

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation**

September 26, 2005

STATE CLAIM NUMBER: M120459

NAMES OF CLAIMANTS: Ivan and Zina Snegirev

MAILING ADDRESS: 29955 S. Meridian Road
Hubbard, Oregon 97032

PROPERTY IDENTIFICATION: Township 4S, Range 1W, Section 36
Tax Lots 201 / 1300
Clackamas County

OTHER INTERESTS: Ignatei and Ekaterina Snegirev

DATE RECEIVED BY DAS: April 5, 2005

180-DAY DEADLINE: October 2, 2005

I. SUMMARY OF CLAIM

The claimants, Ivan and Zina Snegirev, seek compensation in the amount of \$1,500,000 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 claimants desire compensation or the right to divide their 40-acre property into twenty (20) two-acre lots and presumably construct dwellings on each lot. The property is located at 29955 Meridian Road near Hubbard in Clackamas 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 the claim is valid. In lieu of compensation, the department will not apply the following state laws to the claimant's division of the 40-acre subject property into two-acre lots and to the development of a dwelling on each lot: the applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780 and OAR 660, division 33 enacted after February 16, 1976. These laws will not apply to Ivan and Zina Snegirev only to the extent necessary to allow them a use of the property permitted at the time they acquired it on February 16, 1976. (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, no written comments, evidence or information were received in response to the 10-day notice.

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 April 5, 2005, for processing under OAR 125, division 145. The claim identifies “The Exclusive Farm Use (EFU) zone’s restrictions on non-farm dwellings and sub-divisions; Oregon Revised Statutes authorizing restrictions on the uses on Agricultural Lands and Oregon Administrative Rules restricting uses on Agricultural Land” as 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 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. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimants, Ivan and Zina Snegirev, acquired the subject property on February 16, 1976.¹ This date is the recorded contract date as confirmed by the Clackamas County Planning Department in a telephone conversation on August 8, 2005. The claim also lists Ignatei and Ekaterina Snegirev as having an ownership interest in the subject property. However, based on the record, they do not appear to be claimants for purposes of this Measure 37 claim.

Conclusions

The claimants, Ivan and Zina Snegirev (and it appears, Ignatei and Ekaterina Snegirev) are current owners of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. They acquired the property on February 16, 1976.

2. The Laws that are the Basis for this Claim

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 claimants state: “To my best knowledge I was able to divide into 1-acre parcels” and “OAR 660-033-0100(1) does not allow me to divide my property.” The claim also lists as “State Regulations Applicable to Application:

Oregon Administrative rules (OAR)

Minimum Lot Size: Found in OAR 660-033-0100(1)

Dwellings Allowed: Found in OAR 660-033-0130(3) (a)

Oregon Revised Statutes (OARS)

Minimum Lot Size: Found in ORS 215.780(1) (a)

Land Divisions: Found in ORS 215.263(1)

Dwellings Allowed: Found in ORS 215.283(1) (f)

¹ The claim lists the date of acquisition of the property as March 10, 1976.

On February 16, 1976 the claimants' property was not zoned by Clackamas County so Statewide Planning Goal 3 (Agricultural Land) applied directly to the property. (Clackamas County's EFU Zone did not apply until September 1, 1976.) Statewide Planning 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, 215.284, 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 new lots or parcels 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. ORS 215.263(4) does not allow new parcels for non-farm dwellings in the Willamette Valley.

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.) For the Willamette Valley, non-farm dwellings are not allowed unless a parcel is predominately composed of Class IV-VIII soils (ORS 215.284).

When Ivan and Zina Snegirev acquired an interest in the property, on February 16, 1976, it was not zoned by Clackamas County and the County's Comprehensive Plan and land use regulations had not been acknowledged for compliance with the Statewide Planning Goals. The Commission acknowledged the Clackamas County Comprehensive Plan and land use regulations in 1981 by acknowledgement order dated December 31, 1981. Since the Commission had not acknowledged the County's plan and land use regulations when Ivan and Zina Snegirev acquired the property in 1976, Statewide Planning Goal 3 applied directly to the use of the property.²

² 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 den* 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).

In 1976, 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 (1975 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). Thus, the right to divide the property when the Snegirevs acquired it in 1976, was limited to land divisions consistent with Goal 3, which required the resulting 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.

As for dwellings allowed under EFU zoning as required by Goal 3 in 1976, farm dwellings were allowed if determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1975 edition). Before, a farm dwelling could be established on Agricultural Land,” the farm use to which the dwelling related must “be existing.”³ Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use. ORS 215.213(3) (1975 edition) authorized a non-farm dwelling only where the dwelling was compatible with farm uses, consistent with the intent of ORS 215.243, did not interfere seriously with accepted farming practices on adjacent lands, did not materially alter the stability of the land use pattern for the area, and was situated on land generally unsuitable for production of farm crops and livestock (ORS 215.213(3) (1975 edition).)

No information has been provided showing that the claimants’ request to divide the property for additional residences complies with either the Goal 3 standard for lot size for farm parcels, or the standards for new parcels under ORS 215.263 (1975 Edition). The claimants have not provided any information to document that the proposed division of the subject 40-acre property could be divided to create two-acre parcels in a manner that meets the requirement of Goal 3 and is (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.” Nor has any information been provided concerning whether dwellings comply with the approval standards for dwellings under ORS 215.213, in effect at the time they acquired the property in 1976.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by ORS 215 and OAR 660, division 33 were, for the most part, enacted after Ivan and Zina Snegirev acquired ownership of the subject property in February 1976, and do not allow the division of the property. However, it is not clear that the property could have been divided for residential development in 1976, at least in the manner described in the claim. Standards in effect when the claimants acquired an interest in the property on February 16, 1976, specifically Statewide Planning Goal 3 and ORS 215 (1975 edition), may have allowed some division of the property

³ *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 (1988).

and the development of farm or non-farm dwellings. Because the current standards in state law are clearly more restrictive with regard to the division of the property and the development of dwellings, the department concludes that provisions of OAR 660, division 33 and ORS 215 applicable to land divisions and dwellings restrict the use of the property for purposes 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. 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 the 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.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any land use regulation 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 includes an informal estimate of \$1,500,000 as the property's fair market value, in the absence of current regulations. This estimate is "achieved by multiplying the fair market value of the newly created buildable lot" (\$75,000) by 20 lots. These values are substantiated by an appraisal of the value of nearby property for residential development. No appraisal was submitted for the subject property.

Conclusions

As explained in Section V. (1) of this report, the claimants acquired the property on February 16, 1976. Based on the information in the records, the claimants are due compensation because land use regulations adopted since the claimants acquired the property in 1976, restrict their use of the property in a manner that reduces the fair market value of the property. Based on the findings and conclusions in Section V. (2) of this report laws have restricted Ivan and Zina Snegirev's ability to divide the subject property for residential development. They estimate the reduction in value due to the restrictions to be \$1,500,000.

Without an appraisal based on the value of 20 two-acre lots or other explanation, 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 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 is based on Marion County's EFU zone and the related provisions of state law that are claimed to restrict use of the property and reduce 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 Goal 3 and ORS 215 in effect in 1976 when the claimants acquired the property, those specified laws do not appear to be exempt under Section 3(E) of Ballot Measure 37.

Conclusions

It appears that the general statutory, goal and rule restrictions on residential development and use of Agricultural land that apply to the claimants' anticipated use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37. 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. Provisions of Goal 3 and ORS 215 were in effect when the claimants acquired the subject property. Other laws in effect when the claimants acquired the property are also 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 the 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. The 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 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 a 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 set forth in this report laws enforced by the Commission or the department restrict the division of the subject property into parcels or lots, and the use of the property for residential purposes. The claimant cannot create the desired 20 two-acre lots out of the subject property, or develop those lots for residential use because laws enacted after the claimants acquired the property prohibit lot sizes that small. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$1,500,000. However, because the claim does not provide an appraisal or other specific explanation for how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely 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 compensation, Ballot Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Ivan and Zina Snegirev to use the subject property for a use permitted at the time they acquired the property on February 16, 1976.

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 Ivan and Zina Snegirev's division of the subject property into two-acre lots and the development of a single-family dwelling on each lot: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33 enacted after February 16, 1976. These land use regulations will not apply to the claimants' use of the property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on February 16, 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 February 16, 1976. On that date, the property was subject to applicable provisions of ORS 215 (1975 edition) and Goals 3 and 14, then in effect. The department acknowledges that the relief provided likely will not allow the extent of use of the property described in the claim.
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 215.402 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 September 9, 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.