

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

August 3, 2005

STATE CLAIM NUMBER: M119728

NAME OF CLAIMANT: Lowell Patton

MAILING ADDRESS: Post Office Box 85
Carver, Oregon 97015

IDENTIFICATION OF PROPERTY: Township 10S, Range 9W, Section 6,
Tax Lot 305
Lincoln County

DATE RECEIVED BY DAS: February 11, 2005

180-DAY DEADLINE: August 10, 2005

I. CLAIM

The claimant, Lowell Patton, seeks compensation in the amount of \$6,300,000 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 claimant desires compensation or the right to divide and develop the 110.14-acre property into 25 one-acre lots on the southern portion plus 17 five-acre lots toward the north. The subject property is described as Tax Lot 305, Township 10 South, Range 9 West, Section 6; along the Siletz River in Lincoln 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. In lieu of compensation, department staff recommends not applying the requirements of the following state laws enforced by the Land Conservation and Development Commission (Commission) or the department to allow the claimant to divide the property and establish a dwelling on each lot or parcel created: OAR 660-004-0040, and those applicable provisions of Goal 4 and OAR 660-006-0055, OAR 660-006-0026 and 0027, and ORS 215.705 to 215.755 and 215.780 that were enacted after December 9, 1988. These laws will not apply only to the extent they are not exempt under subsections 3(A) to 3(D) of Ballot Measure 37, and only to the extent necessary to permit the claimant a use of the property permitted at the time he became the owner of the property, on December 9, 1988. The department acknowledges that this relief will not allow Lowell Patton to

use the property in the manner that appears to be contemplated in his claim (See the complete recommendation in Section VI. of the report.)

III. COMMENTS ON THE CLAIM

Comments Received

On February 28, 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, there were two written comments, evidence or information received by DAS in response to the 10-day notice. The comments were not specific to the criteria required under Measure 37 to be used in the department's review of this claim. 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 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 11, 2005, for processing under OAR 125, division 145. The claim identifies the following state land use regulations as restricting the use of the subject property: Goal 4 and its implementing rules OAR 660-006-0026 and 660-006-0055; OAR 660-14-0040¹, Goal 5 and certain of its implementing rules, and all state land use regulations adopted and enforced since the purchase of the property by the claimant. 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.)

¹ The claim cites OAR 660-14-0040. The reference in the claim to OAR 660-014-0040 appears to be a typographical error. The Commission rule concerning the level of permissible residential development of rural residential lands is OAR 660-004-0040. The remainder of this report addresses that rule.

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 payment of compensation or relief from specific laws for “owners” as that term is defined in the Measure. Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Finding of Fact

The claim documents provided by the applicant include a First American Title Insurance Company Lot Book Search Report and Title Search Report, and a Bargain and Sale Deed that substantiates that Mr. Lowell Patton is the present owner of the property.² The claimant acquired the property from John B. Franzwa, Inc., by Bargain and Sale Deed dated December 9, 1988. This transaction established the date the claimant, Lowell Patton, became the present owner of the property.

Conclusions

Mr. Patton acquired the property on December 9, 1988, and is an owner as that term is defined by section 11 (C) of the measure.

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 at the time the previous owner of the property, Guy Roberts Lumber Company, purchased the property in 1969 it “could have divided been into 25 one-acre lots in the property’s southern portion near the highway and river plus 17 five-acre lots toward the

² A company owned by Mr. Patton first acquired an interest in the property in 1973. That company subsequently conveyed the property to another entity not owned by Mr. Patton. Another company owned by Mr. Patton acquired the property in 1976. That company filed for bankruptcy in 1988 under Chapter 7. The bankruptcy petition, when filed, transferred the assets of the company (including the subject property) to the bankruptcy estate. The present owner of the property, Lowell Patton, acquired the property via a Bargain and Sale deed from the bankruptcy trustee on December 9, 1988.

north.” This description is used as the basis for the claim and to calculate the reduction in value. The claimant does not provide a description of the state or local land use regulations that applied to the property in 1988 when he acquired it. The property is currently zoned “Timber Conservation” by Lincoln County, a forest zone under Statewide Planning Goal 4.

The claim lists the following state land use regulations as restricting the use of the property since it was acquired: OAR 660-04-0040 (Application of Goal 14 to Residential Use of Rural Residential Lands); Goal 5 (Natural Resources, Scenic and Historic Areas and Open Spaces) and the applicable implementing regulations OAR 660-16-0000 to 0020, 660-23-000 to 0250; and Goal 4 (Forest Lands) and the applicable implementing regulations OAR 660-06-0055. The claim also lists “All Statewide Planning Goals and administrative rules, statutes adopted and enforced since purchase of property by claimant.” Without additional information concerning what use(s) the claimant desires to make of the subject property, the department is unable to determine what other state land use regulations may apply to the property. The specific state land use regulations listed in the claim are addressed below.

OAR 660-004-0040, specifies how Goal 14 applies to rural lands in acknowledged exception areas planned for residential uses. As a result of a 1986 Supreme Court decision, the Commission amended Goal 14 (Urbanization) and adopted OAR 660-004-0040, Application of Goal 14 in Rural Residential Areas, effective on October 4, 2000. Because the property is currently zoned “Timber Conservation,” the provisions of OAR 660-004-0040 are not applicable to this property.

Goal 5 (Natural Resources, Scenic and Historic Areas and Open Spaces), and the applicable implementing OAR 660-16-0000 to 0020 and OAR 660-23-0000 to 0250, apply to significant resource sites that have been inventoried by Lincoln County. The Lincoln County Goal 5 inventory does not currently identify any significant resources located on the subject property. As a result, neither Goal 5 nor either division of its implementing rules apply to this property.

Statewide Planning Goal 4 (Forest Lands) and OAR 660, division 6, in conjunction with the statutes applicable to land zoned for forest use under ORS 215, (specifically, ORS 215.705 to 215.755 and 215.780), control the division and development of forest lands for residential uses. The Timber Conservation zone is a forest zone. Goal 4 became effective on January 25, 1975, and required Forest Land as defined by the goal to be zoned for forest use. (See citations to statutory and rule history under OAR 660-015-0000(4).) The Goal 4 administrative rule (OAR 660 division 006) became effective September 1, 1982. The Commission acknowledged the Lincoln County Comprehensive Plan and Zoning Ordinance on January 31, 1985. At the time the claimant acquired the property in 1989, the state law governing dwellings on forest lands was Goal 4 itself. The courts construed Goal 4 as allowing dwellings that were necessary for and accessory to a forest use, and non-forest dwellings only where the property was shown to be generally unsuitable for forest use. Under Goal 4 (as it existed in 1988), it is unlikely that the claimant could have established more than a couple of dwellings on the subject property.

The current Lincoln County Timber Conservation Zone partition and dwelling approval standards, which require a minimum parcel size of 80 acres, are based on the requirements

contained in OAR 660-006-0026, which first became effective on February 5, 1990, as well as ORS 215.780, which were enacted in 1993.

The current Lincoln County land use regulations implement provisions of Goal 4, the Goal 4 implementing rules, and ORS 215.780. These state land use regulations require an 80-acre minimum lot or parcel size. When the claimant acquired the property in 1988, Statewide Planning Goal 4 applied to the property, and may have allowed a couple of parcels to be created along with a couple of dwellings.

Conclusions

Goal 5 (Natural Resources, Scenic and Historic Areas and Open Spaces), and the applicable implementing rules at OAR 660-16-0000 to 0020, 660-23-0000 to 0250, apply to specific significant resource sites that have been inventoried by Lincoln County. The Lincoln County Goal 5 inventory does not currently identify any significant resources as being located on the subject property. Thus, Goal 5 and the implementing administrative rules listed above do not apply to the subject property and thus, do not restrict the use of the subject property.

OAR 660-0004-0040 does not apply to the subject property. The property is not within a Goal 3 or Goal 4 exception area and it is not zoned for predominantly residential use. Therefore, OAR 660-004-0040, Application of Goal 14 (Urbanization) to Rural Residential Areas, is not applicable to the subject property and thus, does not restrict the use of the subject property.

Goal 4 and its implementing rules, and ORS 215.705 to 215.755 and 215.780, apply to the claimant's property. These laws restrict the claimant's use of the subject property by requiring a minimum lot size of 80 acres. In addition the current state land use regulations restrict residential use of the property relative to how it could have been used when acquired by the claimant in 1988.

3. Effect 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

According to the claimant, Goal 4 and OAR 660-006-0026 and 660-006-0055 "limit land divisions, restrict placement of dwellings, [and] restrict location of dwellings." According to the claimant, the land use regulations reduce the number of residences that may be established on the property from 42 to 1. The claim calculates a loss in value as \$6,300,000 based on 42 lots with an average value of \$150,000.

The claim is based on an erroneous date for when the claimant became the present owner of the property. It is likely that no more than a couple of dwellings could have been established on the property in 1988. As a result, although the amendments to Goal 4 and the Goal 4 rules and the

adoption of ORS 215.780 likely have reduced the fair market value of the property, that reduction is likely substantially less than that asserted by the claimant.

Conclusions

As explained in section V.(1) of this report, Lowell Patton is the current owner of the subject property and acquired the property in 1988. Thus, under Ballot Measure 37, Mr. Patton is due compensation for land use laws 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 claimant acquired the property restrict its use by the claimant.. However, without an appraisal or other 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 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 laws. In addition, under Section (3) of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

Of the state land use regulations that the department has found may restrict the use of the claimant's property (in Section V.2), several were enacted before the claimant became the present owner of the property in 1988. Those state land use regulations enacted before January 25, 1989 are exempt under section 3(E) of Ballot Measure 37. These include: Statewide Planning Goal 14, Statewide Planning Goal 5 (and the implementing rules in OAR 660, division 16), and Statewide Planning Goal 4.

Other exemptions, under subsections 3(A)-3(D) of Measure 37 also may apply, depending on the specific characteristics of the use(s) the claimant carries out. Until the department knows the characteristics of the claimant's use of the property, it is not able to make a final determination concerning all the laws that may apply, or concerning which of these laws may be exempt under section 3 of Measure 37.

Finally, while not directly raised by the claimant, the department notes that ORS 215.731 and OAR 660, division 6, include standards for siting dwellings in forest zones. This provision includes 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..." The department finds that siting standards for dwellings in forest zones in ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under subsection (3) for Measure 37.

Conclusions

Those state land use regulations enacted before January 25, 1989 are exempt under section 3(E) of Ballot Measure 37. These include: Statewide Planning Goal 14, Statewide Planning Goal 5 (and the implementing rules in division 16), and Statewide Planning Goal 4. The siting standards for forest dwellings in ORS 215.730, Goal 4, and the Goal 4 implementing rules are also exempt under section 3(B) of Ballot Measure 37 (public health and safety). Other laws and other exemptions, under subsections 3(A)-3(D) of Measure 37 also may apply, depending on the specific characteristics of the use(s) the claimant carries out.

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 department 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 owner to carry out a use of the property allowed at the time the owner acquired the property. The Commission has by rule 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 record currently before the department laws enforced by the Commission, or the department, restrict the division of the property into lots or parcels, and the use of the property for residential purposes. The laws enforced by the Commission or department reduce the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Lowell Patton to use the subject property for a use permitted at the time he acquired the property on December 9, 1988.

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 allow Lowell Patton to allow him to divide his property and establish a dwelling on each lot or parcel created: the provisions of Statewide Goal 4 and OAR 660-006-0026 to 0055 and ORS 215.705 to 215.755 and 215.780 that were enacted after December 9, 1988. These laws will not apply to the claimant's use of the property only to the extent they are not exempt under subsections 3(A) to 3(D) of Ballot Measure 37, and only to the extent necessary to permit the claimant a use of the property permitted at the time he became the owner of the property on December 9, 1988.

2. The action by the State of Oregon provides the state's authorization to the claimant to use his property subject to the standards in effect on December 9, 1988. On that date, those standards include, but are not limited to: Statewide Planning Goal 4 (Forest Lands) (1988 editions).

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 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 claimant 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 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 13, 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.