property as the basis for this 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 claim, Charles Hoff, the claimant, and Colleen Jensen Merrill acquired the property on March 1, 1977. Mr. Hoff included a title report and tax statement for the property to substantiate his ownership.

Conclusions

The claimant, Charles Hoff, is an “owner” of the 52.86-acre property identified as Tax Lot 100, T.2S, R.1E, Section 22, W.M. (tax Map 2 1E 22A 110, West Linn) as that term is defined by Section 11(C) of Measure 37.

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 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 we “can’t do anything on EFU lands. on 2 acre per unit – I could build on it.” The claim is based on the Clackamas County’s Exclusive Farm Use (EFU) Zone that implements ORS 215.263, 215.284 and 215.780 as applied by Statewide Planning Goal 3 (Agricultural Lands), and OAR 660, Division 33. The subject 52.86 acres cannot be further divided and is not entitled to a farm or non-farm dwelling under the current requirements.¹ The claim also cites a “Wildlife Reserve Overlay, on Metro maps- put on in 2004.” The department and County are not aware of any such regulations applied to the subject property by Metro.²

¹ 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). The existing parcel is also not eligible for a non-farm dwelling because the property is composed of predominately Class III agricultural soils, and therefore the property would not qualify for a non-farm dwelling under ORS 215.284(1). (Soils Survey of Clackamas County, property located on Sheet #6. Soil map units for 13C, 23C, 48C, 48D and 78D found on pages 30, 31, 41, 42, 68, 97 and 98, November 1985.)

² Based on personal communication of March 2, 2005 between Doug White (DLCD) and Jennifer Hughes (Clackamas County Planning). Clackamas County has applied a River and Stream Conservation Area (RSCA) plan designation to the drainage way located along the southern portion of the subject property (Comprehensive Plan, Section 3-Natural Resources, and Policy 12). Section 704 of the Zoning Ordinance applies to all primary and

The claimant purchased the property in 1977 when it was zoned by the County as Urban Low Density Residential (R-20) and had a 20,000 square foot minimum parcel size requirement for the creation of new lots or parcels (adopted on March 10, 1964). However, at that time, the County's R-20 Zone 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. Because the Commission had not acknowledged Clackamas County's local comprehensive plan and land use regulations, including the R-20 zone that applied to the subject property, certain site-specific Goal provisions, including Statewide Planning Goal 3, applied directly to the property when the claimant acquired it in March 1977.

Statewide Planning Goal 3 became effective on January 25, 1975 and was applicable to legislative land use decisions and some quasi-judicial land use decisions, on a site-specific basis, prior to the Commission's acknowledgment of local plans.³ Clackamas County's EFU-20 and GAD (General Agriculture District) 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.⁴

Statewide Goal 3 "Agricultural Lands," as adopted in 1975, required that agricultural land be "preserved and zoned for exclusive farm use pursuant to ORS Chapter 215," The subject property is "agricultural land" as defined by Goal 3 because it is composed predominantly of Class III soils and was subject to EFU zoning pursuant to ORS Chapter 215 when acquired by the claimant on March 1, 1977.

In 1977, The State standards for a land division involving property where the local zoning was not acknowledged required 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). Further, ORS 215.263 (1975 edition) required that all divisions of land subject

accessory structures exceeding 120 square feet or 10 feet in height and requires a 50-foot setback from mean high water line of a stream identified in the Plan. This is not a state land use requirement and is not addressed in this review.

³ See *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (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. denied*, 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 the Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions (See *Byrd v. Stringer*, 295 Or 311 (1983). However, the applicable statutes continue to apply and insofar as the local implementing provisions are materially the same as the rules, the local provisions must be interpreted consistent with the substance of the rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

⁴ The subject property was zoned R-20 until it was ultimately rezoned on August 23, 1979 to EFU-20, a little more than two years after the claimant purchased the property. In 1981, the County revised the zone to comply with a Commission order that directed the County to bring its EFU-20 Zone into compliance with Goal 3. On December 11, 1981, the Commission determined that the County's revised EFU-20 Zone complied with Goal 3 because the County included the proper standards for land divisions (LCDC Continuance Order, December 31, 1981, DLCD October 23, 1981 Report, pp. 9-13).

to the provisions for exclusive farm use zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). Thus, the opportunity to divide the property when acquired by the claimant in 1977 was limited to land divisions done consistent with Goal 3 that required the resulting parcels be: (1) “appropriate for the continuation of the existing commercial agricultural enterprise in the areas;” and (2) shown to comply with the legislative intent set forth in ORS 215.243.¹

As for the dwellings allowed under EFU zoning as required by Goal 3 on the date of acquisition in 1977, farm dwellings were allowed if determined to be “customarily provided in conjunction with farm use” under ORS 215.215(1)(d) (1975 edition) and non-farm dwellings were subject to ORS 215.231(3) (1975 edition)

Information has not been presented in the claim to show that the potential two-acre lot development cited by the claimant complies with the “commercial” standard for farm parcels under Goal 3 or the standards for new parcels under ORS 215.263 (1975 Edition).⁵

Conclusions

Mr. Hoff’s claim is based on the assumption that the County’s R-20 zone was the governing land use regulation when he acquired the property in 1977. However, because the County’s R-20 Zone had not been acknowledged by the Commission at the time the claimant acquired the property, the Goal 3 “commercial” standard for farmland divisions and the standards for new parcels under ORS 215.263 (1975 edition) applied to the property, rather than the 20,000 square foot minimum parcel size requirement of the unacknowledged R-20 Zone.

Based on the correct Goal 3 standard for land divisions applicable to this property when Mr. Hoff acquired it in 1977, it is possible that at least one new parcel could be created, which is more than the current ORS 215.780, Goal 3 and OAR 660-033-0100 currently allow. Farm or non-farm dwelling may also be possible based on the standards for such dwellings in effect in 1977 which is more than allowed under the current standards for dwellings under ORS Chapter 215 as applied by Goal 3 and OAR Division 33.

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.”

⁵ An indication of the appropriate land division standards that may have applied to the property when it was acquired 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 EFU Zone which provided for the creation of new farm parcels on a case-by-case basis (see end note ii.)

Findings of Fact

According to the claimant, the inability to divide his 52.86-acre parcel into a two-acre lot development because of the current restrictions of the EFU Zone, results in a fair market value reduction of \$9,500,000, and the “wildlife reserve” results in a fair market value reduction of \$2,100,000. The total reduction in the fair market value set forth in the claim is \$11,600,000.

To explain what the property would be worth if it were zoned for two-acre lot development, the claimant provided for comparison information on two- and five-acre parcels sold in the area during the last year and information on two unsolicited offers to purchase the subject property, if it were zoned for 2-acre lot development. According to a letter included in the claim, the sold parcels indicate a value between \$115,000 to \$340,000 per acre with the two unsolicited offers for the entire acreage indicating a value ranging from \$10,300,000 to \$10,750,000.

Information in the claim does not show that the identified fair market value reduction of \$11,600,000 is actually attributable to land use regulations enacted after the claimant acquired the property in 1977. As stated above, partitioning of the subject property at the time of purchase in 1977 was subject to Goal 3, and no information has been presented that shows that the two-acre lot development would have been authorized under the Goal 3 standard that applied at that time. All that can be determined is that one additional parcel of at least 20 acres may have been possible under the Goal 3 minimum lot size standard in effect at the time of purchase in 1977. Assuming that one additional parcel of at least 20 acres could comply with the Goal 3 minimum lot size standard in effect at the time of purchase, there is still more likely than not some reduction in the fair market value of the property since no new parcels are currently permitted.

Conclusions

The claimant has not provided specific information to show that the Goal 3 standards that applied after they purchased the property in 1977 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 R-20 Zone, and not on the requirements for farmland divisions under Goal 3 and for ORS 215.263 (1975 Edition) or the applicable provisions for farm and non-farm dwellings that applied at the time the claimant purchased the property in 1977.

Until it is determined whether any additional parcel or dwellings could have been approved in 1977 under the Goal 3, 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 or received approval for any additional dwellings under current standards, but possibly could have been under the Goal 3 at the time of purchase in 1977, 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 land use regulations. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The versions of ORS Chapter 215 and Goal 3 relating to agricultural lands in place before March 1, 1977, the date the claimant acquired the property, are exempt under section 3 of Measure 37. Other applicable state regulations cited in the claim do not appear on their face to be exempt under Section 3 of Ballot Measure 37.

Conclusions

The versions of ORS Chapter 215, and Goal 3, relating to agricultural lands in place before March 1, 1977 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, laws enforced by the Commission or the department restrict the division of the subject property into parcels or lots, and the use of the property for residential purposes. The laws enforced by the Commission or the department reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$11,600,000. However, because the amount identified by the claimant 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 may 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 Mr. Hoff to use the subject property for a use permitted at the time he acquired the property on March 1, 1977.

Conclusions

Based on the record currently before the department, Mr. Hoff has established that he is 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 claimant a use of the property permitted at the time he acquired it on March 1, 1977. As a result, the claimant's use of the property will be subject to those specified laws that were in effect on that date.

On March 1, 1977, the property was subject to Statewide Goal 3 and the minimum lot size standard and those for farm and non-farm dwellings specified therein (effective January 25, 1975). Therefore, staff recommends that the department not apply the current provisions of Statewide Goal 3, ORS 215.780, and OAR 660, Division 33, which preclude the division of the subject property and the approval of farm and non-farm dwellings, so as to authorize Mr. Hoff to apply to Clackamas County for the division of the subject property and approval of dwellings pursuant to the provisions of Goal 3 applicable at the time of his purchase in 1977. These earlier provisions require that the resulting parcels be: (1) "appropriate for the continuation of the existing commercial agricultural enterprise in the area;" and (2) shown to comply with the standards for the creation of new parcels under ORS 215.263 (1975 Edition). Similarly, the standards for residential dwellings in effect in 1977 generally require that any farm dwelling be customarily provided in conjunction with farm use, or meet the requirements for non-farm dwellings under Goal 3 and ORS 215.213(3).

Any use of the property by the claimant remains subject to the following laws:

(a) those laws not specified in this claim to the State of Oregon, dated December 30, 2004 or not 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 exempted 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 9, 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.

Endnotes

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, the applicable statutes continue to apply and insofar as the local implementing provisions are materially the same as the rules, the local provisions must be interpreted consistent with the substance of the rules.

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*, *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, *rev. denied*, 290 Or 137 (1980) and *Thede v. Polk County*, 3 Or LUBA 336 (81).

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 05, specifically rules 015 and 020 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 (7/16/82); *Goracke v. Benton County*, 8 Or LUBA 128 (6/8/83); 68 Or App 83 (5/9/84); 12 Or LUBA 128 (9/26/84); 13 Or LUBA 146 (4/4/85); 74 Or App 453 (7/1785), *rev. denied* 300 Or 322 (11/26/85); 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).

ii. The EFU 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 401.10.A, and other evidence as necessary to demonstrate that all of the following criteria are satisfied:

1. All lots created are at least twenty (20) acres in size or as large as the acreage supporting the typical commercial farm unit in the area, whichever is larger (area is defined for purposes of Section 401.09 as the line within a one-mile radius of the subject property);
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;
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 401.09(I)):

- I. Principle Use Lot Size Variance: A variance from the lot size requirements, for principle uses under 401.09A and 401.093D, 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 401.10.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.

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.”