

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

**Final Staff Report and Recommendation
July 15, 2005**

STATE CLAIM NUMBER: M120533

NAME OF CLAIMANT: George H. Forsman

MAILING ADDRESS: P.O. Box 1212
Canby, Oregon 97013

IDENTIFICATION OF PROPERTY: 11300 South Bremer Road
Canby, Oregon
Township 3S, Range 1E, Section 36
Tax Lot 2100
Clackamas County

DATE RECEIVED BY DAS: January 21, 2005

180-DAY DEADLINE: July 20, 2005

I. CLAIM

George Forsman, the claimant, seeks compensation in the amount of over \$4.0 million 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 20-acre property into 1-acre parcels for residential development. (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 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 one-acre lots for development of a single-family residence on each lot: applicable provisions of Statewide Planning Goals 3 and 14, ORS 215 and OAR 660, division 033. These laws will not apply to the claimant's use of the property only to the extent necessary to allow him a use of the property permitted at the time he acquired it in December, 1966.

III. COMMENTS ON THE CLAIM

Comments Received

On April 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, there was one written comment, evidence or information received by DAS in response to the 10-day notice. The comment did not raise issues related to the criteria used to review the claim under the requirements of Measure 37. Because no funds have been made available for payment of compensation, comments regarding the possible impact of the proposed or intended development of the claimants' property are not relevant to the evaluation and determination of the claimant's Ballot Measure 37 claim. (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 January 21, 2005, for processing under OAR 125, division 145. The claim lists SB 100 enacted in 1973, as restricting 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 enacted 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

According to the letter from the claimant, he acquired the subject property in November 1966. No deed, tax statement or document to substantiate his date of acquisition or of his current ownership of the subject property was submitted with the original claim. The Planning Staff Report for this claim by Clackamas County (dated June 15, 2005) indicates that the claimant acquired the property on December 9, 1966. (See the department’s claim file.) Verification was later provided.

Conclusions

George Forsman is an “owner” of the subject property, as that term is defined by Section 11 of Ballot Measure 37, as of December 9, 1966.

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

A letter submitted with the claim identifies “Measure 5, SB 100 enacted in 1973 and Measure 37 enacted in December 2004,” as “taking property values.” It further states, “This claim is being filed because of SB 100 which removed the previous zoning by the County Commissioners of Clackamas prior to 1973 which enabled me to subdivide my 60-acre farm into one acre lots under RA 1 zoning.”¹

The 20-acre subject property has one dwelling and is currently zoned Exclusive Farm Use (EFU) as required by Statewide Planning Goal 3 (Agricultural Lands). The subject property is subject to the provisions of ORS 215 and OAR 660, Division 33 pertaining to land divisions and residential uses allowed in EFU zones. A detailed history of the subject property’s zoning history is included in the Clackamas County staff report for this claim. Based on the County’s report, the property was not zoned when the claimant acquired it in 1966.

¹ The claimant does not explain how Measure 5 and Measure 37 “tak[e] property values.” These measures are not land use regulations under Measure 37 and do not restrict the value of the claimant’s property.

The provisions of Statewide Planning Goal 3 (Agricultural Lands), (OAR 660-015-0000(3)), ORS 215 and OAR 660, division 33, restrict the use and division of the subject property for residential development. Goal 3 became effective on January 25, 1975, and required agricultural land as defined by the goal to be zoned EFU. Land that is zoned EFU also is subject to restrictions based on certain provisions of ORS 215. ORS 215.263, 215.283, 215.284, 215.705 and 215.780. These laws do not allow the subject property to be divided into parcels less than 80 acres in size, and establish standards for dwellings. ORS 215.705 and 215.780 became effective on November 4, 1993. (Chapter 792, Or Laws 1993.) ORS 215.263 (land divisions), 215.283 (uses allowed on EFU zoned land (and its predecessor ORS 215.213)), and 215.284 (non-farm dwellings) first became effective in 1973. Statewide Planning Goal 3 generally requires agricultural land to be used for farm uses. Statewide Planning Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses. As noted above, Goal 3 became effective on January 25, 1975, as did Goal 14. The administrative rules implementing these goals that restrict residential development of EFU land are OAR 660-033-0130 and 0135. None of these provisions applied to the subject property in 1966.

Conclusions

The provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215 and OAR 660, division 33, restrict the use and division of the Claimant's property for residential use relative to the uses allowed when the claimant acquired the property in 1966. The minimum lot size and dwelling standards established by Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, were all adopted after the claimant acquired the subject property in 1966 and do not allow the division of the property into parcels less than 80 acres in size or the approval of residential dwellings on property zoned EFU, thereby restricting the use of the property.

3. Affect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any laws 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 current land use regulations reduce the fair market value of the 20-acre parcel by over \$4.0 million, based on the inability to create 19 one-acre parcels for residential purposes. The claim states "In addition, I have learned from various realtors that my tax lots once platted out will be worth \$250,000 each. My development costs will be less than one million dollars, thus making this claim worth over \$4.0 million." No other data or explanation is provided to substantiate the amount of the requested compensation. (See claim.)

Conclusions

As explained in section V. (1) of this report, the current owner is George Forsman who acquired the property in December 1966. Thus, Mr. Forsman is due compensation under Ballot

Measure 37, for land use regulations enacted after the date he acquired the property that restricts the use of the property in a manner that reduces its fair market value.

Without an appraisal based on the value of the 20-acres subdivided into 19, 1-acre parcels, 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 restriction of the use of the property and 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 reference to the restrictions resulting from EFU zoning and a general claim based on any state land use regulations enacted since 1966 that restrict the use of the property relative to what would have been allowed in 1966 when the property was acquired. All the specified land use regulations that restrict the use of the property were adopted after 1966, and none of them appear to be exempt under Section 3 of Ballot Measure 37. One law that was in place in 1966 when claimant acquired the property was ORS 227.110. This statute required that cities approve the subdivision of land within six miles of the city's limits. This law may still apply to the use of the property.

In addition, other laws adopted to protect public health and safety, or to prevent a public nuisance, may apply to the type of development anticipated in this claim. These laws include, but are not limited to: laws governing septic and water systems.

Conclusions

It appears that the general statutory, goal and rule restrictions on residential development and use of agricultural land apply to the owner's use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37. There may be other specific laws that are exempt and continue to apply under one or more of the exemptions in the Measure, or because they are laws that are not covered by the Measure.

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 a 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 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 restrict the division of the subject property into parcels or lots, and the use of the property for residential purposes. The claimant cannot create the desired 1-acre lots out of the subject 20-acre property and sell or develop those lots for residential use. These laws enforced by the department more likely than not have reduced the fair market value of the 20-acre property to some extent. The claim asserts this amount to be over \$4.0 million. However, because the claim does not provide a specific explanation for how the specified restrictions reduce the fair market value of the property from what the claimant could have done under the regulations in place at the time he acquired the property in 1966, a specific amount of compensation cannot be determined. Nevertheless, based on the current record for this claim, the department finds that the laws on which the claim is based more likely than not 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 allow Mr. Forsman to use the subject property for a use permitted at the time he acquired the property in December 1966.

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 division of the property into lots of approximately one acres, or to the development of a single family residence on each lot: the applicable provisions of Statewide Land Use Planning Goals 3 and 14; ORS 215.263, 215.283, 215.284, 215.705 and 215.780; and OAR 660-033-130 and 660-033-0135. These laws will not apply to the claimant's use of the subject property only to the extent necessary to allow him to use the property for a use permitted at the time he acquired it.
2. The action by the State of Oregon provides the state's authorization to Mr. Forsman to partition and use the subject property for residential use, subject to those laws in effect on December 9, 1966. Those laws may include ORS 227.110.
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 215.412 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 remains subject to the following laws: (a) those laws not listed in (1) or (2), above; (b) any laws enforced by a public entity other than the Commission or department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempt 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 Washington County or other jurisdiction 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 June 27, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's 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.