

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

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

September 27, 2005

STATE CLAIM NUMBER: M120510

NAMES OF CLAIMANTS: Terry and Sandra Howard

MAILING ADDRESS: 23006 S. Reid Road
Estacada, OR 97023

PROPERTY IDENTIFICATION: Township 3S, Range 4E, Section 32A
Tax Lot 1101
Clackamas County

DATE RECEIVED BY DAS: April 7, 2005

180-DAY DEADLINE: October 4, 2005

I. SUMMARY OF CLAIM

The claimants, Terry and Sandra Howard, seek compensation in the amount of approximately \$250,226, for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of private real property. The claimants desire compensation or the right to build a dwelling on the 5.8-acre parcel. The property is located at 23006 S. Reid Road, near Estacada, in Clackamas 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, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimants' development of a dwelling on the 5.8-acre parcel: applicable provisions of Statewide Planning Goals 3 and 4, ORS 215, and OAR 660, divisions 6 and 33 enacted after November 5, 1984. These laws will not apply to the claimants only to the extent necessary to allow Mr. and Ms. Howard a use of the property permitted at the time they acquired it in 1984. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 4, 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 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 April 7, 2005, for processing under OAR 125, division 145. The claim identifies "407.05" (a section of Clackamas County zoning code) as the law that restricts the use of the property and is 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 claimants, Terry and Sandra Howard, acquired the subject property on November 5, 1984, as documented by a Real Estate Contract submitted in the claim. A copy of a recent tax statement notes the 1984 date of acquisition. A deed completing their purchase dated March 25, 1992, was also submitted. (See Deed in the department's claim file.)

Conclusions

The claimants, Terry and Sandra Howard, are "owners" of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of November 5, 1984.

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 identifies section 407.05, of Clackamas County's zoning code, as the land use restriction that "prevents the allowed use of a single-family residence as was allowed under reg. 403.04." Section 407.05 of the Clackamas County zoning code establishes the provisions for mixed Agriculture/Forest zones as required by Goal 4 (Forest Lands) and OAR 660-006-050.

The claimants' property is zoned AG/Forest (AG/F), which is a mixed agricultural and forestland zone adopted to comply with Statewide Goal 4 (Forest Lands) and the implementing provisions of OAR 660-006-0050 (effective February 5, 1990,) and subsequently amended on March 1, 1994, to comply with the provisions of HB 3661 (Chapter 792, Or Laws 1993). In addition, laws applicable to land zoned for forest or farm use under ORS 215, including ORS 215.705 to 215.755, restrict the right of an owner to develop a dwelling on such land. Those laws became effective on November 4, 1993 (Chapter 792, Or Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Statewide Goals 3 and 4 are allowed except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993. No information was provided to the department regarding the predominant use of the property on January 1, 1993. Depending on the predominant use on January 1, 1993, the property is subject to either the requirements for dwellings applicable under Exclusive Farm Use (EFU) zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6.

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 administrative rule history for OAR 660-033-0100, 660-033-0130 and 660-033-0135.)

The claimants acquired the subject property on November 5, 1984, when it was subject to Clackamas County's acknowledged TTD-20 zone, consistent with applicable state implementing statutes and rules. This zoning district was determined by the Commission to comply with the requirements of Goal 4 in 1981, and was fully acknowledged under ORS 197.250 and 197.251 on February 9, 1983. The County's acknowledged TTD-20 zone allowed for the creation of dwellings pursuant to the provisions of Goal 3, Goal 4, and OAR 660 divisions 5 and 6.

Conclusions

Current state land use laws applicable to lands zoned AG/F under OAR 660-006-0050 relating to dwelling standards adopted since the claimants acquired the property on November 5, 1984, restrict the use of the property relative to uses allowed when it was acquired. Under those laws, the claimants are restricted from establishing a dwelling on their property as they may have been able to do when they 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 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 property until there is a specific proposal for that use. When the claimants seek 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 approximately \$250,226, as the reduction in the property's fair market value as a result of regulations that restrict the use of the property. This amount is based on the claimants' analysis and information from the Clackamas County Assessor's office. Based on information from the Assessor, the claimants estimate that the current market value of the 5.8-acre parcel under current regulations is approximately \$25,000 and if "TL 1101 were buildable (single family residence), as was allowed under Rule 403.04, the Clackamas County tax Assessor calculates it's market value to be \$275,226" ($\$275,226 - \$25,000 = \$250,226$).

Conclusions

As explained in Section V.(1) of this report, the current owners are Terry and Sandra Howard, who acquired the property in 1984. Under Ballot Measure 37, Mr. and Ms. Howard are 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 and conclusions in Section V.(2) of this

report, laws adopted since 1984 restrict the claimants' use of the subject property. The claimants estimate the reduction in value due to the restrictions as being \$250,226.

Without an appraisal or other substantiating documentation of the value of a single-family dwelling on the property, 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 identifies the County's Agriculture/Forest zone as restricting the use of the subject property relative to what would have been allowed in 1984, when the property was acquired. This local zone implements applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, division 6. To the extent these laws were enacted after the Howards acquired the property in 1984, these laws do not appear to be exempt under Section 3(E) of Ballot Measure 37.

While not directly raised by the claimants, the department notes that ORS 215.730 and OAR 660, division 6 include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. Section 3(B) of Measure 37 specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes...." To the extent they may be applicable under OAR 660-006-0050, the department finds that siting standards for dwellings in forest zones under ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under subsection (3) 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 establishing a dwelling on farm or forest land apply to the claimants' 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 and Goals 3 and 4 in effect when the claimants acquired the property in 1984 are exempt under Section 3(E) of the Measure and will continue to apply to the claimant's use of the property. In addition, the standards for siting dwellings in forest zones in ORS 215.730 and OAR 660, division 6 are exempt under Section 3(B) of Measure 37, are also exempt and will continue to apply.

Other laws in effect when the claimants acquired the property are also 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 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 uses that the claimants have 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 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 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 may restrict the claimants from building a dwelling on the property as requested. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by approximately \$250,226. However, because the claim does not provide an appraisal or other specific documentation to establish how the specified restrictions reduce the fair market value 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 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 the Howards to use the subject property for a use permitted at the time they acquired the property on November 5, 1984. As discussed above, on that date the subject parcel was zoned TTD-20, a mixed agricultural/forest zone under Statewide Goal 4.

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 Mr. and Ms. Howard's development of a dwelling on their 5.8-acre parcel: applicable provisions of Statewide Planning Goals 3 and 4, ORS 215, and OAR 660, divisions 6 and 33 enacted after November 5, 1984. These land use regulations will not apply to Mr. and Ms. Howard only to the extent necessary to allow them a use permitted at the time they acquired the property on November 5, 1984.
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 November 5, 1984. On that date, the property was subject to Clackamas County's acknowledged TTD-20 zone that allowed for the approval of dwellings pursuant to the provisions of Goal 3, Goal 4, and OAR 660, divisions 5 and 6.
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 September 13, 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.