

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

**Final Staff Report and Recommendation
August 9, 2005**

STATE CLAIM NUMBER: M119842

NAME OF CLAIMANTS: Gary and Laurie Fiesel

MAILING ADDRESS: 18288 South Ferguson Road
Oregon City, Oregon 97045

IDENTIFICATION OF PROPERTY: Township 3S, Range 2E, Section 2A
Tax Lot 600
Clackamas County

DATE RECEIVED BY DAS: February 18, 2005

180-DAY DEADLINE: August 17, 2005

I. CLAIM

The claimants, Gary and Laurie Fiesel, seek compensation in the amount of \$1,119,684 for a reduction in fair market value of property as a result of certain land use regulations that are alleged to restrict their use of the property. The claimants desire compensation or the right to partition their property containing approximately 18.58-acres of land into one-acre lots for residential use. The property is located south of Oregon City and Redland Road, at 18288 South Ferguson Road, Clackamas County, Oregon. (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 the following law to the claimants to allow them to divide the subject property into lots and develop single-family homes on each lot created: the applicable provisions of OAR 660-004-0040. This rule will not apply to the claimants' use of the subject property only to the extent necessary to allow them a use of the property that was permitted at the time they acquired it. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On March 15, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, two comments were received. The comments do 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 letters 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 on February 18, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's Farm Forest 10-Acre (FF-10) zoning and state laws that restrict the use of the property as 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 has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulation 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 of 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

According to the claim, Gary Fiesel, and his brother Curt Feisel, acquired the subject property from their parents, Albert and Alma Fiesel, by a land sales contract on May 4, 1976 (see Land Sale Contract from Albert Fiesel and Alma Fiesel to Gary and Curt Fiesel, dated May 4, 1976).

The claimant, Laurie Fiesel, acquired her interest in the property on February 27, 1980 when Gary Fiesel’s brother, Curt Fiesel, transferred his interest in the property to the claimants (see Bargain and Sales Deed, dated February 27, 1980, Clackamas County Deed Records 80 8045).

The claim includes a warranty deed showing that Mr. Fiesel’s parents acquired the property on August 21, 1964 (see department claim file).

Conclusions

The claimants, Gary and Laurie Feisel, are “owners” of the subject property as that term is defined in Section 11 of Ballot Measure 37. Gary Fiesel acquired an interest in the property on May 4, 1973. Laurie Fiesel acquired an interest in the property on February 27, 1980. Mr. Fiesel’s parents acquired interest in the property in 1964.

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 claimants’ 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 states that land use laws “changed to zoning from 1-acre lots, to 10-acre lots.”

According to the claim, when the claimants acquired the property in 1976 and 1980, it was zoned RA-1 which had a one-acre minimum lot size requirement for the creation of new lots or parcels. The property was rezoned to FF-10, on June 19, 1980.

The property is currently zoned FF-10, which is a rural residential designation under the Clackamas County Comprehensive Plan. The FF-10 zone requires a minimum of ten-acres for the creation of new lots or parcels (Clackamas County Zoning Ordinance,

Section 310.07.B). The subject property is 18.58-acres and cannot be divided under the FF-10 zone.

As a result of a 1986 Supreme Court decision¹, in 2000 the Commission amended Statewide Planning Goal 14 (Urbanization) and adopted OAR 660-004-0040, which became effective on October 4, 2000. The rule provides that after October 4, 2000, a county minimum lot size requirement in RR zone may not allow a smaller minimum lot size without taking an exception to Goal 14 (OAR 660-004-0040(6)). This rule prevents the subject property from being divided without an exception to Goal 14.

Under the provisions of Goal 14 in effect when both claimants acquired their interests in the subject property, urban uses of land outside of an urban growth boundary were prohibited. The density of rural residential development that has been allowed under Goal 14 varies, but it is likely that the division of this property into one-acre lots is not consistent with Goal 14. Nevertheless, some additional residential development of the subject property, at a density level greater than one dwelling per 10 acres of land, is likely consistent with Goal 14. As a result, the enactment and enforcement of OAR 660-004-0040 likely restricts the claimants' use of their property relative to what was permitted when they acquired it.

Conclusions

OAR 660-004-0040, adopted since the Fiesels acquired the property in 1976 and 1980, restrict the use of the property relative to uses allowed when they acquired the property in 1976 and 1980.

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 that 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 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."

¹ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or App 447 (1986).

Findings of Fact

The claim states that there has been a reduction in the fair market value of the property of \$1,119,684 as follows:

“Prior to 1980, RA-1 allowed the sale of 1-acre build able lots. The current RMV of 1-acre lots (butting up to our property and taken from that tax statement’s RMV), is \$82,000 per-acre. 17-acres at \$82,000 each would be \$1,394,000 (disallowing 1-acre for our current house). Current value of our 18.58-acres of land is \$274,316, according to the Tax Statement. Real Estate prices from an agent would value it even higher.”

Included in the claim are current tax statements for the subject property and a 1.01-acre parcel located in the area. Information on properties for sale in the area was also included in the claim. No appraisal was provided regarding the reduction in the fair market value.

Conclusions

As explained in section V. (1) of this report, the current owners are Gary and Laurie Fiesel, who acquired their ownership interests in the property on May 4, 1976 and February 27, 1980. OAR 660-004-0040 prevents the property from being divided into lots smaller than 10 acres. At the time they acquired their interests, the Fiesels likely could have divided the property. The prohibition on any land division under OAR 660-004-0040 likely reduces the fair market value of the property to some extent. Thus, under Ballot Measure 37, the Fiesels are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. The claimants state that the reduction is \$1,119,684.

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 laws 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.

Findings of Fact

The land use regulations that are the subject of this claim are Goal 14 and OAR 660-004-0040, which set forth the requirements for the creation of new lots or parcels in rural residential areas. Goal 14 was in effect when the claimants acquired the property. As a result, it is exempt under section 3(E) of Measure 37. The provisions of OAR 660-004-0040 took effect in 2000, after the claimants acquired the property. As a result, that rule is not exempt under section 3(E) of Measure 37.

Conclusions

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. Goal 14 was enacted before the claimants acquired an interest in the property, and as a result is exempt from the Measure under section 3(E). An amendment to Goal 14 in 2000, authorized the Commission to adopt a rule allowing single family residential development on rural lands under specified circumstances. Before that time, Goal 14 had been held to prohibit residential development in areas outside of urban growth boundaries at densities between one and five-acres per lot.²

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 claimants seek 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 uses that the claimants have 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 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 record before the department, laws enforced by the Commission or the department restrict the subdivision of the property described in the claim. The laws enforced by the Commission or the department reduces the fair market value of the subject property to some extent. The claim asserts this amount to be \$1,119,684. Without an appraisal, 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

² See *DLCD v. Klamath County*, 38 Or LUBA 769 (2000)

there has been some reduction in the fair market value of the subject property as a result of land use regulations.

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 certain land use regulations to allow Gary and Laurie Fiesel to use the subject property for a use permitted at the time they acquired the property on May 4, 1976 and February 27, 1980, respectively.

Conclusion

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

1. In lieu of just compensation, the State of Oregon will not apply the requirements of the following law enforced by the Commission or the department to the claimants to allow them to divide the subject property into lots and develop single-family homes on each lot created: the applicable provisions of OAR 660-004-0040. This rule will not apply to the Feisels' use of the subject property only to the extent necessary to allow them a use of the property permitted when they acquired it.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on May 4, 1976 (for Gary Fiesel) and February 27, 1980 (for Laurie Fiesel). On those dates, the property was subject to applicable provisions of Statewide Planning Goal 14, in effect at that time.
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 19, 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.