

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

September 7, 2005

STATE CLAIM NUMBER: M120237

NAMES OF CLAIMANTS: Ray Sterbick
Louis McIntyre

MAILING ADDRESS: Ray Sterbick
983 Benito Court
Pacific Grove, California 93950

Louis McIntyre
214 Crocker Avenue
Pacific Grove, California 93950

PROPERTY IDENTIFICATION: Township 27S, Range 14W, Section 15
Tax Lot 400
Coos County

OTHER INTEREST IN PROPERTY: Coos-Curry Electric Cooperative, Inc.

DATE RECEIVED BY DAS: March 21, 2005

180-DAY DEADLINE: September 17, 2005

I. CLAIM

The claimants, Ray Sterbick and Louis McIntyre, seek compensation in the amount of \$150,000 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 further develop the 5.44-acre subject property for residential and recreational vehicle facility use. The property is located in Coos 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 by Mr. Sterbick is valid, and that the claim by Mr. McIntyre is not valid. As to Mr. Sterbick, in lieu of compensation, the

department will not apply the following state laws to Mr. Sterbick's use of the subject property: provisions of ORS 215.705-.780 and OAR 660 division 6, enacted after June 5, 1993. These laws will not apply to Mr. Sterbick's use of the property only to the extent necessary to allow Mr. Sterbick as use of the property permitted when he acquired the property on June 5, 1993. As to Mr. McIntyre, the claim is not valid because no state laws enforced by the department or the Land Conservation and Development Commission (the Commission) restrict the use of the subject property relative to how it could have been used by Mr. McIntyre when he acquired the subject property on November 16, 2002. (See the complete recommendation in Section VI. of the report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 25, 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, one written comment, in support of the claim, was received in response to the 10-day notice.

The comment does not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claim to pay compensation for instead of waiving a state law. (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 March 21, 2005, for processing under OAR 125, division 145. The claim identifies the "template test" required by ORS 215.750 to ORS 215.780 and OAR 660-006-0029, 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 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

In response to the department’s request for additional information, the claimant, Ray Sterbick, provided a copy of a Fidelity National Title Report dated June 14, 2005, a contract of sale for the purchase of the property by Mr. Sterbick, dated June 5, 1993, and a contract of sale of a one-third interest with a building site in favor of Louis McIntyre, dated November 16, 2002.

Conclusions

The claimant, Ray Sterbick, acquired the subject property on June 5, 1993, and is listed as an owner of record by the Coos County Assessor’s Office. Ray Sterbick is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37.

The claimant, Louis McIntyre, acquired an interest in the subject property on November 16, 2002, and is listed as an owner of record by the Coos County Assessor’s Office. Louis McIntyre is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37.

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

The claim does not provide any specific information to describe how state or local land use laws or regulations restrict the use of the property. The claimants state that the “Property is outside the template. Previous owner said property was buildable.” The claimants provided copies of permit applications for a dwelling and a Recreational Vehicle Park on the property that were denied by Coos County. Based on those applications and the reference to the template test, it appears that the claimants assert that the requirements under Section 4.8.525 (Forest Dwellings) of the Coos County Zoning and Land Development Ordinance are the current regulations that restrict the claimants’ use of subject property. That section of the County ordinance is required under ORS 215, Goal 4 (Forest Lands), and OAR 660, division 6.

The property is zoned Forest (F) by the Coos County Zoning and Land Development Ordinance. The relevant state regulation is Statewide Planning Goal 4 (Forest Lands) and laws applicable to land zoned for forest use under ORS 215, including ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6, which restrict the right of an owner to divide the property for the purpose of sale and residential use. Goal 4 became effective on January 25, 1975, and required Forest Land, as defined by the Goal, to be zoned for forest use (see citations to statutory and rule history under OAR 660-015-0000(4)). The Forest Land administrative rule (OAR 660, division 6) became effective September 1, 1982. The requirements under OAR 660-006-0028, Dwellings Not Related to Forest Management, were enacted in 1990.

ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Or Laws 1993) and were adopted into OAR 660-006-0026 and 0027 on March 1, 1994 (see citations to rule history under OAR 660-015-0000(4)). ORS 215.750 establishes the template test as implemented by the Coos County Zoning and Land Development Ordinance 4.8.525. The template test applies to properties in Western Oregon based on the use of the property as of January 1, 1993.

Conclusions

Many of the requirements of Statewide Planning Goal 4, OAR 660, division 6 and ORS 215 were in effect when Mr. Sterbick acquired the subject property. For example, the requirements under OAR 660-006-0028, Dwellings Not Related to Forest Management, were enacted in 1990. However, the “template test” established by Statewide Planning Goal 4 and OAR 660, division 6, and by provisions of ORS 215.705-.780 were adopted after Mr. Sterbick’s acquisition of the property in 1993. Thus, depending on the nature and extent of the use proposed by Mr. Sterbick, it is unclear whether the current regulations restrict the use of the subject property relative to uses permitted when Mr. Sterbick acquired the property on June 5, 1993. Nevertheless, because under the current standards Mr. Sterbick is precluded from using the property for residential and recreational vehicle facility use, whereas it is possible that on June 5, 1993, that Mr. Sterbick could have been permitted such use(s) to some extent, the department concludes that regulations enforced after Mr. Sterbick acquired the property have potentially restricted the use of the property to some extent.

As to Mr. McIntyre, all of the regulations that currently restrict the use of the property were in effect when Mr. McIntyre acquired the property in 2002. Mr. McIntyre has not established that any state land use regulations imposed after his acquisition of the property have restricted the use of the property relative to uses permitted when he acquired it.

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 claimant 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 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.

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 an informal estimate of \$150,000 as reduction in the property's fair market value as a result of current regulations. This estimate is based on a statement by a "Real Estate Agent." No comparative values, methodology or explanation for the evaluation are provided to determine the loss of value due to land use restrictions enacted since the acquisition of the property.

Conclusions

As explained in Section V. (1) of this report, the current owners are Ray Sterbick who acquired the property on June 5, 1993, and Louis McIntyre who acquired his interest in the property on November 16, 2002. Under Ballot Measure 37, Mr. McIntyre is not due compensation because he has not identified land use regulations that restrict the use of the subject property relative to how it could have been in 1993 and 2002 in a manner that reduces its fair market value.

As to Mr. Sterbick, he is 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 that regulations imposed after he acquired the property reduce its value by \$150,000. Because it is unclear whether and to what extent regulations imposed after he acquired the property restrict his use of the property, and because no appraisal or other documentation has been submitted to substantiate the alleged reduction in value, it is not possible to substantiate the amount the claimant demands for compensation. Nevertheless, the department determines that it is possible 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 after Mr. Sterbick acquired 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 lists Statewide Planning Goal 4, OAR 660, division 6, and ORS 215 as restricting the use of the subject property. Section 3(E) of Ballot Measure 37 states that the act shall not apply to land use regulations enacted prior to the date of acquisition of the property by the owner or family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first. The laws that restrict Mr. McIntyre's use of the property were enacted before he acquired the property. However, some provisions of ORS 215 and OAR 660, division 6, were enacted after Mr. Sterbick acquired the property. Those specific provisions enacted after June 5, 1993 when Mr. Sterbick acquired the property, are not exempt under Section 3(E) of Measure 37.

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 the use and development of the subject property apply to the claimants' use of the property. As to Mr. McIntyre, the current provisions of Statewide Planning Goal 4, OAR 660 division 6, and ORS 215 that restrict the use of the subject property were enacted prior to his acquisition, and are exempt under the Section 3 (E) of the Measure. As to Mr. Sterbick, some provisions of OAR 660 division 6 and ORS 215 were enacted after Mr. Sterbick acquired the subject property and are not exempt under Section 3(E).

Laws in effect when the claimants 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 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 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 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. 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 the use of their 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 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 conclusion set forth in this report, laws enforced by the Commission or the department do not restrict Mr. McIntyre's use of the property and reduce the fair market value from what was permitted at the time he acquired the property in 2002.

As to Mr. Sterbick, it is possible that laws enforced by the Commission or the department may restrict the use of the property for residential or recreational vehicle facility use to some extent. The claimant asserts laws enforced by the Commission or department reduce the fair market value of the subject property by \$150,000. However, because no appraisal or other documentation has been submitted, and because it is unclear whether and to what extent the regulations imposed after Mr. Sterbick acquired the property restrict Mr. Sterbick's use 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 may 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 all Mr. Sterbick to use the subject property for a use permitted at the time he acquired the property on June 5, 1993.

Conclusion

Based on the current record, the department recommends that the claimant, Mr. Louis McIntyre, is not entitled to relief under Ballot Measure 37. Department staff recommends that the claim must be denied as to him because there has not been a reduction in the fair market value of the subject property due to regulations enacted by the Commission or department since Mr. McIntyre acquired his interest on November 16, 2002.

Based on the record, the department recommends that the claim be approved as to Mr. Ray Sterbick, subject to the following terms:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to claimant Ray Sterbick's use of the subject property for residential or recreational vehicle facility use: applicable provisions of ORS 215.705 to 215.780, and OAR 660, division 6,

enacted after June 5, 1993. These land use regulations will not apply to Ray Sterbick's use of the property only to the extent necessary to allow him a use permitted at the time he acquired the property on June 5, 1993.

2. The action by the State of Oregon provides the state's authorization to Ray Sterbick to use the property subject to the standards in effect on June 5, 1993. On that date, the property was subject to applicable provisions of Statewide Planning Goal 4, OAR 660, division 6, and ORS 215 then in effect. The department acknowledges that the relief to which claimant Ray Sterbick is entitled under Measure 37 may not allow Mr. Sterbick to use the subject 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 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 August 23, 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.