

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

**Final Staff Report and Recommendation
June 16, 2005**

STATE CLAIM NUMBERS: M119362 and M119024

NAME OF CLAIMANTS: Debra R. Salituro (M119362)
Doris Rogers (M119024)

MAILING ADDRESSES: Debra Salituro
424 Cherrywood CT SE
Salem, OR 97306

Doris C. Rogers
7340 Spring Valley Road
Salem, OR 97304

IDENTIFICATION OF PROPERTY: Township 6S, Range 3W, Section 19
Tax lot 1801, Polk County

OTHER INTERESTS: Public Right of Way – Oak Knoll
Road 20' private roadway along
south property line

DATE RECEIVED BY DAS: December 20, 2005

180-DAY DEADLINE: June 18, 2005

I. CLAIMS

Debra Salituro and Doris Rogers, the claimants, seek compensation for an estimated \$250,000 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 desire compensation or the right to place a dwelling on the property. The property is described is located on Oak Knoll Road in Polk County. (See claims.) These two claims are consolidated for evaluation in this report because the claimants' ownership interests, the property that is the subject of the claims, the restrictive land use laws and recommended relief are the same.

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 claims are 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 that preclude the placement of a dwelling on the property not be applied to the subject property to the extent necessary to allow Ms. Salituro and Ms. Rogers to apply to Polk County for a dwelling pursuant to the state land use laws that were applicable to the property when they acquired it on March 3, 1980. (See Section VI. of this report for the complete recommendation.)

III. COMMENTS ON THE CLAIMS

Comments Received

On February 22, 2005 and on April 18, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS), provided written notice to surrounding property owners. According to DAS, three comments on Claim 119362 and three comments were received on Claim 119024 in response to the 10-day notice. General comments were received that are not specific to the criteria required under Measure 37 for the department's review of these claims. (See comment letters in the department's claim file.) Comments regarding the possible impact of the proposed or intended development of the claimants' property are not relevant to the evaluation and determination of the claimants' Ballot Measure 37 claims, and cannot be considered by the department.

IV. TIMELINESS OF CLAIMS

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 claims were submitted to DAS on December 20, 2004 for processing under OAR 125, Division 145. The claims identify Statewide Planning Goal 3 (Agricultural Lands) and implementing regulations as the basis for these claims. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for the claims. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules).

Conclusions

These claims for compensation have 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 are therefore timely filed.

V. ANALYSIS OF CLAIMS

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

Debra Salituro (also known as DR Insogna) and Doris Rogers are owners as tenants in common of property described as T6S, R3W, Section 19, Lot 1801 in Polk County. Ms. Rogers is Ms. Salituro’s mother. The claims include a Property Profile demonstrating that DR Insogna and Doris Rogers are current owners of the subject property. (See Property Profile Information prepared by Fidelity National Title Company, dated December 2, 2004 and included in the department’s claim file.)

On March 3, 1980, Debra Salituro (Insogna) and Doris Rogers purchased the property from Clayton Rogers and Alice C. Rogers (Debra Salituro’s father and grandmother, Doris Rogers’ husband and mother-in-law). Ms. Salituro’s claim includes a Warranty Deed documenting the transfer of ownership from Clayton Rogers and Alice C. Rogers to Debra R. Insogna and Doris C. Rogers. The claim also includes birth certificates, demonstrating the family relationship between Alice Rogers, Clayton and Doris Rogers and Debra Salituro (Insogna).

Clayton Rogers and Alice C. Rogers acquired the property on September 25, 1968. The claim includes a copy of a deed documenting that purchase.

The claims do not include a chain of title report to demonstrate continuous family ownership. However, evidence submitted with Ms. Salituro's claim demonstrates that the claimants' family initially acquired the property in 1968 and that "family members" continued to retain ownership of the property as of December 2, 2004.

Conclusions

Debra R. Salituro (DR Insogna) and Doris C. Rogers are owners the property described in the claims as that term is defined in Section 11(C) of Measure 37. Clayton and Alice C. Rogers, Debra Salituro's father and grandmother, are "family members" as that term is defined in Section 11(A) of Measure 37.

2. The Laws that are the Basis for this Claims

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 private property relative to how the property could have been used at the time the claimant or family member acquired the property.

Findings of Fact

Ms. Salituro's claim states:

"I would like my original property rights restored by a waiver of current restriction (grandfathering), which currently prohibits my dwelling, to be built."

The claim also cites the following restrictive regulations, stating:

"Current land use policy that restrict my use of this home site are:

"OAR 660-33-0135 (7)(d) this changed the dollar amount for a farm dwelling from \$500 three of five years in 1980 to \$80,000 three out of five years making it impossible for any one to site a farm dwelling as this is an unreasonable dollar amount for a five acre parcel to produce.

"OAR 660-33-0020 (8)(a)(b) created a soil classification of 'prime or high value', which has restricted my use as a home site; there was no prime/high value soil in 1980.

"OAR 660-33-0130 (3)(c) exhibit 26-27 (of the claim) had restricted my use. This was the only option left to land owners such as myself to site a house on my one time building site."

Ms. Roger's claim was not specific as to the laws restricting the use of the property or as to her desired use of the property.

The land use laws listed in Ms. Salituro's claim establish standards for the approval of dwellings on areas zoned for exclusive farm use. The claimants' property is required to be zoned for exclusive farm use under Statewide Land Use Planning Goal 3 (Agricultural Lands). The property is "agricultural land" as defined by Goal 3 because it is predominantly composed of NRCS Class IIe Woodburn soils. (See Natural Resource Conservation Service Soil Survey of Polk County, page 179.)

OAR 660, Division 33 contains standards for the approval of farm and non-farm dwellings on lands zoned for exclusive farm use. Specifically, OAR 660-033-0135 requires that for the approval of a dwelling "customarily provided in conjunction with farm use," the owner demonstrate, in part, that the owner's farm operation produced a certain gross farm annual income (\$80,000) from the sale of farm products in the last two or three of the last five years. The claimants indicate that the subject property has not and likely cannot earn the required gross farm income needed to qualify for a farm dwelling. In addition, ORS 215.284(4) and OAR 660-033-0130(4) establish standards for siting non-farm dwellings. Specifically, a non-farm dwelling may only be established on a parcel predominately composed of Class IV to VIII soils. The subject property is predominantly composed of Class II soils and is therefore not eligible for a non-farm dwelling.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994 and interprets the statutory standard for a primary farm dwelling in an exclusive farm use 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. (See citations of administrative rule history for OAR 660-033-0130 and 0135(7).)

Conclusions

The statutory and rule provisions for farm and non-farm dwellings in ORS 215 and OAR 660 Division 033 adopted since the claimants' family acquired the property in 1968, do not allow a single family dwelling to be approved on the subject property. The current land use laws, adopted since 1968, restrict the use of the property from what could have been done when the property was acquired by the claimants' family in 1968 and in 1980 when it was acquired by the claimants.

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

A Polk County tax assessment report included in the Ms. Salituro's claim estimates the property's real market value at \$11,500 as of December 2, 2004. A second report

indicates that the property's assessed real market value was reduced from \$86,540 in 1998 to \$8,170 in 1999. The difference in assessed real market value between 1998 and 1999 is \$78,370. The discrepancy between the assessed values is based on the property's exclusive farm use zoning and is intended to reduce the tax burden on a property dedicated to that use. The claims do not include a real estate appraisal and the current fair market value is not stated in the claims.

Ms. Salituro indicated in a voice mail message to department staff on March 24, 2005 that the current market value is between \$230,000 and \$250,000. A comparative market analysis has also been submitted to substantiate the property's value (See letter from Debbie Salituro dated March 22, 2005 in the department's claim file). Polk County reports a compensation claim in the amount of \$216,450, based on a median comparative sales value of \$227,950. Subtracting Polk County's assessed value of \$11,500 from the median value leads to an estimated reduction in value of \$216,450. (See Polk County staff report M 04-01 included with the claims.)

Conclusions

As explained in section V.(1) of this report, Debbie Salituro and Doris Rogers are current owners who acquired the property in 1980. The subject property has been owned by "family members" as defined in Section 11(A) of Ballot Measure 37 since 1968. Thus, under Ballot Measure 37, Debbie Salituro and Doris Rogers are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Ms. Salituro's claim provides several estimates of the reduction in fair market value.

Without an appraisal based on the value of the proposed dwelling or additional explanation for the reduction in fair market value, 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 laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

Polk County's Exclusive Farm Use (EFU) Zone implements Statewide Planning Goal 3 (Agricultural Lands) and ORS 215.283 and OAR 660, Division 33. These laws were adopted after 1968. Furthermore, none of the laws identified in the claims appear to be exempt, either on their face or as applied to the establishment of a dwelling on the subject property, under Section 3 of Ballot Measure 37.

Conclusions

The regulations cited in the claims 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, because they were not raised in the claims, or because they are laws that are not covered by the Measure to begin with.

IV. 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 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 since the claimants' family acquired the subject property restrict the placement of a dwelling on the property. The laws enforced by the Commission or the department reduce the fair market value of the subject property to some extent. Several estimates of the reduction in the property's fair market value are included. However, because the claims do not include an appraisal or other 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 records for these claims, the department believes that the laws on which the claims are 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 Ms. Salituro and Ms. Rogers to use the subject property for a use permitted at the time they acquired the property on March 3, 1980.

Conclusion

Based on the record before the department, Ms. Salituro and Ms. Rogers 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 claimants a use of the property permitted at the time they acquired it on March 3, 1980. As a result, the claimants' use of the property will be subject to those specified laws that were in effect on that date.

On March 3, 1980, the property was zoned EFU under the Polk County Comprehensive Plan. The Polk County Comprehensive Plan was not yet acknowledged by the State in 1980, but because the property is “agricultural land” as defined by Goal 3, the statutory provisions for exclusive farm use zoning applied to the property, as required by Goal 3, at the time of acquisition by the present owner.¹

The applicable statutory standards for the approval of a farm or non-farm dwellings on March 3, 1980 are found in ORS 215.283(1)(e) and ORS 215.283(3) (1979 edition). ORS 215.283(1)(e) (1979 edition) provided for “the dwellings and other buildings customarily provided in conjunction with farm use.”² Before a farm dwelling could be established on agricultural land, under the dwelling standards applicable as of March 3, 1980, the farm use to which the dwelling relates must have been existing.³

ORS 215.283(3) (1979 edition) provided standards for the approval of a non-farm dwelling. Post 1980 interpretation of these standards can be found in OAR 660-05-040 (1986 edition). Other LUBA and Court decisions have specified what these statutory standards require.⁴

¹ Statewide Planning Goals 1 through 14 (OAR 660-015-0000) became effective and applicable to legislative land use decisions and some quasi-judicial land use decisions applied prior to acknowledgement of a jurisdiction’s comprehensive plan and land use regulations. 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), and *Alexanderson v. Polk County*, 289 Or 427, *rev. denied*, 290 Or 137 (1980)). 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. *Byrd v. Stringer*, 295 Or 311 (1983). Statewide Planning Goal 3 and the statutory provisions for farm and non-farm dwellings remained in effect and applied to local land use decisions until Polk County’s EFU zone was ultimately acknowledged by LCDC on April 22, 1988.

² Guidance for application and interpretation of Statewide Planning Goal 3 (effective January 25, 1975) and OAR 660, Division 5 (effective July 21, 1982) for the approval of a farm parcel or the approval of a farm dwelling on an existing lot or parcel for Polk County can be found in Ordinance No. 87-26, which amended the Comprehensive Land Use Plan, Ordinance No.217 to adopt revised Goal 3 language and a “Commercial Agricultural Justification Statement” as an amendment to the Agricultural Lands Background Report of the Comprehensive Plan (December 23, 1987). On February 17, 1988, Polk County Ordinances 87-26 and 87-27 were acknowledged by the Commission as complying with Statewide Planning Goal 3 and OAR 660, Division 5 (Commission Order 88-ACK-347 signed April 22, 1988.)

³ See *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). Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use. (See *Mateo v. Polk County*, 14 Or LUBA 67, 73 (1985).)

⁴ Additional guidance for the application and interpretation of the applicable statutory and rule standards for non-farm dwellings for Polk County in 1980 can be found in the County’s Exclusive Farm Use Zone, which in 1978 under Ordinance No. 219 incorporated the appropriate provision for farm dwellings, i.e., “single-family dwelling or a mobile home...in conjunction with farm use.”

The Department recommends that any relief granted be subject to the following terms:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Ms. Salituro's and Ms. Roger's establishment of a dwelling on the property: OAR 660-33-0135; OAR 660-33-0020; OAR 660-33-0130; and ORS 215.284(4).
2. The action by the State of Oregon provides the state's authorization to the claimants to establish a dwelling on the property, subject to those standards in effect on March 3, 1980. Those standards include the provisions of ORS 215 that were in effect on that date, as well as the provisions of Goal 3 that were in effect on that date.
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 obtains 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 215.412 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 remains 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 DLCDC; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under section (3) of Measure 37.
5. Without limiting the generality of the foregoing terms and conditions, for the claimants to use the property, it may be necessary 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 the order will relieve 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 May 27, 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.