

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

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

September 21, 2005

STATE CLAIM NUMBER: M120409

NAME OF CLAIMANT: Eugene Thurstonson

MAILING ADDRESS: 28221 SW Navajo Terrace
Wilsonville, Oregon 97070

PROPERTY IDENTIFICATION: Township 3S, Range 1E, Section 25
Tax Lot 1600
Clackamas County

OTHER INTEREST IN THE PROPERTY: MMA Trust Company, Trustee of the
Eugene H. Thurstonson Charitable
Remainder Trust

DATE RECEIVED BY DAS: April 1, 2005

180-DAY DEADLINE: September 28, 2005

I. SUMMARY OF CLAIM

The claimant, Eugene Thurstonson, seeks compensation in the amount of \$180,000 to \$210,000 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 claimant desires compensation or the right to develop a dwelling on his 34.6 acre property. The property is located at Township 3S, Range 1E, Section 25, and tax lot 1600 in Clackamas County (no street address). (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 Eugene Thurstonson's establishment of a dwelling: applicable provisions of Statewide Land Use Planning Goal 3, ORS 215, and OAR 660, division 33 that took effect after December 13, 1985. These laws will not apply to the claimant only to the extent necessary to

allow Eugene Thurstonson a use of the property permitted at the time he acquired it in 1985. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On April 14, 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, one written comment, was 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 April 1, 2005, for processing under OAR 125, division 145. The claim identifies ORS 215 as the law that restricts 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 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, Eugene Thurstonson, acquired the subject property on December 13, 1985, as reflected by a Warranty Deed included with the claim. A copy of a Title Report dated February 10, 2005, indicates that Eugene Thurstonson is the current owner of the subject property, with an undivided 80% interest.¹

Conclusions

The claimant, Eugene Thurstonson, is a current “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. He acquired the property on December 13, 1985.

2. The Laws that are the Basis for this 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 states that “ORS 215 restricts dwellings to 80 acre minimum lots. When purchased in 1985, dwellings were permitted on 20-acre minimum lots (EFU 20).”

The claim is based, in part, on Clackamas County’s current Exclusive Farm Use (EFU) Zone and the applicable provisions of state law that require such zoning. The claimant’s property is zoned

¹ The MMA Trust Company of Goshen, Indiana, as Trustee of the Eugene H. Thurstonson Charitable Remainder Trust, has an undivided 20% interest in subject property and has authorized Eugene Thurstonson’s Measure 37 claim. Nothing in the current record indicates that the trust is a claimant for purposes of this Measure 37 claim.

EFU as required by Statewide Planning Goal 3, in accord with OAR 660, division 33, and ORS 215, because the claimant's 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 provisions of ORS 215 and OAR 660, division 33, as applied by Goal 3 which establish standards for allowing the existing or any proposed parcel to have farm or non-farm dwellings on them. 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.)

The claimant acquired the subject property on December 13, 1985. At that time the property was zoned EFU-20, which allowed a dwelling customarily used in conjunction with farm use, under specified conditions. The property was subject to Clackamas County's comprehensive plan, which was acknowledged between 1981 and 1983. OAR 660, division 5, Interpretation of Goal 3 Agricultural Lands (adopted in 1982) was also in effect in 1985.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by provisions applicable to land zoned EFU in provisions of ORS 215 and OAR 660, division 33, were all enacted after Eugene Thurstonson acquired ownership of the subject property in December 1985, and do not allow a dwelling to be built, thereby restricting the use of the property relative to the uses allowed when the property was acquired by Eugene Thurstonson in 1985. In 1985, the property was subject to the requirements of the County's EFU-20 zone, which were adopted pursuant to the provisions of Goal 3, OAR 660, division 5, and 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 use 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.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any land use regulation 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 loss of fair market value of \$180,000-\$210,000 as the property's fair market value. This estimate is based on the claimant's consultation with realtors and prospective buyers.

Conclusions

As explained in Section V.(1) of this report, the current owner is Eugene Thurstonson who acquired the property on December 13, 1985. Under Ballot Measure 37, Eugene Thurstonson is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings in Section V.(2) of this report, land use regulations adopted since 1985 restrict the claimant's ability to establish a dwelling on the property. The claim estimates the reduction in value due to the restriction at \$180,000-\$210,000.

Without an appraisal based on the value of a dwelling on the subject property 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 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 includes a reference to ORS 215 that restricts the use of the property relative to what would have been allowed in 1985, when the property was acquired by Eugene Thurstonson. Some provisions of ORS 215, Goal 3 and OAR 660, division 5 were in effect prior to 1985 when the claimant acquired the property and are exempt under Section 3 (E) of the Measure.

Conclusions

It does appear that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimant's use of the property, and for the most part these laws are not exempt under Section 3(E) of Measure 37. Provisions of ORS 215, Goal 3 (Agricultural Lands) and OAR 660, division 5, in effect when the claimant acquired the property in 1985, are exempt under Section 3(E) of the Measure and will continue to apply to 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 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 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 in order to allow the present owner to carry out a use of the property permitted at the time the current 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 set forth in this report, laws 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 build a dwelling on the subject property because laws enacted after the claimant acquired the property prohibit a dwelling on lot sizes smaller than 80-acres. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$180,000-\$210,000. However, because the claim does not provide an appraisal, 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 all or parts of certain land use regulations to allow Eugene Thurstonson to use the subject property for a use permitted at the time he acquired the property on December 13, 1985.

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 Eugene Thurstonson's establishment of a dwelling on the approximately 34.63-acre property: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33 enacted after December 13, 1985. These land use regulations will not apply to Eugene Thurstonson's use of his property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property on December 13, 1985.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property subject to the standards in effect on December 13, 1985. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 5, then in effect.
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 September 8, 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.