

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

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

September 29, 2005

STATE CLAIM NUMBER: M120531

NAMES OF CLAIMANTS: Melvin B. Mason and Valetta A. Mason

MAILING ADDRESS: 38701 S.E. Porter Road
Estacada, Oregon 97023

PROPERTY IDENTIFICATION: Township 3S, Range 4E, Section 35
Tax Lot 200
Clackamas County

OTHER INTEREST IN PROPERTY: James Erwin, Property Lessor
29790 S.E. Shorgorick Road
Estacada, Oregon 97023

DATE RECEIVED BY DAS: April 11, 2005

180-DAY DEADLINE: October 8, 2005

I. SUMMARY OF CLAIM

The claimants, Melvin and Valetta Mason, seek compensation in the amount of \$200,000 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 seek compensation or the right to divide and develop the 20.1-acre property for residential use. The property is located at 38701 S.E. Porter Road, near Estacada, in Clackamas County. (See claim file.)

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 this claim is valid. Department staff recommends that, in lieu of just compensation, the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Melvin and Valetta Mason's partition and development of the 20.1 acre property: the applicable provisions of Statewide Planning Goals 3 and 4, ORS 215, and OAR 660, divisions 6 and 33 enacted after December 15, 1975. These laws will not apply to the claimants'

use of the subject property only to the extent necessary to allow them a use of the property permitted at the time they acquired it on December 15, 1975. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On April 27, 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 April 11, 2005, for processing under OAR 125, division 145. The claim identifies provisions of ORS 215 and the county's zoning, as laws that restrict the use of the property and are 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, Melvin and Valetta Mason, acquired the subject property on December 15, 1975, as reflected by a signed real estate contract included with the claim. A copy of a 2004-2005 Clackamas County Real Property Tax Statement indicates that they currently own the subject property.

Conclusions

The claimants, Melvin and Valetta Mason, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of December 15, 1975.

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 cites ORS 215.705 and 215.710 as state laws or rules that restrict the subject property so that it cannot be divided and developed for residential use. Other regulations cited in the claim include a Clackamas County Transitional Timber (TT-20) zone and Agriculture/Forest (AG/F) zoning designation implemented by County Ordinance 407.10.

The claim is based generally on Clackamas County’s current AG/F zone and the applicable provisions of state law that require such zoning. The claimants’ property is zoned AG/F as required by Statewide Planning Goals 3 and 4 in accord with OAR 660, divisions 6 and 33, in accord with ORS 215, because the claimants’ property is “resource land” as defined by Goals 3 and 4. The County’s AG/F zoning applied to the subject property in 1994.

Clackamas County’s AG/F zone provisions were adopted to comply with Statewide Planning Goal 4 (Forest Lands), and the implementing provisions in 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, Oregon 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 will be 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.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones which implements the 80-acre minimum lot size specified in ORS 215.780. ORS 215.780 established an 80-acre minimum size for the creation of new parcels in EFU and Forest 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 allowed in an EFU zone.

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.)

When the claimants acquired the subject property on December 15, 1975, the County's comprehensive plan had not yet been acknowledged by the Commission. Until the County's plan was acknowledged by the Commission in early 1983, the Statewide Planning Goals applied directly to the property on a site-specific basis.¹ The specific Goals that applied to this property in 1975 included the versions of Goal 3 and Goal 4 then in effect.²

¹ Statewide Planning Goals 3 and 4 became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions where site-specific goal provisions applied prior to the Commission's acknowledgment of the County's Planning program on March 10, 1983 (*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), *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 County's plan and land use regulations were acknowledged by the Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions (*Byrd v. Stringer*, 295 Or 311, (1983)). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same in substance, the applicable 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).

² In 1979, the property was zoned by the County to Transitional Timber District (TT-20) with a 20-acre minimum parcel size. This zoning district was determined by the Commission to comply with the requirements of Statewide Planning Goal 4 in 1981 and was fully acknowledged under ORS 197.250 and 197.251 on February 9, 1983. (See Continuance Order dated December 31, 1981 and Acknowledgment Order 83-ACK-14, dated February 9, 1983, in the department's files.) In 1994, the property was rezoned to its current AG/F zoning in accordance with OAR 660, divisions 6 and 33.

Conclusions

Current land use regulations, particularly ORS 215 and OAR 660, divisions 6 and 33 as applied by Goals 3 and 4, restrict the claimants from dividing or developing the property relative to the use allowed when they acquired 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 use 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 permit 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 estimate of \$200,000 as the property's fair market value, in the absence of current regulations. This amount is based on a realtor's estimate of the market value of new parcels and dwellings. The claim also includes real estate listings reflecting the current real market value of comparable properties in the area. An April 2005, Clackamas County property record shows that the total real market value of current land and improvements to be \$255,164.00.

Conclusions

As explained in Section V. (1) of this report, the current owners are Melvin and Valetta Mason. They acquired the property on December 15, 1975. Under Ballot Measure 37, the claimants 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 the claimants acquired the property restrict division of the subject property. The claimants estimate the reduction in value due to the restrictions to \$200,000.

Without a formal appraisal or other documentation, 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 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 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 state laws that restrict the use of the subject property relative to what would have been allowed in 1975, when the property was acquired by Melvin and Valetta Mason. These laws include Statewide Planning Goals 3 and 4, and applicable provisions of ORS 215 and OAR 660, divisions 6 and 33. To the extent these laws were enacted after Melvin and Valetta Mason acquired the property in 1975, they are not exempt under Section 3(E) of Ballot Measure 37. Provisions of ORS 215 and Goal 3 and 4 in effect when the claimants acquired the subject property in 1975 are exempt under Section 3(E) of the Measure, which exempts laws in effect when the claimants acquired the property.

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 in OAR 660, division 6, are exempt under Section (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 residential development and use of farm and 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 Goal 3 and 4 in effect, when the claimants acquired the property in 1975, are exempt under Section 3(E) of the Measure and will continue to apply to the property. Applicable laws enacted for the protection of public health and safety are also exempt under Section 3(B) of the Measure.

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. For example, siting standards ORS 215.738 and OAR 660, division 6, related to public health and safety are exempt under Section 3(B).

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 restrict the division and development of the subject property for residential use. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$200,000. However, because the claim does not provide an appraisal or other documentation for 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 Melvin and Valetta Mason to use the subject property for a use permitted at the time they acquired the property on December 15, 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 Melvin and Valetta Mason's division and development of the 20.1-acre property: applicable provisions of Statewide Planning Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33, enacted after December 15, 1975. These land use regulations will not apply to claimants' use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on December 15, 1975.

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 December 15, 1975. On that date, the property was subject to Statewide Goals 3 and 4 and applicable provisions of ORS 215 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 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 9, 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.