

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation**

September 16, 2005

STATE CLAIM NUMBER:	M120288
NAME OF CLAIMANT:	Maurice McCullough
MAILING ADDRESS:	2121 Wabaska Court San Diego, California 92107
PROPERTY IDENTIFICATION:	Township 5S, Range 10W, Section 30 Tax Lot 1000 Tillamook County
OTHER INTEREST IN PROPERTY:	Sandra McCullough
DATE RECEIVED BY DAS:	March 24, 2005
180-DAY DEADLINE:	September 20, 2005

I. CLAIM

The claimant, Maurice McCullough, seeks compensation in the amount of \$365,596 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 subdivide his approximately seven-acre property into six lots of which five would be approximately one-acre each and the sixth would be approximately two acres, and to develop each lot with a dwelling. The seven-acre property is located near Neskowin, in Tillamook 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, that 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 his property into six lots and develop a dwelling on each lot: applicable provisions of Statewide Planning Goals 4 (Forest Lands) and Goal 14

(Urbanization) OAR 660-006-050 and 055, and ORS 215.705 to 755 and 780. These laws will not apply to the claimant's use of the property only to the extent necessary to allow Maurice McCullough a use of the subject property permitted at the time he acquired it on effect on March 3, 1975. (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, two written comments, evidence or information were received in response to the 10-day notice.

The comments do 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 claims 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 24, 2005 for processing under OAR 125, division 145.¹ The claim identifies Tillamook County provisions that implement the requirements of Statewide Goal 4 and OAR 660, division 6, with respect to the approval of land divisions and

¹ The claimant did not file a claim using the State of Oregon Measure 37 form. Rather, the claimant provided a copy of his Tillamook County claim form to DAS.

dwellings on lands zoned for mixed agriculture/forest uses, 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

Maurice McCullough acquired an ownership interest in the subject property on March 3, 1975 as reflected by a Land Sale Contract with a subsequent Warranty Deed (fulfillment deed). No other information is included to substantiate his ownership.

Sandra McCullough is listed as having an ownership interest in the property. The nature of her interest is not described. Based on information in the record, Sandra McCullough is not a claimant for purposes of this Measure 37 claim.

Conclusions

The claimant, Maurice McCullough, is an “owner” of the property that is subject of this claim as defined by Section 11(C) of Ballot Measure 37. Maurice McCullough acquired an interest in the property on March 3, 1975.

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 claimant states that “My property went from buildable lots to forest use only.” The claim is based on the Tillamook County’s Small Farm and Woodlot 20 (SFW-20) Zone that implements OAR 660-006-050 and 055, and the provisions of ORS 215.780 as applied by Statewide Planning Goal 4 (Forest Lands). The seven-acre property cannot be further divided under current laws, nor may a dwelling be established on the property.

The claimant acquired an interest in the property on March 3, 1975 when it was zoned by the County as Rural Residential (RA) and had a 20,000-square-foot minimum parcel size requirement for the creation of new lots or parcels. The RA Zone was adopted by the County on May 24, 1972. However, at that time the claimant acquired the property in 1975, the County’s land use program was not acknowledged by the Commission under ORS 197.250 and 197.251. Because the Commission had not acknowledged Tillamook County’s comprehensive plan and land use regulations, including the RA Zone that applied to the subject property, certain site-specific Goal provisions, including Statewide Planning Goal 4, applied directly to the use of the property when the claimant acquired it in March 1975.² Tillamook County’s Small Farm and Woodlot 20 (SFW-20) Zone was not acknowledged until March 16, 1984. Until the County’s land use regulations were acknowledged by the Commission, the use of the subject property was subject to both Tillamook County’s ordinances and the applicable statewide land use planning goals, as well as any applicable state statutes.

Statewide Planning Goal 4, which was in effect at the time the claimant purchased the property, required Forest Land as defined by the Goal to be zoned for forest use.³ Goal 4 allowed a dwelling on Forest Land if the dwelling was necessary and accessory to forest use of the property. (See citations to statutory and rule history under OAR 660-015-0000(4).) The claimant’s property is Forest Land because it meets the definition of such land in Goal 4. The Forest Land administrative rule, OAR 660, division 6, did not become effective until September 1, 1982. ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Or Laws 1993) and were implemented by OAR 660-006-0026 and 0027 on March 1, 1994. (See citations to rule history under OAR 660-015-0000(4).)

² The original Statewide Planning Goals, including Goal 4, became effective on January 25, 1975. Site specific goal provisions applied to land use decisions prior to the Commission’s acknowledgment of the County’s Goal 4 program (*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), and *Alexanderson v. Polk County*, 289 Or 427, *rev den* 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1, (1985). After the local plan and land use regulations are acknowledged by the Commission, the Statewide Planning Goals and implementing rules no longer directly apply to such local land use decisions, *Byrd v. Stringer*, 295 Or 311 (1983). However, insofar as the state and local provisions are materially the same in substance, the applicable statutes and 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). In addition, certain state land use statutes also applied directly to land use decisions at the time the claimant acquired the property.

³ Evidence that the subject property was forest land, subject to Goal 4 in 1975, is presented by the fact that the property was planned and zoned for forest use by the county, and by the fact that the county’s designation was acknowledged by the Commission.

ORS 215.730(1)(b) establishes approval standards for dwellings on lands zoned for forest use to protect the public health and safety with regard to fire safety, water supply and development on steep slopes. Together, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 0027 establish an 80-acre minimum lot size for the creation of a new parcel in a forest zone and also establish the standards for dwellings in forest zones. Finally, the claim also describes a density of residential development (one dwelling per acre) that likely is prohibited by Statewide Land Use Planning Goal 14. Goal 14 was adopted prior to the date the claimant acquired the property, however. As a result, it does not restrict the claimant's use of the property relative to what was permitted at the time he acquired it.

Conclusions

The minimum lot size and dwelling standards established by ORS 215.705 to 215.755 and 215.780, and OAR 660-006-0026 and 0027 were all adopted after Maurice McCullough acquired the property in 1975, and do not allow the division of the property into lots or parcels less than 80-acres in size, or the approval of dwellings on smaller parcels. The current land use regulations restrict the use of the property from what could have been done when the property was acquired. However, Statewide Planning Goal 4 was adopted and effective prior to ownership of the subject property by the claimant. Therefore, Goal 4 requirements in effect on March 3, 1975 will continue to apply to the claimant's use of the property.⁴

Statewide Planning Goal 14 generally requires that land outside urban growth boundaries be used for rural uses. Goal 14 likely prohibits lot sizes as small as those described in the claim. However, Goal 14 became effective on January 25, 1975 and will continue to apply to the claimant's use of the property.

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. There may be other laws that currently apply to the claimant's use of the property, and that may 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 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.

⁴ Goal 4 went into effect January 25, 1975, "To conserve Forest Lands for forest uses," and required that "Lands suitable for forest uses shall be inventoried and designated as Forest Lands. Existing Forest Land uses shall be protected unless proposed changes are in conformance with the comprehensive plan." Those forest uses were defined as follows: Forest Uses are (1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock.

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 states that the fair market value of the subject property has been reduced by \$365,596 as a result of land use laws enacted after he acquired the property on March 3, 1975. The subject seven-acre property is currently undeveloped. The claimant proposes to divide the parcel into six lots; one lot for the claimants’ retirement home and five lots of approximately one-acre each for sale to help finance the claimants’ retirement home.

The claim includes an informal market analysis prepared by the claimant with the help of a real estate broker. The claimant estimates an average price per one-acre lot of \$64,266, for a total value of \$385,596. The claimant estimates the current value of the parcel, subject to current regulations at \$20,000. The claimant’s calculations conclude that the resulting reduction in value on the subject property is approximately \$365,596. (See letter dated March 20, 2005 and included in the department’s claim file.)

Conclusions

As explained in Section V.(1) of this report, Maurice McCullough is the current owner of the subject property as of March 3, 1975. Under Ballot Measure 37, Maurice McCullough is due compensation for land use laws 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 the assorted proposed lots or other explanation, 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 land use regulations enacted or 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. Based on the findings and conclusions in Section V. (2) of this report, laws adopted since March 3, 1975 restrict Maurice McCullough’s ability to divide his property and establish a dwelling on each lot or parcel.

Findings of Fact

The claim is based on certain state laws that restrict the use of the subject property relative to what would have been allowed on March 3, 1975 when the property was acquired by Maurice McCullough. Requirements under ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, including standards for siting dwellings in forest zones, restrict the claimant's use of the property. With the exception of provisions of ORS 215 and provisions of Goal 4 (Forest Lands) and Goal 14 (Urbanization) in effect on March 3, 1975, none of these laws appear to be exempt under subsection 3(E) of Ballot Measure 37. Provisions of what is now ORS 215 and Goals 4 and 14 adopted before March 3, 1975 are exempt under subsection 3 (E) of the Measure.

In addition, those siting standards for forest dwellings in ORS 215.705 to 215.755 and 215.780, and in OAR 660 division 006, relating to protection from fire, are exempt under subsection 3(A) of Measure 37 (health and safety laws). As a result, the portions of those statutes and rules relating to fire safety also will continue to apply to the claimant's use 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 residential development and use of Forest Land apply to the claimant's use of the property, and for the most part these laws are not exempt under subsection 3(E) of Measure 37. Provisions of ORS 215 and Statewide Planning Goals 4 and 14 in effect when the claimant acquired the property in 1975 are exempt under subsection 3(E) of the Measure and will continue to apply to the claimant's use of the property. Provisions of ORS 215.705 to 755 and 780, and OAR 660 division 006, relating to fire protection, are exempt under subsection 3(A) of the Measure and also will continue to apply to the claimant's use of the property.

Other laws in effect when the claimant acquired the property are also exempt under Section 3(E) of Measure 37, and will continue to apply to the claimant's 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 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. 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. The claimant

should be aware that the less information he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his 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 or department 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 Land Conservation and Development Commission (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 parcels or lots, and the use of the property for residential purposes. These restrictions reduce the fair market value of the subject property to some extent, though it is unclear what level of development would be allowed under the laws in effect in 1975 when the claimant acquired the property. The claim asserts the reduction in value to be \$365,596. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, no appraisal was submitted and it is not possible to substantiate the specific dollar amount the claimant demands 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, Ballot Measure 37 authorizes the department to modify, remove or not apply one or more land use regulations to the extent necessary to allow Maurice McCullough to use the subject property for a use permitted at the time he acquired the property on March 3, 1975.

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 claimant's use of the property for a dwelling subject to: applicable provisions of Statewide Planning Goals 4 and 14 enacted after March 3, 1975; ORS 215.705 to 755 and 780, and OAR 660-006-0050 and OAR 660-006-0055. These land use regulations will not apply to the Maurice McCullough's use of property only to the extent necessary to allow him a use permitted at the time he acquired the property on March 3, 1975.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the property subject to the standards in effect on March 3, 1975. On that date, the property was subject to Statewide Planning Goals 4 and 14. The department acknowledges that these laws may not allow the type or intensity of development described 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 215.402 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 claimant 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 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 August 30, 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.