

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

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

September 9, 2005

STATE CLAIM NUMBER: M120192

NAME OF CLAIMANT: Leonard A. Dieringer¹

MAILING ADDRESS: P. O. Box 832
Molalla, Oregon 97038

PROPERTY IDENTIFICATION: Township 5S, Range 2E, Section 12,
Tax Lot 2200
Clackamas County

DATE RECEIVED BY DAS: March 17, 2005

180-DAY DEADLINE: September 13, 2005

I. SUMMARY OF CLAIM

The claimant, Leonard A. Dieringer, seeks compensation in the amount of \$636,000 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 36.25-acre property into seven approximately five-acre parcels and to develop a dwelling on six of the new parcels. The property is located at 31727 South Grimm 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. Dieringer's division of the property into seven, approximately five-acre parcels, and development of dwellings on six of those parcels: the applicable provisions of Statewide

¹ The completed claim form identifies Leonard Dieringer as the claimant. Leonard Dieringer's wife, Margaret Dieringer, also signed the claim form. Ms. Dieringer is currently a trustee of the Dieringer Family Trust, which owns the subject property. However, it does not appear that Ms. Dieringer is an owner of the subject property. A deed filed with the claim indicates that Ms. Dieringer conveyed her interest in the subject property to Leonard Dieringer on January 14, 1992. Thus, the department concludes that, as stated on the claim form, Leonard Dieringer is the sole claimant in this Measure 37 claim.

Planning Goal 4 (Forest Lands), ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6. These laws will not apply to the claimant only to the extent necessary to allow Mr. Dieringer a use of the property permitted at the time he acquired it in 1963. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On April 7, 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, six written comments, evidence or information were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law. (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 March 17, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County General Timber District (GTD) (enacted September 23, 1979) and Timber (TMB) (enacted July 20, 1994) as laws that restrict the use of the property as the basis for the claim.² Only laws that were enacted prior to December 2, 2004,

² The claim contains a supplemental sheet of paper titled "Measure 37, Laws Applicable to Application." This list contains laws implementing both Goals 3 (Agricultural Lands) and 4 (Forest Lands). Only the Goal 4 laws are applicable to this claim.

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, Leonard Dieringer, acquired the subject property along with his wife, Margaret Dieringer on July 22, 1963, by contract of sale as reflected by a Warranty Deed dated January 30, 1978, included with the claim. On January 14, 1992, Margaret Dieringer deeded her interest in the property to Leonard Dieringer. A copy of a Title Report dated March 16, 2005, indicates that the Dieringer Family Revocable Living Trust (dated August 12, 1998) is the current owner of the subject property. Transfer of the subject property to a revocable trust by the claimant does not constitute a transfer of ownership for purposes of reviewing this Measure 37 claim. The Title Report also indicates Leonard A. and Margaret M. Dieringer are the trustees of the trust.

Conclusions

The claimant, Leonard Dieringer, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, since July 22, 1963.

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 “When we purchased the property we could divide it as we wanted into lots for homes. We have one house only [and] want to divide [the property] into seven five-acre parcels.” The claim identifies Clackamas County General Timber District (GTD) (enacted September 23, 1979) and Timber (TMB) (enacted July 20, 1994), as laws that restrict the use of

the property as the basis for the claim. These local laws were enacted to implement Statewide Goal 4 (Forest Lands) and OAR 660, division 6.

Statewide Planning Goal 4 (Forest Lands), and laws applicable to land zoned for forest use under ORS 215, including ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6, restrict the division and residential development of the subject property. 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 Forest Land administrative rule (OAR 660, division 6) became effective September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Or Laws 1993). OAR 660-006-0026 and 0027 were adopted on March 1, 1994 to implement the statutes. (See citations to rule history under OAR 660-015-0000(4)).

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 0027 establish an 80-acre minimum lot size for the creation of a new parcel in a forest zone, and also establish the standards for dwellings in forest zones under Statewide Planning Goal 4.

The claimant acquired the subject property on July 22, 1963, prior to the establishment of the statewide planning goals and their implementing statutes and rules. The property was not zoned by the County when the claimants acquired it.

Conclusions

The minimum lot size and dwelling standards established by Statewide Planning Goal 4 and OAR 660-006-0026 and 0027, and by provisions of ORS 215 were all adopted after Mr. Dieringer acquired the property in 1963, and do not allow the division of the property into parcels less than 80-acres in size or the approval of dwellings on 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 \$636,000 as the amount of reduction in the property's fair market value, as a result of current regulations. This estimate is based on sale of comparable properties in the area.

Conclusions

As explained in section V.(1) of this report, the current owner is the Dieringer Family Revocable Living Trust. Leonard Dieringer acquired the property on July 22, 1963, and is a co-trustee of the trust. Therefore, under Ballot Measure 37, Leonard Dieringer 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, state laws adopted since 1963 restrict the claimant's use of the property.

Without an appraisal based on the value of five-acre parcels with dwellings or other explanation, 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 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 general reference to state land use regulations that restrict the use of the property relative to what would have been allowed in 1963 when the claimant acquired the property. These provisions include Statewide Planning Goal 4 (Forest Lands) and applicable provisions of ORS 215 and OAR 660, division 6, which Clackamas County has implemented through its TBR zone. None of these laws are exempt under Section 3(E) of Ballot Measure 37, which exempt 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. These provisions include fire protection standards for dwellings and for surroundings 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 code..." To the extent they may be applicable under OAR 660-006-0050, the department finds that siting standards for dwellings in Forest zones under ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under Section (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. It does appear that the general statutory, goal and rule restrictions on residential development and use of Forest 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 ORS 215 in effect when the claimant acquired the property in 1963, are exempt under Section 3(E) of the Measure and will continue to apply to the property.

Other laws in effect when the claimant acquired the property are also 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. The siting requirements of ORS 215.730, Goal 4 and its implementing rules related to dwelling siting standards based on health and safety will also continue to apply.

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 provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his 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 parcels or lots, and the use of the property for residential purposes. The claimant can not create the desired five-acre parcels out of the subject property, or develop those lots for residential use because laws enacted after the claimant acquired the property prohibit lot sizes that small. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property

by \$636,000. 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 Leonard Dieringer to use the subject property for a use permitted at the time he acquired the property on July 22, 1963.

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. Dieringer's subdivision of the 36.25-acre property or to the establishment of a single family dwelling on each parcel created: the applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215.705 to 215.755 and 215.780, and OAR 660 division 6. These laws will not apply to Mr. Dieringer's use of the property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property on July 22, 1963.
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 July 22, 1963. In addition, provisions of ORS 215.730 and OAR 660-006-0050 that are exempt under Section 3(B) of Measure 37 will continue to apply to the subject property.
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 15, 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.