

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

July 21, 2005

STATE CLAIM NUMBER: M119559

NAME OF CLAIMANTS: Burton Taylor Hotchkiss and
Nancy Jean Hotchkiss

MAILING ADDRESS: 25441 Rice Road
Sweet Home, Oregon 97386-9620

IDENTIFICATION OF PROPERTY: Township 14S, Range 1W, Section 23,
Tax Lot 700
Linn County

OTHER INTERESTS IN PROPERTY: 1. Access easement in favor of Norval Rice;
2. Access easement in favor of C.W. and
Mabel V. Whitener, and Larry W. and
Beverly Whitener;
3. Power line placement easement in favor
of Pacific Power and Light Co.

DATE RECEIVED BY DAS: February 2, 2005

180-DAY DEADLINE: August 1, 2005

I. CLAIM

The claimants, Burton Taylor Hotchkiss and Nancy Jean Hotchkiss, seek compensation in the amount of \$485,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of private real property. The claimants desire compensation or the right to divide and develop their 44.16-acre property into five-acre lots for residential development. The property is located at 25441 Rice Road in Linn County. (See the claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that 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 subject property in order to allow Burton Taylor Hotchkiss and Nancy Jean Hotchkiss to divide the subject property into five-acre lots and establish dwellings on each lot: applicable provisions of Statewide Planning Goal 4, ORS 215 and OAR 660, Divisions 6 and 33, in agricultural /forest zones. These laws will apply to the claimants' use of the subject property only to the extent necessary to allow them a use of the property permitted at the time they acquired the property on October 7, 1976. (See the complete recommendation in Section VI. of this report.)

III. 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, one written comment was received in response to the 10-day notice. The comment received does not address the relevant criteria for determining whether this claim is valid. 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 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 criterion 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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on February 2, 2005 for processing under OAR 125, division 145. The claim identifies ORS 215.780, enacted in 1993, as the restriction on the use of the property that is 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 was submitted within two years of December 2, 2004, the effective date of Measure 37, 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 to “owners” as that term is defined in the Measure. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimants, Burton Taylor Hotchkiss and Nancy Jean Hotchkiss, acquired the subject property October 7, 1976. (See copy of land sale contract in department claim file.) Ownership is further substantiated by Linn County Assessor records showing Burton T. and Nancy J. Hotchkiss as the current owners of the property.

Conclusions

The claimants, Burton Taylor Hotchkiss and Nancy Jean Hotchkiss, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of October 7, 1976.

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 the 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 claimants or a family member acquired the property.

Findings of Fact

The claim cites ORS 215.780 (1993) and states: “When I bought the property in 1976 it was zoned Agriculture, Residential and Timber (ART) 5 acre Minimum. I could divide the property and build on each 5 acre Parcel. The minimum is now 80 acres.”

The claim is based, in part, on Linn County’s current Farm/Forest (F/F) zone,¹ a mixed agricultural and forestland zone adopted to comply with Statewide Goal 4 (Forest Lands) and the implementing provisions of OAR 660-006-0050 (effective February 5, 1990 and subsequently

¹ This zone has been applied to the property since September 2, 1980. See March 23, 2005 staff report to Linn County Board of Commissioners in the department’s claim file.

amended on March 1, 1994 to comply with the provisions of HB 3661 (chapter 792, Or Laws 1993)).

Under OAR 660-006-0050, all the uses permitted under Statewide Goals 3 and 4 are allowed. For dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993. No information was provided to the department regarding the predominant use of the property on January 1, 1993. Regardless, the property will be subject to either the requirements for dwellings applicable under Exclusive Farm Use (EFU) zoning required by OAR 660, Division 33 or forest zone provisions required by Statewide Goal 4 and OAR 660, Division 6, depending on the predominant use.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the 80-acre minimum lot size specified in ORS 215.780. The claimants' property is 44.16-acres with one dwelling. Under OAR 660-006-055, the claimants' property cannot be divided into parcels smaller than 80-acres, as may have been possible under the county zone applied on October 7, 1976. However, no analysis of whether the subject property can be divided for non-farm dwellings under ORS 215.263(4) (b) has been provided.

When the claimants acquired the property on October 7, 1976, it was designated by Linn County as Agriculture, Residential and Timber (ART). This zone had a five-acre minimum parcel size and permitted two single-family dwellings, or one single-family dwelling or duplex, outright on lots four acres or larger.² However, at that time, the County's agricultural and forest land zones were not acknowledged by the Commission under the standards for state approval of comprehensive plans and land use regulations pursuant to ORS 197.250 and ORS 197.251. Because the Commission had not acknowledged Linn County's local comprehensive plan and land use regulations, for the land subject to this claim, certain site-specific goal provisions, including Statewide Planning Goals 3 and 4, applied directly to the property when the claimants acquired it on October 7, 1976.

Statewide Planning Goals 3 and 4 became applicable on January 25, 1975, and applied to legislative land use decisions and some quasi-judicial land use decisions before the Commission acknowledged local plans.³ Goal 3, as adopted in 1975, required that agricultural lands be "preserved and zoned for farm use pursuant to ORS 215." The subject property is considered to be "agricultural land" as defined by Goal 3 because it is comprised of Class IV or better soils and

² See March 23, 2005 staff report to Linn County Board of Commissioners in the department's claim file.

³ See *Sunnyside Neighborhood Association 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 den* 290 or 137 (1980); and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985). After the commission acknowledged the county's plan and land use regulations, the Statewide Planning Goals and implementing rules no longer directly applied to local land use decisions (see *Byrd v. Stringer*, 295 Or 311 (1983)). However, insofar as 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)).

was subject to resource zoning pursuant to ORS 215 when the claimants acquired it on October 7, 1976.⁴

In 1976, the state standards for a division of land without acknowledgment of the local zoning required that the created lots or parcels be of a size “appropriate for the continuation of the existing commercial agricultural enterprise in the area” (see Statewide Planning Goal 3). Further, ORS 215.263 (1975 edition) required that all land divisions subject to EFU zoning comply with the legislative intent in ORS 215.243 (Agricultural Land Use Policy). Thus, the opportunity to divide the subject property when acquired by the claimants in 1976 was limited to new lots or parcels that were (1) “appropriate for the continuation of the existing commercial agricultural enterprise in the area,” and (2) shown to be consistent with the ORS 215.243 legislative intent.

At the time of claimants’ acquisition in October 1976, farm dwellings were allowed if they were determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1) (e) (1975 edition), and non-farm dwellings were subject to ORS 215.213(3) (1975 edition).⁵ Other uses were authorized and governed by the applicable provisions under Goal 3 and ORS 215.213.

No information has been provided showing that the division or placement of dwellings desired by the claimants complies with either the minimum lot size standard for farm parcels under Goal 3, the standards for new non-farm parcels under ORS 215.263 (1975 edition), or the approval standards for dwellings in effect at the time the Hotchkisses acquired their interest in the property in October 1976.

Conclusions

The current provisions applicable to lands zoned Farm/Forest (F/F) under OAR 660-006-0050 to 0055 relating to land divisions and dwelling standards adopted since the claimants acquired the property on October 7, 1976, restrict the use of the property relative to uses allowed when the claimants acquired the property in 1976. Under these current provisions, the claimants are restricted from further dividing or developing their property as they could have when they acquired it. Additional land use regulations in ORS 215 and OAR 660, Divisions 6 and 33, were adopted after the claimants acquired the subject property in 1976, and also restrict the use of the property relative to the uses allowed when they acquired it.

⁴ The March 23, 2005 Linn County staff report in the department’s claim file states that the site consists of Dixonville silty clay loam (Class III), Nekia silty clay loam (Class IV), Jory silty clay loam (Class II and III), and Marcola cobbly silty clay loam (Class IV). This is confirmed by locating the subject property in the *Soil Survey of Linn County*, sheet # 74, July 1987.

⁵ Under ORS 215.213, a farm dwelling may be established on agricultural land only if the farm use to which the dwelling relates exists (*Matteo 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)). Guidance on the application of the statutory standards for farm and non-farm dwellings in EFU zones can be found in Commission rules (OAR 660, division 5, adopted July 21, 1982, amended June 7, 1986 and repealed August 7, 1993).

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that the current land use regulation(s) described in Section V.(2) of this report “has the effect of reducing the fair market value of the property, or any interest therein.”

Findings of Fact

The claim estimates a fair market value reduction of \$485,000 under current land use restrictions. The claim includes no appraisal or other evidence to substantiate this amount. The claim provides no estimate of the value of the property if it were divided into eight five-acre parcels. Linn County Tax Assessor records show the 2004-2005 real market value of the subject property at \$215,120.⁶ In connection with the Hotchkisses’ Linn County Measure 37 claim, the County Assessor stated that the market value of the land alone (without considering the existing home) is \$90,030, which would increase to approximately \$330,000 if the land were dividable into approximately six parcels of five to eight acres each. This would result in a reduction in value of \$239,970.⁷

Conclusions

As explained in section V.(1) of this report, the current owners are Burton Taylor Hotchkiss and Nancy Jean Hotchkiss, who acquired the property on October 7, 1976. As explained in Section V.(2) of this report, land use regulations enforced after acquisition do not allow the claimants to divide the subject property into five-acre lots or parcels for residential development and therefore have the effect of reducing its fair market value to some extent. Thus, under Ballot Measure 37, Burton and Nancy Hotchkiss are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value. The exact amount of that reduction is not known. The claim asserts this amount to be \$485,000. However, without an appraisal based on the current value of the property under land use restrictions, and on the value of the property if dividable into five-acre parcels, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the record for this claim, the department acknowledges that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under Section 3 of Measure 37

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

⁶ See Property Tax Statement submitted with the claim in the department’s claim file.

⁷ See March 23, 2005 staff report to Linn County Board of Commissioners in the department’s claim file.

Findings of Fact

The claim is based on Linn County's F/F zone and the related provisions of state law that have restricted use of the property and reduced its fair market value, including Statewide Planning Goal 3, "Agricultural Lands," and Goal 4, "Forest Lands," and applicable provisions of ORS 215 and OAR 660, Divisions 6 and 33. All of the specific state land use regulations cited in the claim were enacted after the claimants acquired the property in 1976, and restrict the use of the property in a manner that likely reduces its fair market value.

To the extent they may be applicable under OAR 660-006-0050, the department finds that siting standards for dwellings in forest zones under ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under section (3) of Measure 37. These provisions include fire protection standards for dwellings and for surrounding forest lands. Subsection 3(B) of Measure 37 specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes..."

With the exception of ORS 215.730 and provisions of ORS 215 in effect when the claimants acquired the property, none of the laws identified in the claim are exempt, either on their face or as applied to the subject property, under Section 3 of Ballot Measure 37.

Conclusions

It appears that the general statutory, goal and rule restrictions on the division, residential development and use of agricultural/forest land apply to the owners' use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37. The restrictions in ORS 215 in effect when the claimants acquired the property will continue to apply to the property. The siting requirements of ORS 215.730, Goal 4 and its implementing rules related to dwelling siting standards based on health and safety will also continue to apply. 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 permitted at the time the 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 prohibit the division of the subject property into five-acre parcels or lots for residential development. These restrictions reduce the fair market value of the property to some

extent though it is unclear what level of development would be allowed under the laws in effect in 1976, when the claimants acquired the property. The claim asserts this amount to be \$485,000. However, because the claim does not provide an appraisal or other substantiating documentation, a specific amount of compensation cannot be determined. Nevertheless, the department acknowledges that the laws on which the claim is based have more likely than not 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, Measure 37 authorizes the department to modify, remove or not apply all or parts of land use regulations to allow Burton and Nancy Hotchkiss to use the subject property for a use permitted at the time they acquired the property on October 7, 1976.

Conclusions

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

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to the Hotchkiss' division of their property or to the establishment of a single-family dwelling on each lot or parcel created: applicable provisions of Statewide Planning Goals 3 and 4, ORS 215 and OAR 660, Divisions 6 and 33, enacted after October 7, 1976 that relate to the division of land or establishment of dwellings in agricultural/forest zones. These land use regulations will not apply to the claimants' use of their property only to the extent necessary to allow the claimants to a use permitted at the time they acquired the property on October 7, 1976.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property subject to the standards in effect on October 7, 1976. On October 7, 1976, the property was subject to Statewide Goals 3 and 4 and some provisions of ORS 215 pertaining to EFU zoning.
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 final order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.412 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 under the terms of this final order will remain subject to the following laws: (a) those laws not specified in (1) above; (2) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under Section (3) of the Measure.
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the property, it may be necessary for them to obtain a decision under Measure

37 from Linn County or any other public jurisdiction that enforces land use regulations applicable to the property. Nothing in the final order will relieve the claimants from the necessity of obtaining a decision under Measure 37 from local public entities that have jurisdiction to enforce a land use regulation applicable to a use of the property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on July 1, 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.