

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

August 5, 2005

STATE CLAIM NUMBER: M 119742

NAME OF CLAIMANTS: Robert E. Huckfeldt and
Carol S. Huckfeldt

MAILING ADDRESS: 3997 Southwest Helmholtz Way
Redmond, Oregon 97756
(541) 548-3245

IDENTIFICATION OF PROPERTY: Township 15S, Range 12E, Section 25
Tax Lot 800
Deschutes County

DATE RECEIVED BY DAS: February 14, 2005

180-DAY DEADLINE: August 13, 2005

I. CLAIM

Robert E. Huckfeldt and Carol S. Huckfeldt, the claimants, seek compensation in the amount of \$750,000 for a reduction in fair market value as a result of certain land use regulations alleged to restrict the use of certain property. The claimants desire compensation or the right to divide the subject property into five-acre parcels. The subject property is 41.11 acres and is located at 3997 Southwest Helmholtz Way, Deschutes County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that this claim is valid. Department staff recommends, in lieu of just compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimants land to allow them to divide their property into 5-acre parcels: Statewide Planning Goal 3 (Agriculture), ORS 215.263 and 215.780, and OAR 660, division 33, to the extent necessary to allow Mr. and Ms. Huckfeldt a use of the subject property permitted at the time they acquired it on April 15, 1971. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 2, 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 does not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law. (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 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 for processing under OAR 125 on February 14, 2005. The claim identifies as the basis for the claim, "All regulations since 1971 that would prevent owners from dividing property into five-acre parcels." Only laws enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for the claim.

Conclusions

The claim has been 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 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 claimants, Robert E. and Carol S. Huckfeldt, purchased the subject property on April 15, 1971. (See warranty deed in department claim file.) The property is currently owned by the Carol S. Huckfeldt Revocable Trust. The claimants Carol and Robert E. Huckfeldt are the co-trustees of the trust. Other information obtained from the Deschutes County Assessors records indicate that the property was transferred to the Carol S. Huckfeldt revocable trust on January 14, 2002. Transfer to the revocable trust does not result in a change in ownership for purposes of this review. Information provided by the claimants’ attorney to Deschutes County Community Development Department states that the subject property has been owned by the Huckfeldts continuously since 1971. (See letter from Edward P. Fitch to Kevin Harrison dated February 9, 2005 in the department’s claim file.)

Conclusions

Robert E. and Carol S. Huckfeldt are “owners” of the subject property as that term is defined in Section 11 (C) of Ballot Measure 37, as of April 15, 1971. The transfer to a revocable trust does not create a new owner for purposes of Ballot Measure 37.

2. The Laws that are the Basis for the Claim

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a law must restrict the current 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 is based on Deschutes County’s current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimants’ property is zoned EFU 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. 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. (See OAR 660-015-0000(3))

Current land use regulations, particularly ORS 215.263, 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.

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 allowed in an EFU zone.

OAR 660-033-0100 (relating to minimum lot size) was adopted by the Commission effective August 7, 1993. (See citations of administrative rule history for OAR 660-033-0100).

The claimants acquired the subject property in 1971. At that time, Statewide Planning Goal 3 and administrative rules were not in effect. Provisions of ORS 215 were adopted in 1963 and may have been applicable to the property, based upon the county zoning of the property at that time.

Conclusions

Minimum lot size standards established by Statewide Planning Goal 3, ORS 215.263 and 215.780, and OAR 660, division 33, adopted since the claimants acquired the property in 1971, do not allow the division of the property into parcels less than 80-acres in size as may have been possible in 1971. The County's EFU zone is based on the standards required by Goal 3, ORS 215 and OAR 660, division 33. Land use laws adopted since 1971 restrict the use of the property from what could have been done when the claimants acquired the property in 1971. Provisions of ORS 215 in effect in 1971 may have applied to the property when the claimants acquired it, based on the county zoning at that time.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses the claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When a claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

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 subject property was acquired by the current owners on April 15, 1971. It encompasses 41.11-acres and includes about 35-acres of irrigation water rights. According to the Deschutes County Assessor's records, the subject property also includes an established single-family dwelling built in 1973. The property is assessed for taxation purposes at \$400,600.

The claim asserts that the fair market value of the property has been reduced by \$750,000 as a result of land use laws enacted after claimants purchased the property in 1971. However, no

basis for this estimate has been provided. The claim does not include an appraisal or any other form of evidence to support the claimants' estimate of fair market value reduction.

Conclusions

As explained in section V.1 of this report, Robert E. and Carol S. Huckfeldt have been the owners of the subject property since April 15, 1971. Therefore, under Ballot Measure 37, the Huckfeldts, are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value relative to the uses allowed when the claimants acquired the property in 1971. Based on the findings and conclusions in section V.2 of this report, laws adopted since the claimants acquired the property restrict division of the subject property. The claim asserts the reduction in value due to the restriction to be \$750,000. However, without an appraisal or 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 land use regulations. In addition, certain types of laws are exempt from Ballot Measure 37 as set forth in section 3 of the measure.

Findings of Fact

The claim is based on Deschutes County's EFU 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 applicable provisions of ORS 215 and OAR 660, division 33. With the exception of provisions of ORS 215 in effect in 1971, all the specified land use regulations were enacted after the claimants acquired the property in 1971, and restrict the use of the property in a manner that likely reduces its fair market value. None of the specified laws that restrict the use of the property appear to be exempt under Section 3(E) of Ballot Measure 37.

Conclusions

It appears that the general statutory, goal and rule restrictions on the division of agricultural land apply to the claimants' use of the property, and these laws do not appear to come under the exemptions in Measure 37(3)(E). If any of the provisions in ORS 215 in effect when the claimants acquired the property applied to the property, those provisions will continue to apply.

Laws in effect when the claimants acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the property that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When a claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

And, in some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the use(s) that the claimants has identified. Similarly, this report only addresses the exemptions provided for under section (3) of Measure 37 that are clearly applicable given the information provided to the department in the claim. Claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the property.

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 in this report, laws enforced by the Commission or the department, prohibit the division of the 41.11 acre subject property into five-acre parcels. The claim asserts these restrictions reduce the fair market value of the subject property by \$750,000. 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 more likely than not reduced the fair market value of the property.

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 Huckfeldts to use the subject property for a use permitted at the time they acquired the property on April 15, 1971.

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 Huckfeldts' division of their property into 5-acre parcels: applicable provisions of Statewide Planning Goal 3, ORS 215.263, 215.284 and 215.780 ; and OAR 660, division 33, enacted after April 15, 1971. These land use regulations will not apply to the Huckfeldts' use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on April 15, 1971.

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 April 15, 1971. On that date, the property was subject to applicable provisions of ORS 215.
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 14, 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.