

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

**Final Staff Report and Recommendation
June 28, 2005**

STATE CLAIM NUMBER: M119143

NAME OF CLAIMANT: Robert and June Chaney

MAILING ADDRESS: 19161 SE Highway 224
Clackamas, Oregon 97015

IDENTIFICATION OF PROPERTY: Township 2S, Range 3E, Section 17
Tax lot 2700
Clackamas County

DATE RECEIVED BY DAS: January 3, 2005

180-DAY DEADLINE: July 2, 2005

I. CLAIM

Robert and June Chaney, the claimants, seek compensation in the amount of \$350,317 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 and construct two additional dwellings on lands designated for forest use. (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. Department staff recommends that, in lieu of compensation, the requirements of certain applicable state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, specifically the provisions of Statewide Planning Goal 4 (Forest Lands), OAR 660, Division 6, and ORS 215.750, 215.755 and 215.780 that relate to the division of the property or to the establishment of a dwelling on each lot or parcel, to the extent necessary to allow Robert and June Chaney to divide the property and establish a dwelling on each lot or parcel, as permitted at the time they acquired the property. (See the complete recommendation in Section VI. of this report).

III. COMMENTS ON THE CLAIM

Comments Received

On February 18, 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, there were no written comments, evidence or information 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

The claim was submitted to DAS on January 3, 2005, for processing under OAR 125, Division 145. The claim identifies HB 3661 and OAR 660-015-0004 (Forest Lands) 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 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 claim states that Robert E. and June D. Chaney are the current owners of the subject property, described as Tax Lot 2700 of Tax Map T2S, R3E, S17 in Clackamas County. (See Clackamas County Tax Statement included in the claim.) A land sale contract indicates that Robert and June Chaney acquired an interest in the property on April 22, 1961. (See the contract included in the claim.) Additional conversations with the Clackamas County planning department confirm that Robert and June Chaney remain the current owners of the subject property.

Conclusions

The claimants, Robert E. and June D. Chaney, acquired an interest in the subject property on April 22, 1961, and remain current “owners” of the subject property as that term is defined by Section 11 of Ballot Measure 37.

2. The Laws that are the Basis for this 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 that: “zoning and use changes...have at one time or another prevented our dividing our 4.53 acre property into smaller parcels” and “[i]t is our intent to divide the property into smaller parcels for primarily residential development.”

When the Chaney’s acquired the property on April 22, 1961, state land use regulations did not prohibit division or development of the property. Subsequent land use regulations enacted by the State of Oregon and implemented by Clackamas County identify the parcel as Forest Land, in conformance with Statewide Planning Goal 4 (Forest Lands), adopted in 1975. The claim specifically cites House Bill 3661, as implemented by OAR 660-006-0004 in 1994, which regulates the division of lands and the placement of dwellings in forest zones. The subject property fails to meet the criteria for subdivision or placement of dwellings, thereby restricting the claimants’ current proposed use of the property.

Conclusions

The minimum lot size and dwelling standards established by Statewide Planning Goal 4, HB 3661 and applicable provisions of OAR 660, Division 6, adopted since the property was acquired by the claimants, restrict the use of the property relative to the uses allowed when the property was acquired in April 22, 1961.

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.”

Findings of Fact

Using comparable market sales, the claimants estimate the property’s current fair market value at \$200,000. The County’s assessed value is listed at \$125,050, which may or may not include the market value of harvestable timber on the property. The County’s assessed value also may reflect subsidized tax assessment rates under the County’s exclusive forest use (timber zoning) designation.

Assuming the property could be divided into three 1.5-acre parcels and developed with one dwelling per parcel, the claim estimates an unregulated fair market value of \$50,000 per acre. That total unregulated value of the property is estimated by the claimant to be \$492,000. It is not clear what assumptions are made in estimating the fair market value of the property.

Conclusions

As explained in section V. (1) of this report, Robert and June Chaney are current owners who acquired the property on April 22, 1961. Thus, under Ballot Measure 37, Robert and June Chaney 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 claim estimates the reduction in fair market value as \$350,317.

Without an appraisal, it is not possible to substantiate the specific dollar amount the claimant demands 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 laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The claim refers to the provisions of Statewide Planning Goal 4 (Forest Lands), and limitations on forestland divisions and placement of dwellings. These provisions were adopted after 1961. While not directly raised by the claimants, 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 and road access standards for dwellings and for surrounding forestlands. 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...” The standards

for dwellings in forest zones in ORS 215.730 and in Goal 4 and its implementing rules, OAR 660, Division 6, are exempt under Section (3) of Measure 37.

Conclusions

Without a specific proposed use or a specific listing of laws that are the basis for the claim, it is impossible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that the general statutory, goal and rule restrictions on residential development and use of forest land apply to the owner's anticipated use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37.

The requirements of ORS 215.730, Goal 4 and its implementing rules related to dwelling standards based on health and safety will continue to apply. There may be other specific laws that continue to apply under one or more of the exemptions in Measure 37, or because they are laws that are not covered by Measure 37 to begin with.

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 set forth in this report, laws enforced by the Commission or the department restrict the claimants' ability to subdivide and construct dwellings on two additional parcels, reducing the fair market value of the subject property to some extent. The claim asserts this amount to be \$350,317. This amount is substantiated by claimants' estimate and on recent comparable sales. However, because the claim does not provide a 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, Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Robert and June Chaney to use the subject property for a use permitted at the time they acquired the property on April 22, 1961.

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 claimants' use of the subject property: the provisions of Statewide Planning Goal 4 (Forest Lands), OAR 660, Division 6, and ORS 215.750, 215.755 and 215.780 that relate to the division of the property or to the establishment of a dwelling on each lot or parcel, to the extent necessary to allow Robert and June Chaney to divide the property and establish a dwelling on each lot or parcel, as permitted at the time they acquired the property.
2. The action by the State of Oregon provides the state's authorization to the claimants to subdivide and establish residential dwellings on their property, subject to the standards in effect in 1961 when they acquired the property, and any standards that are exempt under section 3 of Measure 37. Those standards include the provisions of ORS 215 in effect at that time. In addition, ORS 215.730 and provisions of Goal 4 and those current provisions of OAR 660, Division 6, relating to standards for dwellings for the protection of public health and safety are also exempt under subsection (3) of Measure 37 and will continue to apply to the claimants' use of the property.
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 Measure 37.
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 June 10, 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.