

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

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

August 23, 2005

STATE CLAIM NUMBER: M120038

NAME OF CLAIMANT: Tom Sims

MAILING ADDRESS: PO Box 9293
Pahrump, Nevada 89060

PROPERTY IDENTIFICATION: Township 8S, Range 3W, Section 33D,
Tax Lot 1200
8633 Redstone SE, Salem Oregon
Marion County

DATE RECEIVED BY DAS: March 4, 2005

180-DAY DEADLINE: August 31, 2005

I. SUMMARY OF CLAIM

The claimant, Mr. Tom Sims, seeks compensation for the reduction in fair market value of the subject property as a result of certain land use regulations that are alleged to restrict his use of the property. The claimant desires compensation or the right to develop one single-family dwelling on the 7.69-acre subject property. The property is currently vacant and is located on the west side of Redstone Road, 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 state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimant to allow him to develop the subject property with a single-family dwelling: those applicable provisions of Statewide Planning Goals (Agricultural Lands), ORS 215.284 and OAR 660-033-0130, enacted after July 2, 1990. These laws will not apply to the claimant's use of the property only to the extent necessary to allow Mr. Sims a use of the property permitted at the time he acquired it on July 2, 1990. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 16, 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 March 4, 2005, for processing under OAR 125, division 145. The claim identifies Marion County's Special Agricultural (SA) zoning and state laws (specifically HB 3361 (1993)) that restrict the establishment of a single-family dwelling on 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 claimant, Tom Sims, acquired the subject property on July 2, 1990, as reflected by a Trust Deed included in the claim. Recent Marion County Tax Records document that Tom Sims remains an owner of the subject property.

Conclusions

The claimant, Tom Sims, is the “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. Mr. Sims acquired the property on July 2, 1990.

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 “I am ready to build my home, but I have been stopped from doing so by Marion County due to Agricultural Preservation Law House Bill 3661, passed in 1993.”

The claim is based on Marion County’s current Special Agricultural (SA) zoning, which is an Exclusive Farm Use (EFU) zone, and the applicable provisions of state law that require such zoning. The County zoning is 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 3.¹ Goal 3 requires that Agricultural Lands as defined by the Goal be zoned for EFU pursuant to ORS 215.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in the county’s SA 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

¹ The claimant’s property is “Agricultural Land” because it contains predominately NRCS (Natural Resources Conservation Service) Class II and III soils (McAlpin and Jory silty clay loam). Property located on Sheet #52, Soil Survey of Marion County Oregon, September 1972.

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 citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

The claimant acquired the subject property on July 2, 1990. The statutory provisions for EFU zoning under ORS 215 (1989 edition) and Marion County's acknowledged SA zoning applied to the use of the property when Mr. Sims acquired it. The applicable statutory standard for approval of a non-farm dwelling was in effect when the claimant acquired the property in 1990 are found in ORS 215.283(3) (1991 edition). It is not clear whether the claimant could establish a dwelling on the property under the standards in effect when he acquired it in 1990.

Conclusions

The current provisions of ORS 215.284, OAR 660-033-0130(4)(a) were adopted after the claimant acquired the property in 1990, and do not allow the claimant to site a non-farm dwelling on his 7.69-acre parcel because the property appears to be predominately composed of high value soils.² While it is not clear, it may have been possible to approve the construction of a dwelling under the more general provisions of zoning requirements and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 5 (1986 edition), and the Marion County regulations that were in effect on July 2, 1990, when the claimant acquired the subject property. Because current regulations prohibit the development of a dwelling on the subject property, whereas it is possible that a dwelling could be established under the standards in effect at the time the claimant acquired the property, it appears that state laws enacted after the claimant acquired the property may restrict the claimant's use of the property relative to uses permitted at the time he acquired it.

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and that may continue to apply to the claimant's 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 claimant seeks 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."

² According to the County, the soils on the subject property are 75.4% high-value, and did not qualify for a dwelling in 1990. (Marion County Public Works letter to claimant dated January 20, 2005).

Findings of Fact

The claim does not include a specific estimate of the reduction in value of the property as a result of current regulations that restrict the use of the property. However, information provided in the claim on the sales of property in the area indicates that if the property can be developed with a single-family dwelling, the selling price would range from \$160,000 to \$200,000. A Tax Statement for July 1, 2003 to June 30, 2004 shows a market value of \$41,360 for the subject 7.69-acres.

Conclusions

As explained in section V. (1) of this report, the current owner is Tom Sims who acquired the property on July 2, 1990. Under Ballot Measure 37, Mr. Sims is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value.

Without an appraisal based on the value of the property, if approved with a single-family dwelling, or other substantiating documentation, it is not possible to substantiate the 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 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 a reference to state land use regulations that restrict the use of the property relative to what would have been allowed in 1990 when the property was acquired by the claimant. These provisions include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Marion County has implemented through its SA zone. With the exception of provisions of Goal 3 and ORS 215 in effect on June 27, 1990, these identified laws are not exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimant acquired the property. Provisions Goal 3 and ORS 215 enacted before July 2, 1990 are exempt under Section 3(E) of the Measure and will continue to apply to the subject property.

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 appears that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimant's

use of the property, and for the most part these laws are not exempt under section 3(E) of Measure 37. Provisions of Goal 3 and ORS 215 in effect when the claimant acquired the property in 1990 are exempt under section 3 (E) of the measure and will continue to apply to the property.

There may be other laws that continue to apply to the claimant's 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 claimant seeks 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 use that the claimant has 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 claimant 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 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 conclusions set forth in this report, laws enforced by the Commission or the department restrict the establishment of a single dwelling on the subject property. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property. However, because the claim does not provide an appraisal or any specific explanation 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 may 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 Mr. Sims to use the subject property for a use permitted at the time he acquired the property on July 2, 1990.

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 Mr. Sims' establishment of a single family dwelling on the subject property those applicable provisions of Statewide Planning Goals 3 (Agricultural Lands), ORS 215.284 and OAR 660-033-0130, enacted after July 2, 1990. These laws will not apply to Mr. Sims' use of his property only to the extent necessary to allow the claimant a use permitted at the time he acquired it on July 2, 1990.
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 July 2, 1990. On that date, the property was subject to applicable provisions of Goal 3 and 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 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 215.402 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 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 him 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 August 2, 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.