

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

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

September 7, 2005

STATE CLAIM NUMBER: M120164

NAME OF CLAIMANT: William C. Hart

MAILING ADDRESS: 22284 Upper Highland Road
Beavercreek, Oregon 97004

PROPERTY IDENTIFICATION: Township 4S, Range 3E, Section 2,
Tax Lot 1601
Clackamas County

OTHER CONTACT INFORMATION: David L. Hart
22284 Upper Highland Road
Beavercreek, Oregon 97004

DATE RECEIVED BY DAS: March 15, 2005

180-DAY DEADLINE: September 11, 2005

I. SUMMARY OF CLAIM

The claimant, William C. Hart, seeks compensation in the amount of \$75,000 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 subdivide the 9.24-acre property into four separate parcels and to develop each parcel with a dwelling. The property is located at 22284 Upper Highland Road in Clackamas 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 Mr. Hart's division of the property for residential development: Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215, and applicable provisions of OAR 660, division 6. These laws will not apply to the claimant only to the extent necessary to

allow Mr. Hart a use of the property permitted at the time he acquired it in 1969. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 2, 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 15, 2005, for processing under OAR 125, division 145. The claim identifies Goal 4, ORS 215.705 and 215.780 and OAR 660, division 6, as laws that restrict 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 claimant, William Hart, acquired the subject property on July 30, 1969 as documented by a contract and a Satisfaction of Mortgage document submitted with the claim. The Clackamas County Assessor’s Office confirmed by telephone on July 25, 2005 that William Hart is the current owner of the subject property. Tax lot 1601 contains two non-contiguous parcels connected by a 10-foot easement. The intervening parcel is owned by Mr. Hart’s brother, John Hart and June Hart.¹

Conclusions

The claimant, William Hart, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of July 30, 1969.

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 claimant desires to “Legally divide the property for separate lots” and “eventually build” on them.

The claimant’s property is zoned AG/F, which is a mixed Agricultural and Forest Land zone adopted to comply with Statewide Goal 4 (Forest Lands) and the implementing provisions of OAR 660-006-0050 (effective February 5, 1990) and subsequently amended on March 1, 1994 to comply with the provisions of HB 3661 (Chapter 792, Or Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Statewide Goals 3 and 4 are allowed except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993. No information was provided to the department

¹ There is some confusion over the numbering of tax lots 1601, 1602, 1603, and 1604. This report is written with the understanding that William Hart is the owner of tax lot 1601 and a non adjacent parcel, which, at times, has been described as parcel #1603.

regarding the predominant use of the property on January 1, 1993. Depending on the predominant use on January 1, 1993, the property will be subject to either the requirements for dwellings applicable under Exclusive Farm Use (EFU) zoning required by Statewide Goal 3 and OAR 660, division 33 or forest zone provisions required by Statewide Goal 4 and OAR 660, division 6. This includes the dwelling standards asserted by the claimant as restricting the use of the property. However, no analysis of whether the property can be approved for a dwelling under the applicable farm or forest provisions has been provided.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones which implement the 80-acre minimum lot size specified in ORS 215.780. Under OAR 660-006-055, the claimant's property cannot be divided into parcels smaller than 80-acres, as may have been possible in 1969 when no county zoning applied. However, no analysis of whether any of the tax lots can be divided for non-farm dwellings under ORS 215.263(4)(b) has been provided.

The Statewide Planning Goals and implementing statutes and regulations had not been adopted at the time William Hart acquired the property in 1969. Provisions of ORS 215 may have applied to the subject property at the time, depending on the local zoning at that time.

Conclusions

The current provisions applicable to lands zoned AG/F under OAR 660-006-0050 and 660-006-0055 relating to land divisions and dwelling standards adopted since the claimant acquired the property in 1969, restrict the use of the property relative to uses allowed when the claimant acquired the property on July 30, 1969. Under these current provisions, the claimant is restricted from further dividing or developing the property as he could have when he acquired it. Additional land use regulations in ORS 215 and OAR 660, division 6 cited by the claimant, were adopted after he acquired the subject property in 1969, and also restrict the use of the property relative to the uses allowed when 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 uses 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."

Findings of Fact

The claim includes an informal estimate of \$75,000 as the reduction in the property's fair market value as a result of restrictions imposed after the claimant acquired the property. This amount is based on the claimant's estimate of the market value of similar buildable home sites in the area.

Conclusions

As explained in Section V.(1) of this report, the current owner is William Hart who acquired the property on July 30, 1969. Under Ballot Measure 37, William Hart is 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, land use laws adopted since 1969 do not allow the division and residential development of the property as was allowed in 1969.

Without an appraisal based on the value of smaller lots, 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 enacted or 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 Clackamas County's AG/F zone and the related provisions of state law that have restricted the use of the subject property and reduced its fair market value, including Statewide Planning Goals 3 (Agricultural Lands), and 4 (Forest Lands), and relevant provisions of ORS 215 and OAR 660, division 6. These laws were, in general, adopted after 1969, when William Hart acquired the property. Applicable provisions of ORS 215 enacted before 1969 are exempt under Section 3(E) of Measure 37, which exempts laws in effect when the claimant acquired the property.

While not directly raised by the claimant, the department notes that ORS 215.730 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) 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. Except for applicable provisions of ORS 215 in effect in 1969, it does appear that applicable provisions of ORS 215, Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Land) and OAR 660, division 6 and division 33, adopted subsequent to William Hart's acquisition of the subject property in 1969 apply to the claimant's use of the property, and are not exempt from Ballot Measure 37. The restrictions in ORS 215.730 and provisions of OAR 660, division 6 that establish fire protection standards for dwellings in forest zones are exempt under Section 3(B) of the Measure and will continue to apply to the subject property. 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.

Laws in effect when the claimant acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimant's use of 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 uses 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 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 division of the subject property into four separate parcels and to

develop each parcel with a dwelling. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$75,000. However, because the claim does not provide an appraisal or other specific documentation to establish 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 William Hart to use the subject property for a use permitted at the time he acquired the property on July 30, 1969.

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 William Hart's subdivision of the subject property into four separate parcels and to develop each parcel with a dwelling: the applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215, and OAR 660, division 6. These land use regulations will not apply to the William Hart's use of the property only to the extent necessary to allow the claimant to carry out a use permitted at the time he each acquired his interest in the property on July 30, 1969.
2. The action by the State of Oregon provides the state's authorization to William Hart to use the property subject to the laws in effect when he acquired the property on July 30, 1969, including applicable provisions of ORS 215 enacted prior to that date.
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 18, 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.