

**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: M119801

NAME OF CLAIMANTS: David Mathiesen and
Martha Mathiesen

MAILING ADDRESS: 23845 Northwest Pumpkin Ridge Road
North Plains, Oregon 97133

IDENTIFICATION OF PROPERTY: Township 2N, Range 3W, Section 28
Tax Lot 1500
Washington County

DATE RECEIVED BY DAS: February 16, 2005

180-DAY DEADLINE: August 15, 2005

I. CLAIM

David Mathiesen and Martha Mathiesen, the claimants, seek compensation 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 property into three parcels and to develop a residential dwelling on two of the parcels. The property includes 69.85 acres in Washington County.¹ (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 state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the Mathiesens to allow them to divide their property into three parcels and to establish residential dwellings on two of the parcels: Statewide Planning Goal 3 (Agricultural Lands), applicable provisions of ORS 215 and OAR 660, division 33, to the extent necessary to

¹ As originally filed, the claim requested to right to develop one residential dwelling on their property. The claimants subsequently revised their claim to request a division of the property into three parcels, and the development of two dwellings.

allow David and Martha Mathiesen a use of the property permitted at the time they acquired the subject property on September 16, 1968. (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 February 16, 2005, for processing under OAR 125, Division 145. The claim includes a list of land use regulations (see claim) all of which were enacted prior to December 2, 2004, the effective date of Measure 37. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The claim was submitted within two years of December 2, 2004 the effective date of Measure 37, is 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

David Mathiesen and Martha Mathiesen acquired the subject property by warranty deed on September 16, 1968. The claim also includes a current Washington County property tax statement showing the Mathiesens as the current owners.

Conclusions

The claimants, David Mathiesen and Martha Mathiesen, are “owners” of the Tax Lot that is the subject of this claim as that term is defined under Section 11(C) of Ballot Measure 37, as of September 16, 1968.

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.

Findings of Fact

As originally filed, the claim stated that adoption of Senate Bill 100 in 1973 and subsequent regulations have prevented the claimants from building a house on the subject property.

The claim is based on Washington County’s current 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 and ORS 215 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 pursuant to ORS 215.

Current land use regulations, particularly ORS 215.213, 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 in an EFU zone.

OAR 6600330135 (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 215.213.

OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993.

When the claimants acquired the property on September 16, 1968, it was zoned by Washington County for agricultural use, pursuant to provisions of ORS 215 enacted in 1963.

Conclusion

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3, ORS 215.213, ORS 215.780, and OAR 660-033-0090, were all adopted after the claimant acquired the subject property, and do not allow the claimants to divide their property into three parcels and develop two residential dwellings on the property. In 1968, the property was subject to the County’s agricultural zoning, which was adopted pursuant to the provisions of ORS 215 then in effect,

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 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 the 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 evidence 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 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 does not include an estimate of reduction in fair market value.² Nor does the claim include any documentation or explanation to substantiate any reduction in value from regulations enacted or enforced by the state.

² A notice of a Measure 37 claim filed by the claimants with Washington County includes an estimate by the claimants that restrictions imposed by the county have reduced the value of their property by \$500,000.

Conclusions

As explained in section V.(1) of this report, the claimants, David and Martha Mathiesen are current owners of the subject property. Thus, under Ballot Measure 37, claimants are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value. The claimants have provided no information on the reduction in fair market value as a result of land use laws that restrict the partition of their property into three parcels or the development of two dwellings on their property. Without any evidence of a reduction in value, the department cannot conclude that compensation is due under Ballot Measure 37. Nevertheless, based on the findings and conclusions in section V.(2) of this report, it is more likely than not that laws adopted since the claimants acquired the property in 1968, restrict the division and development of the property. Provided that the claimants provide some evidence of a reduction in value, it appears 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. This conclusion, however, is contingent upon the claimants providing some evidence that the land use laws adopted since they acquired the property in 1968 have reduced the value of the property.

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 reference to “Senate Bill 100 and other restrictions” that were enacted after the claimants acquired the property in 1968. The laws related to Statewide Planning Goal 3 (Agricultural Lands), including specific provisions of ORS 215 and OAR 660, division 33, were adopted after the claimant acquired the property in 1968, with the exception provisions of ORS 215, enacted prior to the claimants’ 1968 acquisition of the property.

Conclusions

Without a specific development proposal for the property, it is not possible 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 minimum lot size, residential development and use of agricultural land apply to the claimants’ use of the property, and for the most part these laws are not exempt under Measure 37, Section 3(E). Provisions of ORS 215 in effect when the claimants acquired the property in 1968 are exempt under section 3(E) of the measure and will continue to apply to the property.

Laws in effect when the claimant 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 laws that continue to apply to the claimant’s 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 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. 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 use(s) that the claimant has 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 and the department have 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, that 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 conclusion set forth in this report, laws enforced by the Commission or the department restrict the division of the subject property into three parcels, and the development of two dwellings on the property. The laws enforced by the Commission or department appear to reduce the fair market value of the 69.85-acre property to some extent. The claim does not identify a compensation amount and does not provide an appraisal or other documentation of the reduction in fair market value. Provided that the claimant provides some evidence of a reduction in value caused by these restrictions, it is more likely than not that they 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 David and Martha Mathiesen to use the subject property for a use permitted at the time they acquired the property in 1968.

Conclusion

Based on the record, and provided that the claimants provide some evidence of a reduction in value caused by the restrictions on the use of their property discussed above, 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 Mathiesens' division of their property into three parcels or to the establishment of two

single family dwellings on the property: applicable provisions of Statewide Planning Goal 3, ORS 215.213 and ORS 215.780, OAR 660, division 33, enacted after 1968. These land use regulations will not apply to the Mathiesens' use of their property only to the extent necessary to allow the claimants to a use permitted at the time they acquired the property on September 16, 1968.

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 September 16, 1968. On that date, the property was subject to applicable provisions ORS 215.

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 14, 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.