

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

July 25, 2005

STATE CLAIM NUMBER: M119603

NAME OF CLAIMANT: Marshall Eugene Christofferson

MAILING ADDRESS: 8126 Lakeside Drive NE
Salem, Oregon 97305

IDENTIFICATION OF PROPERTY: Township 6S, Range 2W, Section 21A
Tax Lots 900 and 1100
Marion County

OTHER CONTACT INFORMATION: Nola Marie Jeli
29800 Southeast 32nd Circle
Washougal, Washington 98671

DATE RECEIVED BY DAS: February 4, 2005

180-DAY DEADLINE: August 3, 2005

I. CLAIM

The claimant, Marshall Eugene Christofferson, seeks compensation in the amount of \$1,000,000 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 claimant desires compensation or the right to divide his property into between nine and eighteen one- to two-acre lots, for residential development. The property is located at 8126 Lakeside Drive NE in Marion 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 laws enforced by the Land Conservation and Development Commission (the Commission) or by the department, not apply to the claimant to allow him to divide and develop the property for residential use: Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215.263, 215.283, 215.284, 215.780, and OAR 660, divisions 14 and 33. These laws will not apply to the claimant only to the extent necessary to allow Marshall Eugene Christofferson a use of the property

permitted on the dates he acquired the three parcels that are the subject of this claim. Specifically, the department recommends that Mr. Christofferson be allowed a use of 7.66 acres of Tax Lot 1100 permitted when he acquired that parcel in 1947; a use of Tax Lot 900 permitted when he acquired that parcel in 1951; and a use of the “notch” of Tax Lot 1100 that he acquired in 1991 for a use permitted at that time. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On March 15, 2005, pursuant to OAR 125-145-0080, the Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, two written comments were received in response to the 10-day notice. Comments that address specific requirements of Ballot Measure 37 are summarized in the relevant sections of the staff report. Because no funds have been made available for payment of compensation, comments regarding the possible impact of the proposed or intended development of the claimant’s property are not relevant to the evaluation and determination of the claimant’s Ballot Measure 37 claim. (See comment letters 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 February 4, 2005 for processing under OAR 125, division 145. The claim identifies “Senate Bill 100 ... designating [the] property as Exclusive Farm Use (EFU) zoning” as the restriction on the use of the property that 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 was 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 to “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

On October 15, 1947, the claimant, Marshall Christofferson, and his then wife, Elinor, acquired 7.66 acres of Tax Lot 1100. On August 16, 1951, the Christoffersons acquired Tax Lot 900 (11.67 acres). On March 14, 1991, the claimant and his then wife, Mildred, acquired an additional 840 square-foot “notch” in the southern portion of Tax Lot 1100. On January 29, 2002, the claimant created the Christofferson Family Trust and conveyed the subject property to the trust.¹ The transfer to this revocable trust does not establish a break in the claimant’s ownership for purposes of Measure 37.

Comments Regarding Ownership

One comment letter states that there are two owners of the property in addition to the claimant. The department does not agree. The record indicates that the trust is the only current owner. Mr. Christofferson, as trustor of a revocable trust, retains an ownership interest in the property he conveyed to the trust.

Conclusions

The claimant, Marshall Eugene Christofferson, is an “owner” of the 19.33-acre property, as that term is defined by Section 11(C) of Ballot Measure 37.

2. The Laws That Are the Basis for the Claim

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that the 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.

¹ A March 9, 2005 title report and the most recent Marion County Real Property Tax Statement show Marshall Christofferson and Nola Marie Jeli (his daughter), trustees of The Christofferson Family Trust, as current owners of the 19.33-acre subject property. (See the department’s claim file.)

Findings of Fact

The claim states:

“[T]here were NO zoning, comprehensive land use, environmental or planning laws in effect when the subject property was purchased in 1947 and 1951, and ... there was NO zone restrictions as to the use of the subject property such as, EFU or size of lots or property partitioning restrictions.

“In or after 1973 Oregon Senate Bill 100 was enacted designating my property EFU zoning. This zoning restricted the use of my property to one home per 80-acres. Further, Senate Bill 100 and it [sic] zoning requirements restricted partitioning or division of my property.

“Therefore, Marshall Christofferson, Claimant and Nola Jeli Agent and trustee for The Marshall Christofferson Family Trust, request that ALL State of Oregon and or Marion County land use laws, zoning designations, comprehensive planning rules and regulations that were enacted after 1947, and 1951, with the exception of those rules that apply to drinking water and septic systems in land partitioning/ subdivisions, be waived and revert back without restriction to the rights and use(s) of the property that the owner enjoyed when he purchased the property so that the property can be partitioned, parceled, subdivided into up to 18, 1-acre minimum lots or any combination of 1-acre, 1.5-acre or 2-acre parcels”

The claim is based, in part, on Marion County’s current EFU zone and the applicable provisions of state law that require such zoning. The claimant’s property is zoned EFU as required by Goal 3 in accord with OAR 660, Division 33 and ORS 215 because the claimant’s property is “agricultural land” as defined by Goal 3.² 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. Statewide Planning Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses and also became effective on January 25, 1975.

Current land use regulations, particularly ORS 215.263, 215.283, 215.284, 215.780 and OAR 660 Division 33, as applied by Goal 3, and OAR 660, division 14 as applied by Goal 14, do not allow the subject property to be divided into parcels less than 80 acres and establish standards for allowing the existing or any proposed parcel(s) to have farm or non farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (chapter 792, Oregon Laws 1993). ORS 215.263

² The claimant’s property is “agricultural land because it contains NRCS (Natural Resources Conservation Service) Soils classified as Woodburn (Class II and III),” Labish (Class III) and Concord (Class II). See Marion County Hearings Officer Measure 37 Recommendation on Case No. 05-13, June 2, 2005, page 1 (in the department’s claim file.)

(2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

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, 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.)

OAR 660-014-0040 requires an except to Goal 14 to establish urban development on rural land outside urban growth boundaries.

Mr. Christofferson acquired the properties (except for the “notch” in Tax Lot 100) in 1947 and in 1951. At that time, the property was not zoned, and there was no minimum lot size³. Marion County has zoned the subject property EFU since March 12, 1975. The EFU zone has a minimum lot size of 80-acres and restrictions on the development of farm dwellings and non-farm dwellings.⁴

Comments Regarding the Applicable Laws

One comment states that the claimant has not made a case that land use regulations have restricted the use of his land under Measure 37, because subdividing land is not a land “use.” The department does not agree. Land division regulations constitute a “land use regulation” as that term is defined in Section (11) (B) of Ballot Measure 37.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215, specifically ORS 215.263, 215.283, 215.284, and 215.780 and OAR 660, Division 33, were all enacted after the claimant acquired ownership of the greater portion of Tax Lot 1100 in 1947, and Tax Lot 900 in 1951, and do not allow division of the property for residential development, thereby restricting the use of the property relative to the uses allowed when claimant acquired the property in 1947, and 1951. Except for ORS 215.780 and applicable provisions of OAR 660, divisions 14 and 33, all of these laws were enacted before claimant acquired the “notch” added to the bottom of Tax Lot 1100 in 1991. ORS 227.110, which requires approval of a subdivision

³ See Marion County Hearings Officer Measure 37 Recommendation on Case No. 05-13, June 2, 2005, page 14, in department file.

⁴See Marion County Zoning Ordinance (MCZO) sections 136.050(a) and 136.090(a) and (b), in the department’s claim file.

where property is located within six miles of a city, by that city, may apply the property. This statute was in effect when all three of the properties were acquired.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that the current land use regulations described in Section V. (2) of this report “have the effect of reducing the fair market value of the property, or any interest therein.”

Findings of Fact

A March 29, 2005 appraisal letter estimates the “as is” fair market value of the property with current land use restrictions as \$320,000.⁵ Based on certain Salem-area sales, the letter estimates that the fair market value of the subject property would be \$1,327,500 to \$2,025,000 if the property could be divided into nine two-acre lots worth \$147,500 to \$225,000 each. Based on that estimate, the claim alleges that state law has reduced the fair market value of the subject property by \$1,000,000. (See the claim.) Neither the claim nor the letter includes a formal appraisal or other documentation or evidence to substantiate these amounts.

Comments Regarding Valuation

One comment states that the claimant has provided no information on how he arrived at his demand for \$1,000,000. This was true of the claim as originally submitted. However, at the department’s request, the claimant supplemented his claim to assert that the fair market value of the subject property without the current land use restrictions would be \$1,327,500 to \$2,025,000 if the property were divided into nine two-acre lots worth \$147,500 to \$225,000 each.

Conclusions

As explained in Section V. (1) of this report, Marshall Eugene Christofferson is a current owner of the property, which he acquired in 1947, 1951, and 1991. Thus, under Ballot Measure 37, the claimant is due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value.

The claim provides some evidence to demonstrate the reduction in fair market value of the property due to land use laws adopted after he acquired the property. However, without an appraisal of the value of the subject property if dividable for residential development or other substantiating documentation, 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

⁵ The 2004 Marion County Tax Statement for the subject property shows the current real market value of the 19.33-acre property as \$119,290 (\$10,480 for Tax Lot 900 and \$108,810 for Tax Lot 1100). The Marion County Hearings Officer’s Measure 37 Recommendation in Case No. 05-1 states: “The Marion County Assessors’ office records indicate a real market value of \$363,380.” (See the department’s claim file.)

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 both a specific reference to EFU zoning, and a general claim based on any and all state land use laws enacted after 1947 and 1951, that restrict use of the property relative to what would have been allowed when the property was acquired in 1947 and 1951. Most laws that qualify as “land use regulations” under Measure 37 were adopted after 1947 and 1951. None of these laws, either on their face or as applied to the subject property, is exempt under Section 3 of Measure 37. However, the claimant acquired the “notch” in Tax Lot 1100 in 1991. Statewide Planning Goals 3 and 14, and ORS 215.263, 215.283, and 215.284, were enacted before the claimant acquired that portion of the property. As noted earlier in this report, ORS 227.110 was in effect at the time the claimant acquired all of these properties and, as a result, is exempt under Section 3(E) of the Measure.

Conclusions

The general statutory, goal and rule restrictions on division and residential use of agricultural land that apply to the owner’s use of the subject property for the most part were adopted after the claimant acquired most of the property, and would not come under any of the exemptions in Measure 37. With regard to the “notch” in Tax Lot 1100, which the claimant acquired in 1991, provisions in Statewide Planning Goals 3 and 14 and provisions of ORS 215 adopted prior to 1991, are exempt as to that portion of the property. In addition, there may be other specific laws that 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 to begin with.

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 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 by the legislature 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 for residential use.

The claimant cannot create the desired nine to eighteen lots out of the subject 19.33-acre property, and sell or develop those lots for residential use. The laws enforced by the Commission or department reduce the fair market value of the property to some extent. The claim asserts this amount to be \$1,000,000. However, because the claim does not substantiate 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 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 claimant to use the subject property for a use allowed at the time he acquired the property in 1947, 1951, and 1991.

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 his property into 1-2 acre parcels and to his establishment of residential dwellings on the parcels: the provisions of Statewide Planning Goal 3 (Agricultural Lands), Goal 14 (Urbanization), ORS 215.263, 215.283, 215.284, 215.780, and OAR 660, divisions 14 and 33, that relate to the division of land or establishment of dwellings, and that were enacted after October 15, 1947, for that portion of Tax Lot 1100 acquired on that date; after August 16, 1951 for Tax Lot 900; and after March 14, 1991 for the "notch" at the bottom of Tax Lot 1100.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property subject to the standards in effect on October 15, 1947 for that portion of Tax Lot 1100 acquired on that date; August 16, 1951, for Tax Lot 900; and March 14, 1991, for the "notch" at the bottom of Tax Lot 1100 acquired on that date. On March 14, 1991, the property was subject to Statewide Planning Goals 3 and 14, 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 final 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 under the terms of the final 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 Marion 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 July 1, 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.