

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Report and Recommendation

July 27, 2005

STATE CLAIM NUMBER: M119606

NAME OF CLAIMANTS: Charles A. Anderson and
Mary A. Anderson

MAILING ADDRESS: 41390 Oretown Road
Cloverdale, Oregon 97112

IDENTIFICATION OF PROPERTY: Township 5S, Range 10W, Section 7
Tax Lot 1300
Tillamook County

Township 5S, Range 10W, Section 6
Tax Lot 1000
Tillamook County

Township 5S, Range 10W, Section 6
Tax Lot 900
Tillamook County

Township 5S, Range 10W, Section 6
Tax Lot 701
Tillamook County

OTHER CONTACT INFORMATION: Wallace W. Lien, P.C.
1775 32nd Place NE, Suite A
Salem, Oregon 97303

DATE RECEIVED BY DAS: February 4, 2005

180-DAY DEADLINE: August 3, 2005

I. CLAIM

The claimants, Charles and Mary Anderson, seek compensation in the amount of \$687,514¹ 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 claimants desire compensation or the right to subdivide their property into 22 lots and develop each lot with a residential dwelling. The claim concerns property containing approximately 81 acres of land owned by the claimants located in Tillamook County.²

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 claimants to allow them to divide their property into 22 lots and develop each lot for a residential dwelling: the applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and Goal 4 (Forest Lands), ORS 215.263, 215.283, 215.284, and 215.705 to 215.755, 215.780, and OAR 660 Divisions 6 and 33. These laws will not apply only to the extent necessary to allow Mr. and Ms. Anderson a use of the subject property permitted at the time they acquired it on July 15, 1952, and only to the extent that when the claimants seek development permits for a specific use of the property, the department determines that none of the exemptions under subsections 3(A)-(D) apply to laws that regulate the proposed use. (See the complete analysis and recommendation in Sections V. and VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On February 11, 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 (1) written comment letter has been received in response to the 10-day notice. None of the comments were specific to the criteria required under Measure 37 to be used in the department's review of this claim. 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.)

¹ This is the value that was included in the original application materials. The Supplemental Claimants' Statement submitted to Tillamook County on June 13, 2005, indicates that land use regulations have reduced the value of the Andersons' property by \$2,725,000.

² The claim specifies that the claimants desire two 10-acre lots, seven 2.8 acre lots, ten 3.2 acre lots and three 2.92 acre lots, each with dwellings.

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

This claim was submitted to DAS on February 4, 2005 for processing under OAR 125, division 145. The claim identifies “the Statewide Planning Goals, OAR 660, and ORS 197 and 222” as the state land use planning statutes and regulations that “dictate that Tillamook County adopt a comprehensive plan and accompanying land use ordinance, which restricts the use of agricultural land such as the subject property.”

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

Charles A. Anderson and Mary A. Anderson acquired the subject property on July 15, 1952, as reflected by a copy of the warranty deed included in the claim.³ (See claim.) On February 16, 1994, the Andersons conveyed the property to themselves as Trustees of the Charles A. Anderson Trust and the Mary A. Anderson Trust, a revocable trust. (See claim.) The transfer to a revocable trust does not create a new current owner for the purposes of Ballot Measure 37.

Conclusions

The claimants, Charles A. Anderson and Mary A. Anderson, are “owners” of the property that is the subject of this claim, as defined by Section 11 (C) of Ballot Measure 37, and have been owners of the property since July 15, 1952.

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:

“...all state statutes and administrative rules that qualify under Measure 37 and that were enacted subsequent to 1952 are subject to this claim. ...Specifically, the Statewide Planning Goals, OAR 660, and ORS 197 and 222 dictate that Tillamook County adopt a comprehensive plan and accompanying land use ordinance, which restricts the use of agricultural land such as the subject property. To the extent that ORS 197 and 122, and OAR 660 serve to restrict or prohibit the uses proposed by the claimants, those land use regulations are subject to this claim and the claimants hereby request waiver or enforcement and application of those regulations in their entirety in regard to the subject property.”⁴

A Supplemental Claimant’s Statement submitted on June 13, 2005 states:

“any and all local and state regulations that restrict the use and development of the claimant’s property beyond that which was in place when the claimants acquired the property in 1952...These include all statewide goals and guidelines, which were not adopted until 1975, and all current provisions of the OAR 660, and the ORS, 197 and 215. In

³ The claim also includes a Warranty Deed dated February 28, 1955. In correspondence to the applicant dated March 9, 2005, Tillamook County acknowledged proof of ownership to 1952.

⁴ From the February 4, 2005 letter by Wallace W. Lien, the claimants’ attorney submitted as part of the Measure 37 claim materials to the state.

addition, all provisions of ORS chapters 90-105 that have been adopted subsequent to the claimants [sic] acquisition of the subject property.”

The claim is based, in part, on Tillamook County’s current zoning for the property and the applicable provisions of state law that require such zoning. Tax Lots 1000 and 1300 are zoned Farm Zone (F-1) as required by Goal 3 in accord with OAR 660, Division 33 and ORS 215 because the claimants’ property is “agricultural land” as defined by Goal 3. Tax Lots 701 and 900 are zoned Small Farm and Woodlot 20 (SFW-20). Tillamook County has not updated its zoning ordinance since 1993; subsequently, some zones do not comply with current state law (F-1) and some are outdated (SFW-20.) In the absence of controlling zoning designation for some agriculture and forest zones, Tillamook County applies the corresponding state laws (statutes and administrative rules) to land use applications on agricultural and forest lands.⁵

Statewide Planning Goal 3 became effective on January 25, 1975 and required that agricultural lands as defined by the Goal be zoned Exclusive Farm Use (EFU) pursuant to ORS 215. Current land use regulations, particularly ORS 215.263, 215.283, 215.284, 215.780 and OAR 660 division 33 as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80 acres and establish standards for allowing the existing or any proposed parcel(s) to have farm or non-farm dwellings on them. ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (chapter 792, Oregon Laws 1993). ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone. OAR 660-033-0135 (applicable to farm dwellings) 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). 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. 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.)

Statewide Planning Goal 4 (Forest Lands) became effective on January 25, 1975, and required forest land as defined by the goal to be zoned for forest use. Goal 4 provisions of state subdivision and partition laws in ORS 92, and laws applicable to land zoned for forest use under ORS 215, including ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6, restrict the right of an owner to divide the property for the purpose of sale and residential use. The forest land administrative rule (OAR 660, division 6) became effective September 1, 1982 and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (chapter 792, Or Laws 1993) and were adopted into OAR 660-006-0026 and 0027 on March 1, 1994. (See citations to statutory and rule history under OAR 660-015-0000(4).)

The provisions of ORS 92 prohibiting the sale of land without the prior approval of a partition or subdivision plat, generally date from prior to 1952, when the claimant acquired the property.

⁵ This report evaluates those state land use laws and regulations, as defined by Measure 37 and cited by the claimants, that appear to restrict the use of the claimants’ property. The claimants’ attorney generally cites other statutes and rules, but does not specify how those other cited state laws restrict the use of the property in a manner that reduces the fair market value of the property. Without an explanation as to how those laws may restrict the use of the claimants’ property for purposes of Measure 37, no evaluation of those allegations is possible.

The claimants acquired the subject property on July 15, 1952. At that time the property was not zoned. None of the land use regulations addressed above, other than some of the provisions of what is now ORS 92 relating to procedures for partition and subdivision of land, applied to the subject property in 1952.

Conclusions

The minimum lot size and dwelling standards established by Statewide Planning Goal 3 and Goal 4 and applicable provisions of OAR 660 divisions 6 and 33, and ORS 215, were all adopted after the claimants acquired their property in 1952 and do not allow the claimants to divide and develop the subject property as proposed in the claim. Except for the provisions of ORS 92, which generally were in effect when the claimant acquired the property, the land use laws addressed above were enacted after 1952 and restrict the use of the property relative to the uses allowed when the property was acquired in 1952.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any law(s) 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 states that the fair market value of the subject property has been reduced by \$687,514 as a result of land use laws enacted after the Andersons acquired the property in 1952.

According to the letter submitted with the claim by the claimants’ attorney to Tillamook County, the claimants used the average sales price of comparable, but buildable, vacant land in Tillamook County as an estimate of the potential value of the subject property. That figure was then compared to the Real Market Value (RMV) of the subject property as determined by the Tillamook County Tax Assessor and the loss of value was determined to be \$687,514.⁶

Conclusions

As explained in section V. (1) of this report, Charles and Mary Anderson are the current owners of the subject property as of July 15, 1952. Thus, under Ballot Measure 37, the Andersons are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value if those laws are not exempt under section (3) of the measure. Based on the findings and conclusions in section V. (2) of this report, laws adopted since the claimants acquired the property restrict division and development of the subject property. The claim asserts the reduction in value due to state land use laws to be \$687,514. However, without an appraisal or

⁶ A separate analysis in a Supplemental Claimant’s Statement sent to the County on June 13, 2005 with regard to a Measure 37 claim filed by the claimants with Tillamook County, estimates a \$2,724,000 loss in value to the Andersons’ property due to land use regulations.

other documentation, 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

The claim is based on Tillamook County's EFU (F-1) and SFW-20 zones and the related provisions of state law that govern the establishment of dwellings on farm or forest land. These are Statewide Planning Goal 3, Agricultural Lands, Statewide Planning Goal 4 (Forest Lands), and applicable provisions of ORS 215 and OAR 660, division 33 and division 6. The claim also identifies ORS 92, which governs the subdivision and partitioning of land. With the exception of those provisions of ORS 92 that were in effect in 1952, none of these state land use regulations were enacted after the claimants acquired the property in 1952. As a result, these land use regulations are not exempt under section 3(E) of the measure.

While not directly raised by the claimant, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. Section 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..." In addition, the department notes that the subject property is located adjacent to the Nestucca estuary, will require access to State Highway 101, that portions of the property appears to be steeply sloped, and that portions of the property appear to be within the Nestucca National Wildlife Refuge. As a result, depending on the specific characteristics of claimants' use of this property, that use may be subject to other laws that are not addressed in this decision. The other laws that may apply to the use include, but are not limited to, Statewide Land Use Planning Goals 5, 6, 7, 11, 12, 16 and 17 (and their implementing rules), as well as other state laws administered by other agencies.

Some of these laws likely are exempt from Measure 37 under subsections 3(A) through 3(D) of the measure and, as a result, will continue to apply to the use of the property. The State of Oregon is unable to make a final determination regarding what laws may apply to the use of this property or regarding the application of the exemptions provided for under section 3 of Measure 37 based on this record. When the claimants are ready to proceed with their use of the property, they should submit their plans to the state to verify what laws may apply to the use, and whether exceptions under subsection 3(A) through 3(D) require that those laws continue to apply to the claimants' use of the property.

Conclusions

Based on the record before the department at this time, it appears that none of the state land use regulations addressed in this report (other than the provisions of ORS 92 in effect in 1952) were enacted before the claimants acquired the property. As a result, none of the state land use regulations addressed in this report (except for the provisions of ORS 92 in effect in 1952) are exempt under subsection 3(E) of Measure 37 (laws enacted before the owner acquired the property). As to the other exemptions provided under subsections 3(A) through 3(D) of Measure 37, the department is unable to make a final determination based on the current record.

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 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 conclusions in this report, laws enforced by the Commission or the department, prohibit the division and development of the subject property. These restrictions reduce the fair market value of the subject property to some extent, though it is unclear what level of development would be allowed under the laws in effect in 1952, when the claimants acquired the property. The claim asserts this amount to be \$687,514. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, no appraisal or other substantiating documentation was submitted and it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, the department acknowledges that state land use laws 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 just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow the Andersons to use the subject property for a use permitted at the time they acquired the property on July 15, 1952.

Conclusion

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 Andersons' subdivision of their property into 22 parcels and to the establishment of a single family dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3

and Goal 4, ORS 215.263, 215.283, 215.284, 215.705 to 215.755 and 215.780, and applicable provisions of OAR 660, divisions 6 and 33. These land use regulations will not apply to the Andersons' use of their property only to the extent necessary to allow the claimants to a use permitted at the time they acquired the property, and only to the extent that they are not exempt under subsection 3(A) through 3(D) of Measure 37. The State of Oregon will make a final determination regarding what laws may apply to the use of the property, and the application of the exemptions, when the claimants have a specific plan for their use of the property.

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 July 15, 1952, and subject to any other laws that may continue to apply under the exemptions in subsections 3(A) through 3(D) of Measure 37. On July 15, 1952, the property was subject to some provisions of what is now codified as ORS 92.

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 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 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 claimants to use the property, it may be necessary for them 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 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 this claim on July 8, 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.