

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

July 22, 2005

STATE CLAIM NUMBER: M 119453

NAME OF CLAIMANT: Mary M. Thompson

MAILING ADDRESS: 4144 Southeast Boardman Avenue
Milwaukie, Oregon 97267

IDENTIFICATION OF PROPERTY: Township 8S, Range 4W
Tax Lot 1000
Columbia County

Township 8S, Range 4W, Section 20
Tax Lot 100
Columbia County

Township 8S, Range 4W, Section 29
Tax Lot 100
Columbia County

OTHER INTERESTS IN PROPERTY:

Guy R. Thompson 4208 SE Boardman Ave. Milwaukie, OR 97267	Elizabeth M. Boswell 17564 SE Plainview Ct. Bend, OR 97701	Robert J. Thompson 16219 - 135 th Avenue E Puyallup, WA 98373
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David F. Thompson 4188 SE Boardman Ave. Milwaukie, OR 97267	Roger J. Thompson 20047 S Fischers Mill Road Oregon City, OR 97045
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DATE RECEIVED BY DAS: January 25, 2005

180-DAY DEADLINE: July 24, 2005

I. CLAIM

Mary M. Thompson, the claimant, seeks compensation in the amount of \$15,850,000 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

the 145 acre property into 145 parcels for residential development on property located along the Columbia River, near the City of Clatskanie in Columbia County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimant to allow her to divide and develop the properties for residential use: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), Statewide Planning Goal 14 (Urbanization), ORS 215.263, ORS 215.283, ORS 215.284, ORS 215.700 to 215.710 and ORS 215.780, and OAR 660, division 33. These laws will not apply to the subject property only to the extent necessary to allow Ms. Thompson a use of her life estate in the property permitted at the time she acquired the property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On February 23, 2005, pursuant to OAR 125-145-0080 the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, there was one written comment, in response to the 10-day notice. Comments specific to the criteria in Ballot Measure 37 are addressed in the appropriate sections of this report. General comments regarding the possible impact of the proposed or intended development of claimant's property are not relevant to the evaluation and determination of claimant's Ballot Measure 37 claim, and cannot be considered by the department. Because no funds have been made available for payment of compensation, comments regarding the possible impact of the proposed or intended development of the claimant's property are not relevant to the evaluation and determination of the claimant's Ballot Measure 37 claim. (See 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 January 25, 2005, for processing under OAR 125, division 145. The claim identifies, “Any and all rules, laws, ordinances that are inclusive of any land use/zoning regulations. Exclusive Farm Use (EFU), Columbia County Primary Agriculture (PA-38) and others.” EFU zoning and applicable portions of Oregon’s Statewide Planning Goals were all adopted prior to December 2, 2004. (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. The claim is based on land use regulations adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

Ballot Measure 37 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in the Measure. Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claim includes copy of deeds prepared by Ticor Title on December 29, 2004, that document the family’s original acquisition of the property by Thomas Hodgkins (great-great-grandfather) and Levi Ball (great-great-grandfather) on August 16, 1878. Subsequent titles clearly demonstrate continuous family ownership until acquisition by the current owner, Mary M. Thompson, on January 26, 1981.¹

On August 23, 2000, the claimant transferred the property equally to her five children, Guy Thompson, Elizabeth Boswell, Robert Thompson, David Thompson and Roger Thompson. In the deed transferring the property to her children, Mary Thompson expressly reserves to herself a life estate in the property.

¹ Detailed information on the family relationships dating back to 1878 was not included in the claim. However, a subsequent conversation with the claimant’s son, Roger Thompson, confirmed the continuous ownership between current owners and family members. (See the department’s claim file for a discussion of the family relationship dating to 1878.)

Conclusions

Mary M. Thompson is the current owner of a life estate in the subject property. She has had an interest in the property since January 26, 1981.²

2. The Laws that are the Basis for this Claim

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a law must restrict the claimant's use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

Findings of Fact

The claim cites as the bases for the claim:

“Oregon Revised Statutes/Oregon Administrative Rules: Any and all rules, laws, ordinances that are inclusive of zoning regulations. EFU Primary Agriculture, and others” and “Any and all land use rule, divisions, statutes enacted after the year 1878.”

The claim also states that the regulations cited above:

“Prohibits or severely restricts uses of the property other than for farming/agricultural purposes. Prohibits or severely restricts having more than one residential building site. The requirements of EFU preclude me of dividing the property into optimal sections. There were no zoning/requirements when the property was acquired by the current owners' descendants in 1884 (sic). The current owners of the property are asking for the State of Oregon to waive all of the zoning regulations, strictly pertaining to this property, in lieu of the required monetary compensation. If not possible then adequate compensation will suffice.”

The claim is based on Columbia County's EFU zone and state laws that restrict the use of the property. The subject property is zoned EFU in accord with Statewide Planning Goal 3 (Agricultural Lands), OAR 660, division 33, and the applicable provisions of ORS 215 because the claimant's property is “agricultural land” as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.283, 215.284, 215.705 and 215.780 and OAR 660, division 33 as applied by Goal 3, generally do not allow the subject property to be divided into parcels less than 80-acres and establish standards for farm and non farm dwellings on them. ORS 215.705 and 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones, but allowed for the approval of minimums less than 80-acres

² A conversation with Roger Thompson on April 25, 2005 indicates that Mary Thompson is the sole claimant and that her children, although owners of an interest in the property, are not claimants under Measure 37.

subject to approval by the Commission.³ These laws became effective November 4, 1993 (chapter 792, Oregon Laws 1993). ORS 215.263 (land divisions), 215.283 (uses allowed on EFU zoned land (and its predecessor ORS 215.213)), and 215.284 (non-farm dwellings) first became effective in 1973.

Statewide Planning Goal 3 generally requires agricultural land to be used for farm uses. Statewide Planning Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses. As noted above, Goal 3 became effective on January 25, 1975, as did Goal 14. The administrative rules implementing these goals that restrict residential development of EFU land are OAR 660-033-0135 (applicable to farm dwellings), which became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f), and OAR 660-033-0130(4) (applicable to non-farm dwellings), which became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. Subsequent amendments to comply with HB 3326, (chapter 704, Oregon Laws 2001, and effective January 1, 2002) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

In 1878 when the property was acquired by Ms. Thompson's family, none of the state land use laws listed above restricted the use of the property.

Conclusions

Minimum lot size and dwelling standards established under Statewide Planning Goals 3 and 14 and OAR 660, division 33, and by the applicable provisions of ORS 215, were adopted after the claimant's family acquired the properties. When the claimant's family members initially acquired the subject in 1878, none of the land use regulations described above had been enacted. The laws described above were enacted after claimant's family first acquired the property, and restricts the use of the property relative to uses allowed when the property was acquired by family members in 1878.

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 alleges a reduction in fair market value of \$15,850,000. The claim includes tax statements prepared January 21, 2005, which indicate that the subject parcels have a total assessed real market value of \$112,800. The claim also indicates that similar parcels on Puget Island, Washington, are valued at \$110,000 per acre and indirectly compares the subject property with those properties. The claim does not include an appraisal or other analysis of the fair market value of the subject property or of comparison properties.

³ Minimum lot sizes less than 80-acres were approved by LCDC under ORS 215.780(2)(a) (see Order 94-Remand 931, dated June 20, 1994).

Conclusions

As explained in section V. (1) of this report, Mary Thompson is a current owner of a life estate, who acquired an ownership interest in the property on January 26, 1981. Family members of Ms. Thompson originally acquired the subject parcels in 1878. Thus, under Ballot Measure 37, Ms. Thompson is due compensation for land use regulations enacted after that date that restrict the use of her life estate in the subject property in a manner that reduces its fair market value.

The claim identifies a reduction in fair market value of \$15,850,000. Without an appraisal or other explanation, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. However, 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 claimant's life estate in the subject property as a result of laws enacted or 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

The claim generally identifies state and county land use regulations, enacted subsequent to the family's acquisition of the property, which allegedly restrict the use of the property relative to what would have been allowed when the claimant's family acquired it. Laws enacted subsequent to the family's acquisition of the property that restrict the division and residential development of the EFU zoned property are not exempt under Section 3(E) of Ballot Measure 37.

The subject property is noted to contain river frontage and flood prone areas, which may be regulated to protect public health and safety, or under provisions required by federal law. Regulations enacted to protect public health and safety and regulations required by federal law are exempted under Section 3 of Measure 37, and will continue to apply to the property. To the extent that state laws limit the subdivision and development of this property to protect public health and safety or as required by federal law, these state laws are exempt from a claim under Measure 37, Section 3, and shall remain in effect.⁴

The subject parcels are noted to contain two active nests of bald eagles. The nesting sites are protected by buffer zones, which encompass large portions of the property. To the extent that state or federal laws limit development in the protected buffer, those laws are also exempted from this claim under Measure 37.

⁴ Statewide Planning Goal 7 requires local governments to identify areas of natural hazards and to adopt ordinances to protect people and property from such hazards.

Conclusions

Without a more specific listing of laws that are the basis for the claim, and without a specific proposal for the use of the subject property, it is not possible for the department to identify all the laws that 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 dividing the subject property or developing it for residential use do not come under the exemptions in Measure 37. Land use regulations for the protection of the public health and safety, as well as regulations required to comply with federal law are exempt and will continue to apply to the claimant's use of the property. 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.

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 to allow the present owner to carry out a use of the property allowed at the time the present owner acquired the property. The Commission has by rule directed that if the department determines a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department preclude development of the subject properties into one-acre home sites. Therefore, the department concludes that laws enforced by the Commission or the department reduce the fair market value of the subject property to some extent. The claimant estimates the reduction to be \$15,850,000 based on sales of similar properties on Puget Island, Washington. Without an appraisal or other substantiating documentation, it is not possible for the department to determine the amount of reduction in value of the claimant's life estate. Nevertheless, the department acknowledges that state land use laws have likely reduced the fair market value of the claimant's life estate in the property to some extent.

Mary Thompson acquired the property on January 21, 1981, when it was not yet zoned by Columbia County for agricultural use under ORS chapters 215 and 308. At the time the claimant acquired the property, the County's Comprehensive Plan and zoning ordinance was also not yet 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 Columbia County Comprehensive Plan and land use regulations as complying with the Statewide Planning Goals on July 25, 1985. Since the Commission had not acknowledged Columbia County's comprehensive plan and land use regulations, including the PA-38 zone, when Mary Thompson acquired the property on January 21, 1981, Statewide

Planning Goals 3 and 14 applied directly to property on the date of acquisition.⁵ In 1981, 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). Further, ORS 215.263 (1979 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). The County’s current EFU zoning, as applied to the subject parcels, is authorized by the state under applicable sections of ORS 215 and OAR 660, division 33.

Thus, the opportunity to divide the property when Ms. Thompson acquired it in 1981 was limited to land divisions consistent with Goals 3 and 14, 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.) Land divisions to create residential lots have been held to violate Goal 14 when the density is between one dwelling for every one to five acres.

As for dwellings allowed under EFU zoning as required by Goal 3 on the date of acquisition in 1981, farm dwellings were allowed if determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1979 edition) and ORS 215.213(3) (1979 edition) authorized a non-farm dwelling only where the dwelling is compatible with farm uses, consistent with the intent of ORS 215.243, does not interfere seriously with accepted farming practices on adjacent lands, does not materially alter the stability of the land use pattern for the area, and is situated on land that is generally unsuitable for production of farm crops and livestock (ORS 215.213(3) (1979 edition)). Before a farm dwelling may be established on agricultural land, the farm use to which the dwelling relates must “be existing.” Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use.⁶

Conclusion

Based on the current record the department recommends that the claim be approved, subject to the following terms:

⁵ 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 where site specific goal provisions applied prior to the Commission’s acknowledgment of the County’s Goal 3 program on February 9, 1979 (*Sunnyside Neighborhood Assn. V. Clackamas County*, 280 Or 3 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, rev. 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 Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions, (*Byrd v. Stringer*, 295 Or 311, (1983)). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same in substance, the applicable rules must be interpreted and applied by the county in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

⁶ *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) affirmed without opinion 70 Or App 179 (September 14, 1984) and *Newcomer v. Clackamas County*, 92 Or App 174, modified 94 Or App 33, November 23, 1988). Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use (*Matteo v. Polk County*, 14 Or LUBA 67, 73 (1985)).

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to the Mary Thompson's division of her property or to the establishment of a single family dwelling on each lot or parcel created: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands) and 14 (Urbanization) enacted after January 26, 1981; applicable provisions of ORS 215.263, 215.283, 215.284, 215.705 and 215.780 enacted after January 26, 1981; and applicable provisions of OAR 660-033-0130 and 660-033-0135 enacted after January 26, 1981. These land use regulations will not apply to Ms. Thompson's use of the property permitted pursuant to her life estate interest in the property, and only to the extent necessary to allow the claimant a use permitted when she acquired an interest in the property on January 26, 1981.

2. The action by the State of Oregon provides the state's authorization to the claimant to use her interest in the property for the division of the property into lots and the establishment of single-family dwellings, subject to the standards in effect on January 26, 1981. On that date, the property was subject to Statewide Planning Goals, including Goals 3 and 14, and applicable provisions of ORS 215.213 and 215.263 (1979 edition). (See endnote ¹.)

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 claimant 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. Portions of the subject property appear not to have access to a public road. Nothing in this decision affects access to the property.

4. Any use of the property by the claimant 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 claimant to use the property, it may be necessary for her to obtain a decision under Measure 37 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant 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 claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on June 24, 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.

ⁱ To comply with the department's decision to not apply those land use regulations that restrict the claimant's use of her property, to allow the claimant to apply to Columbia County for a use permitted at the time she acquired the subject property, Columbia County may directly apply:

1. The Goal 3 minimum lot size standard for farm parcels, and the requirements of ORS 215.263(1) (1979 edition). For guidance, these provisions were interpreted under OAR 660, division 5, specifically rules 15 and 20 effective July 21, 1982, and as amended June 7, 1986; or
2. For the purpose of determining an appropriate minimum lot size under Goal 3, the county may rely on its acknowledged EFU zone adopted July 25, 1985, in order to comply with Statewide Goal 3 and specifically the Goal 3 minimum lot size standard; and
3. The applicable standards for farm or non-farm dwellings under ORS 215.213 (1979 edition).