

**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: M120534

NAMES OF CLAIMANTS: Mark and Adele Cerny

MAILING ADDRESS: 56423 Meadow Lane
Canyon City, Oregon 97820

PROPERTY IDENTIFICATION: Township 15S, Range 30E, Section 28
Tax Lot 1701
Grant County

DATE RECEIVED BY DAS: April 11, 2005

180-DAY DEADLINE: October 8, 2005

I. SUMMARY OF CLAIM

The claimants, Mark and Adele Cerny, seek compensation in the amount of \$51,000, 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 desire compensation or the right to register their pasture as a private airport and build a hangar to house their airplane. The property is located at 56423 Meadow Lane, near Canyon City, in Grant 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 Mark and Adele Cerny's use of their property as a private use airport and the development of a hangar to house their airplane: applicable provisions of OAR 660, division 6. These laws will not apply to the claimants only to the extent necessary to allow them a use of the property permitted at the time they acquired it in 1978. (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 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 claimants, Mark and Adele Cerny, acquired the subject property on June 12, 1978, as reflected by a recorded Notice of Sale included with the claim. The Grant County Assessor's Office lists Mark and Adele Cerny as the current owners of the subject property.

Conclusions

The claimants, Mark and Adele Cerny, are "owners" of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of June 12, 1978.

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 "the current rules for Primary Forest [ORS 215] restricts me from registering one of my treeless pastures as a private use airport and keeps me from building a hangar to house my airplane."

The claim is based, generally, on Grant County's current Primary Forest (PF) zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned PF as required by Statewide Planning Goal 4, in accord with OAR 660, division 6 and ORS 215 because the property is considered "Forest Land" as defined by Goal 4. The requested personal use airport and the associated hangar are not permitted under the current zoning.

According to the Grant County Planning Department, the property was zoned Exclusive Farm Use (EFU) in 1981, Timber (T1) in 1982, and Multiple Use Forest (MUF) in 1982. Sometime after 1982, it was rezoned PF. The exact zoning of the property when the claimants acquired it on June 12, 1978 is unclear. That date was; however, after the adoption of the Statewide Planning Goals, but before the County's Comprehensive Plan and Zoning Ordinance were acknowledged to be in compliance with the Goals. Accordingly, the Statewide Planning Goals applied directly to the property at the time the claimants acquired it.¹

¹ Statewide Planning Goals 3 and 4 were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the County's plan and implementing regulations. (*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 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

In 1978, private airports and associated structures, including hangars, were an allowed use on EFU land (ORS 215.213 (2)(g) (1977 edition), in accord with Goal 3. Goal 4 implementation guidelines effective in 1978, provided that “[d]evelopments that are allowable under the forest lands classification should be limited to those activities for forest production and protection and other land management uses that are capable with forest production. Forest lands should be available for recreation and other uses that do not hinder growth.” The claim does not establish whether the requested use would have been permitted under this standard.

Conclusions

Applicable provisions of OAR 660, division 6 were enacted after Mark and Adele Cerny acquired ownership of the subject property in June 1978, and do not allow the airport or hangar, thereby restricting the use of the property relative to the uses allowed when the property was acquired.

In 1978, the development of the property was subject to direct compliance with the Statewide Planning Goals, including Goals 3 and 4. The requested personal use airport and hangar would have been permitted under Goal 3. The claim does not establish whether the requested use would have satisfied the applicable Goal 4 requirements.

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 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 \$51,000; as the reduction in the property’s fair market value reduction as a result of current regulations. This estimate is based on estimates of the value of the property with an airport and hangar provided to the claimants by two real estate brokers. The estimates for reduction in fair market value of the property from the brokers were \$51,000 to \$56,000, and \$100,000, less development costs.

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).

Conclusions

As explained in Section V.(1) of this report, the current owners are Mark and Adele Cerny, who acquired the property on June 12, 1978. Under Ballot Measure 37, Mark and Adele Cerny 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 registration of pasture land as an airport and construction of a hangar. The claimants estimate the reduction in value due to the restrictions is \$51,000.

Without an 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 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 is based on state land use regulations that restrict the use of the property relative to what would have been allowed when the claimants acquired the property. Those provisions include Goal 4 (Forest Lands), and applicable provisions of ORS 215 and OAR 660, division 6 enacted after June 12, 1978. Provisions of Goal 4 in effect on June 12, 1978, are exempt under Section 3(E) of the measure, which exempts laws in effect when the claimants acquired the property.

The department notes that ORS 215.730 and OAR 660, division 6 include fire protection standards for structures and 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” The department finds that those standards are exempt under Section 3(B) 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 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 Goal 4 in effect when the claimants acquired the property in 1978 are exempt under Section (3)E) of the Measure, and will continue to apply to the property.

Other laws in effect when the claimants acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. The fire protection standards for structures and surrounding forest lands under ORS 215.780 and OAR 660, division 6, are exempt under Section 3(B) of the Measure and will also 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, restrict the claimants' ability to create a private airport and build a hangar for personal use. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$51,000. However, because the claim does not provide an appraisal or other specific 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 Mark and Adele Cerny to use the subject property for a use permitted at the time they acquired the property on June 12, 1978.

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 Mark and Adele Cerny's development of a private airport and a hangar for personal use: applicable provisions of OAR 660, division 6. Those land use regulations will not apply to Mark and Adele Cerny's use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on June 12, 1978.
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 June 12, 1978. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3 (Agricultural Use) Goal 4 (Forest Lands) and ORS 215.
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 16, 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.