

**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: M119678

NAME OF CLAIMANT: Gregg Munson

MAILING ADDRESS: 28966 Highway 99E
Shedd, Oregon 97377

IDENTIFICATION OF PROPERTY: Township 8S, Range 4W, Section 33
Tax Lot 700
Polk County

OTHER INTERESTS IN PROPERTY: Susan Munson
Jeffrey Munson

DATE RECEIVED BY DAS: February 9, 2005

180-DAY DEADLINE: August 8, 2005

I. CLAIM

Gregg Munson, the claimant, seeks compensation in the amount of \$1,194,827 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 claimant desires compensation or the right to divide his 36.59-acre parcel into eleven, 2.5 to 5-acre lots, and to develop one single-family dwelling on each lot. The property is located on the west side of Corvallis Road, south of the City of Independence in Polk 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. 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 claimant to allow him to divide and develop his property: Statewide Planning Goal 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780, and applicable provisions of OAR 660, division 33, enacted after January 24, 2004. These laws will not apply to the property only to the extent necessary to allow Gregg Munson a use of the property permitted at the time

he acquired the property on January 24, 2004. The department acknowledges that the relief recommended in this report will not allow Mr. Munson to use the property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

On February 15, 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, three written comments, evidence, or information were received in response to the 10-day notice. Comments received relevant to applicable criteria under Measure 37 are addressed in the following sections of this report. 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.)

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 9, 2005, for processing under OAR 125, division 145. The claim identifies OAR 660, divisions 33, 15, 6, 14, ORS chapters 91, 92, 136, 138, 196, 197, 215, Senate Bill 100 and "any other law or rule that restricts the use of my 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

The claimant, Gregg L. Munson, inherited the property from his mother, Helen Irvine, upon her death on January 24, 2004. Mr. Munson’s acquisition of the property is confirmed by a Deed of Personal Representatives from the Estate of Helen V. Irvine on November 9, 2004.

Helen Irvine acquired the property via Warranty Deed on April 18, 1969. (See deed in Claim file.) A Limited Chain of Title Report, included in the claim, confirms that Gregg Munson is a current owner of the subject property along with the claimant’s brother, Jeffrey Munson.¹

Conclusions

The claimant, Gregg Munson, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of January 24, 2004. Helen Irvine is a “family member,” as defined under Section 11(A) of the Measure, as of April 18, 1969.

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.

¹ Although Jeffrey Munson is an owner of the property, nothing in the current record indicates that he is a claimant for the purposes of this Measure 37 claim. Susan Munson, the claimant’s spouse, is also listed in the claim as having an interest in the property. A conversation with the claimant on June 2, 2005, confirmed that Susan Munson is not a current owner and that Ms. Munson is not a claimant for the purposes of this claim under Measure 37.

Findings of Fact

The claim states:

“At the time of the purchase of the property there were no land use laws in effect. In 1966, 4.89-acres, was divided off with ease. The intent of the purchase of this property was to divide it up into small acreages and keep a home site in the Oak Woods on the north end. If it were zoned SR today...then we would still be able to follow the original plan for the use of the property.”

The claim specifically cites Senate Bill 100, OAR 660-033-0000, 660-015-0000, 660-006-0000, OAR 660-014-0000, ORS chapters 91, 92, 136, 138, 196, 197, 215 and “any other laws that restrict the use” of the claimant’s property.

Senate Bill 100, OAR 660, divisions 33 and 15, and ORS chapters 92 and 215 include land use regulations which may restrict the use of the property.

The following laws are either not land use regulations or do not restrict the use of the subject property:

OAR 660, division 6, establishes standards for the use and division of lands designated for forest use; the subject property is not designated for forest use; as a result, these laws do not restrict the use of this property;

OAR 660, division 14, and Statewide Planning Goal 14 establish standards for development in newly incorporated cities and generally prohibit urban development of rural lands. The claimant’s stated desired use of the subject property likely is not restricted by these laws;

ORS chapter 91 pertains to landlord-tenant laws and does not restrict the claimant’s stated desired use of the subject property;

ORS 136 establishes the procedure for criminal trials in the State of Oregon. ORS 136 is not a land use regulation;

ORS 138 establishes the procedure for testing DNA following a conviction in a criminal trial. ORS 138 is not a land use regulation;

ORS 196 establishes standards for the fill or removal of material from waters of the state. Until there is a specific proposal for use of the property, it is not possible to determine whether these laws restrict the claimant’s stated desired use of the property;

ORS 197 establishes the authority of the Land Conservation and Development Commission and the requirements for comprehensive planning for both cities and counties within the State. ORS 197 does not restrict the claimant’s stated desired use of the subject property.

The claim is based on Polk County's current Exclusive Farm Use (EFU) Zone and the applicable provisions of state law that require EFU zoning. The claimant's property is zoned EFU, as required by Statewide Planning Goal 3 (OAR 660-033-015-0000) in accord with OAR 660, division 33, and ORS 215 because the claimant's property is "Agricultural Land" as defined by Goal 3.² Goal 3 became effective on January 25, 1975, following the passage of Senate Bill 100 in 1973.

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 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.)

ORS 92 requires land partitions to be done in accordance with state law and prohibits the sale of a parcel prior to approval of a tentative plan for the partition. ORS 92.025 prohibits the sale of a parcel until the final plat of the partition has been recorded. ORS 92.040 to 92.046 authorize cities and counties to adopt ordinances containing standards for the partitioning of property. ORS 92.050 and 92.100 set technical requirements for partition plats. All of these statutes may restrict the division of the claimant's property into legal parcels.

ORS 92.012, 92.016 and 92.025 generally prohibit the sale of property unless it is a lawfully-created lot or parcel. ORS 92.042 provides that cities have jurisdiction over the subdivision and partition of property within 6 miles of a city's boundary under certain circumstances. The City of Independence urban growth boundary is currently within one mile of the subject property. The other listed provisions of ORS 92 generally establish requirements for local governments, or for the form of recordation of plats, and do not restrict an owner's use of real property.

² The subject property is defined as "Agricultural Land" because it contains predominantly Dayton Silt Loam, a class IVw soil, defined as Agricultural Land by Polk County in compliance with OAR 660-033-0020. According to information from Polk County, the subject property is currently zoned EFU.

The claimant's family acquired the subject property in 1969. At that time, Statewide Planning Goal 3 and applicable provisions of OAR 660 were not in effect. Most of the applicable provisions of ORS 92 were in effect in 1969, as were some provisions of ORS 215. Laws in effect when the claimant's family acquired the property are exempt from any claim under Measure 37. (See further discussion in section V (4) of this report.)

Conclusions

With the exception of ORS 92, and provisions of ORS 215 enacted prior to 1969, the minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) (OAR 660-015-0000(3)) and applicable provisions in ORS 215, and OAR 660, division 33, were enacted after the claimant's family acquired the subject property in April, 1969, and do not permit further division or development of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimant's family in 1969.

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 includes a collection of data from the Polk County Assessor's office indicating the average real market value for land zoned EFU in Polk County. According to the claimant's estimates, small acreage home sites in Polk County are valued at an average of \$34,511 per acre. The claimant asserts that the 36.59 acres of EFU land would be valued at \$1,262,757 if permitted for an 11-lot subdivision with one single-family dwelling per lot. According to the Polk County Assessor, the subject parcel's current real market value is \$67,930. It is not clear in the claim whether the estimated real market value includes farm deferral.

The claim does not include a formal appraisal or other analyses to confirm the claimant's estimate of reduction in value.

Conclusions

As explained in section V.(1) of this report, Gregg Munson is a current owner of the property. Mr. Munson inherited the property on January 24, 2004, from his mother, Helen Irvine. Helen Irvine is a "family member," as defined in Measure 37 Section 11(A), who acquired the subject property in 1969. Therefore Gregg Munson is due compensation for land use laws enacted after 1969 that restrict the use of the subject property in a manner that reduces its fair market value.

Without an appraisal based on the value of eleven proposed residential building lots, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, including information from the Polk County

Tax Assessor's office, 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 includes a list of state land use regulations that allegedly restrict the use of the property. State land use laws that may restrict the use of the property include Statewide Planning Goal 3 (Agricultural Lands), ORS 92, ORS 215, and OAR 660, division 33.

Most of ORS 92 was in effect prior to 1969, as were some provisions of ORS 215. Those laws in effect prior to 1969 are exempt under Section 3(E) of Ballot Measure 37. Otherwise, in general, the cited land use laws that restrict the use of the property do not appear to be exempt under Section 3 of Ballot Measure 37.

Conclusions

In general, the applicable provisions of Statewide Planning Goal 3, ORS 215 enacted after 1969 and OAR 660, division 33, do not appear to be exempt under Measure 37. ORS 92 and provisions of ORS 215 enacted prior to the family's acquisition in 1969, are exempt and continue to apply to the property. 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.

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 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

The claimant's property is zoned for EFU, as required by Statewide Planning Goal 3. EFU zoning limits the size, use and development of parcels zoned for EFU. Based on the findings and conclusions set forth in this report, laws enacted or 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 11 lots or sell or develop additional homes on the property.

The laws enforced by the Commission or the department reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$1,194,757. 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, Ballot Measure 37 authorizes the department to modify, remove or not apply one or more land use regulations to allow the claimant, Gregg Munson, to use the subject property for a use permitted at the time he acquired the property. The subject property was zoned EFU when the claimant acquired an interest in the property on January 24, 2004. The property remains subject to the standards and provisions of current land use regulations, including Polk County's EFU zone and the applicable standards of OAR 660, division 33, ORS 215 and Statewide Planning Goal 3.

Conclusions

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 Gregg Munson's use of the subject property by dividing the property into eleven, 2.5 to 5-acre lots, and developing one single-family dwelling on each lot: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33, enacted since the claimant acquired the subject property on January 24, 2004.
2. The action by the State of Oregon provides the state's authorization to Gregg Munson to use the property subject to those standards in effect on January 24, 2004, when he acquired the property. Those standards include the provisions of Goal 3, ORS 215 and OAR 660, division 33, that were in effect on that date. The department acknowledges this relief will not allow the claimant to use the property as requested 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 claimant first obtains 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 claimant remains subject to the following laws: (a) those laws not specified in the claim to the State of Oregon, dated December 20, 2004, or identified in this report; (b) any laws enacted or enforced by a public entity other than the Commission or department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempt under Section (3) of the Measure.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for him 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 claimant 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 claimant.

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.