

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

August 2, 2005

STATE CLAIM NUMBER: M119709

NAME OF CLAIMANTS: Robert and Lumae Malone

MAILING ADDRESS: 64880 Half Mile Lane
Bend, Oregon 97701

OTHER CONTACT INFORMATION: Edward P. Fitch
PO Box 457
Redmond, Oregon 97756

IDENTIFICATION OF PROPERTY: Township 16S, Range 12E, Section 27D
Tax Lot 1000
Deschutes County

DATE RECEIVED BY DAS: February 10, 2005

180-DAY DEADLINE: August 9, 2005

I. CLAIM

The claimants, Robert and Lumae Malone, seek compensation in the amount of \$350,000 for a 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 approximately 10-acre property into four parcels of approximately 2.5-acres, with one single-family dwelling on each new parcel. The property is located at 64880 Half Mile Lane, north of the City of Bend in 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 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 to allow them to divide their property into four, approximately 2.5 acre parcels, and develop each parcel with a single-family dwelling: Statewide Planning Goal 3, ORS 215.263, 215.284 and 215.780, and applicable provisions of OAR 660, division 33, enacted after

the claimants acquired their respective interests in the property. These laws will not apply to the claimants' use of the property only to the extent necessary to allow Lumae Malone a use of the subject property permitted at the time she acquired it on June 24, 1977; and to allow Robert Malone, a use of the subject property permitted at the time he acquired it on October 21, 1988. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On February 18, 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 written comments, evidence or information were received in response to the 10-day notice. Comments received that are specific to the criteria required under Measure 37 for the department's review of this claim are discussed in the appropriate section 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 claimants' property are not relevant to the evaluation and determination of the claimant's Ballot Measure 37 claim. (See comment letters in the department's claim files.)

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 owners, 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 owners 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 10, 2005, for processing under OAR 125, division 145. The claim identifies "all regulations and ordinances restricting subdivision of 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

Lumae Malone acquired the subject property by contract on June 24, 1977. The contract signed by Robert and Lumae Malone on that date states that “the deed will run from Sellers to Lumae T. Malone alone.” (Contract of Sale, dated June 24, 1977, page 4.)

On October 21, 1988, by a Quitclaim Deed, Lumae Malone granted an interest in the subject property to Robert and Lumae Malone.

According to Deschutes County Tax Records, as of June 27, 2005, Lumae and Robert Malone remain the current owners of the subject parcel.

Conclusions

The claimants, Robert and Lumae Malone, are “owners” of the subject property as that term is defined in Section 11 of Ballot Measure 37. Lumae Malone is a “family member” as to Robert Malone, as that term is, defined in Section 11(A) of Measure 37. Lumae Malone acquired an interest in the property on June 24, 1977. Robert Malone acquired an interest in the property on October 21, 1988.

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 claimant or a family member acquired the property.

Findings of Fact

The claim cites “all regulations and ordinances restricting subdivision of property.”

A letter from the claimants' attorney, Ed Fitch, to Deschutes County on February 8, 2005, identifies County Exclusive Farm Use (EFU-20) zoning and indicates that County regulations "have the effect of prohibiting the claimants from subdividing the property into 2.5-acre parcels." The property currently contains 10-acres zoned EFUTBR (Exclusive Farm Use Tumalo Bend Redmond). County EFU zoning requires a minimum of 80-acres in any new parcel designated for agricultural use.

The claim is based on Deschutes County's 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 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. Land that is zoned EFU also is subject to restrictions based on certain provisions of ORS 215. Current land use regulations, particularly ORS 215.263, 215.284, 215.780, along with Goal 3 and OAR 660 division 33, do not allow the subject property to be divided into parcels less than 80 acres and establish standards for farm and non-farm dwellings.

ORS 215.780 contains 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 (1993 HB 3661)). ORS 215.263 contains standards for the creation of new parcels for farm uses, non-farm uses and dwellings allowed in an EFU zone; and became effective on October 5, 1973. ORS 215.263 was amended in 2001 by HB 3326 to provide new standards for the creation of new parcels for non-farm dwellings as well as the non-farm dwellings themselves.

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.)

When Lumae Malone acquired the property on April 24, 1977, it was zoned Exclusive Agriculture (A-1), by Deschutes County. However, on that date, Deschutes County's Comprehensive Plan and land use regulations had not been acknowledged for compliance with the Statewide Planning Goals. The Commission acknowledged the Deschutes County Comprehensive Plan and land use regulations on April 30, 1981. Since the Commission had not acknowledged the county's plan and land use regulations, including the A-1 zone, when Lumae Malone acquired the property in 1977, Statewide Planning Goal 3 applied directly to property.¹

¹ 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. denied, 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

In 1977, the State standards for a land division involving farm 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 opportunity to divide the property when Ms. Malone acquired it in 1977, was limited to land divisions consistent with Goal 3, which required the resulting farm or non-farm 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 1977, 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.”² 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 complies with either the Goal 3 standard for lot size or for farm parcels, or the standards for new parcels under ORS 215.263 (1975 Edition). Nor has any information been provided concerning whether additional dwellings comply with the approval standards for dwellings under ORS 215.213, in effect at the time that Lumae Malone acquired the property in 1977.

Conclusions

Lot size and dwelling standards established by amendments to Statewide Planning Goal 3, and applicable provisions of ORS 215 and OAR 660, division 33, adopted since Lumae Malone acquired the property in 1977, do not allow the division of the property into parcels less than 80-acres in size or allow the approval of dwellings as may have been possible in 1977. 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 1977 restrict the use of the property from those uses permitted when Lumae Malone acquired the property. However, no information has been provided by the claimants to establish what level of development was permitted in 1977 when she acquired the property.

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).

² *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, (November 23, 1988).

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

The claim states that the fair market value of the subject property has been reduced by \$350,000 as a result of land use laws enacted after Lumae Malone acquired the property in 1977.

The claimants have provided information regarding the value of the property based on what is allowed under current land use regulations as compared with the assumed value if developed into four 2.5-acre residential parcels.

The claim includes no certified appraisal or other documentation to substantiate the alleged values, either before or with state land use regulations, and the claim does not specifically identify land use regulations that have reduced the fair market value of the subject property.

Conclusions

As explained in section V.(1) of this report, Robert and Lumae Malone are the current owners of the subject property. Thus, under Ballot Measure 37, the Malones are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in section V.(2) of this report, laws adopted since claimant Lumae Malone acquired the property restrict division and development of the subject property. The claim asserts the reduction in value due to restricting land use regulations to be \$350,000. 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, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The claim is based on Deschutes County’s EFUTRB 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 Goal 3 and ORS 215 in effect in 1977 when claimant Lumae Malone acquired the property, those specified laws do not appear to be exempt under Section 3(E) of Ballot Measure 37.

Conclusions

Laws in effect when claimant Lumae Malone 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 specific laws that continue to apply to the claimants' use of the property under one or more of the other 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 the 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 in this report, laws enforced by the Commission or the department prohibit the division of the subject property into four 2.5-acre parcels and development of a single-family dwelling on each parcel. The claim asserts these restrictions reduce the property's fair market value by \$350,000. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, the claim includes no appraisal or other substantiating documentation, and does not establish what level of development would be allowed under the laws in effect in 1977 when the claimant Lumae Malone acquired the property. Therefore, 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 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 state land use regulations to allow Lumae Malone to use the subject property for a use permitted when she acquired the property on June 24, 1977, and to allow Robert Malone to use the subject property for a use permitted when he acquired an interest in the property on October 21, 1988.

As explained in section V. (2) of this report, the Deschutes County Zoning on the property in 1977 was A-1 Exclusive Agricultural. At that time, the A-1 zone permitted a minimum lot size of five (5)-acres with one dwelling per lot. However, the Deschutes County Comprehensive Plan was not yet acknowledged until April 30, 1981. Therefore, at the time Lumae Malone acquired ownership in 1977, Statewide Planning Goals applied directly to the property.

In 1988, the property was zoned EFU by the County, and standards for lot size and for dwellings are established in the County's acknowledged EFU-20 zone in place at that time. In 1988, the County's EFU-20 zone provided for 20-acre minimum parcel size for the creation of any new lot and permitted "dwellings and other buildings customarily provided in conjunction with farm use as defined in ORS 215.203."

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 Lumae Malone's division of the property into 2.5-acre lots or to the establishment of a single-family dwelling on each lot or parcel created: applicable provisions of Statewide Planning Goal 3, ORS 215.263, 215.780 and 215.284; and OAR 660, division 33 enacted after June 24, 1977. These land use laws will not apply to Lumae Malone's use of the property only to the extent necessary to allow her to use the property for a use permitted at the time she acquired the property on June 24, 1977.

In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Robert Malone's division of the property into 2.5-acre lots or to the establishment of a single-family dwelling on each lot or parcel created: applicable provisions of Statewide Planning Goal 3, ORS 215.263, 215.780 and 215.284; and OAR 660, division 33 enacted after October 21, 1988. These land use laws will not apply to Robert Malone's use of the property only to the extent necessary to allow him to use the property for a use permitted at the time he acquired an interest in the property on October 21, 1988.

2. The action by the State of Oregon provides the state's authorization to Lumae Malone to use her property subject to the standards in effect on June 24, 1977. On that date, the property was subject to Statewide Goal 3 and applicable provisions of ORS 215 (1975 edition). The action by the State of Oregon provides the state's authorization to Robert Malone to use the property subject to the standards in effect on October 21, 1988. On that date, the property was subject to Statewide Planning Goal 3 and applicable provisions of ORS 215 (1987 editions).

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(s) 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(s) 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 11, 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.