

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation
September 15, 2005**

STATE CLAIM NUMBER: M120347

NAMES OF CLAIMANTS: John A. and June A. Hart

MAILING ADDRESS: 16414 Wayne Drive
Oregon City, Oregon 97045

PROPERTY IDENTIFICATION: Township 4S, Range 3E, Section 2
Tax Lots 1602 and 1604
Clackamas County

DATE RECEIVED BY DAS: March 28, 2005

180-DAY DEADLINE: September 24, 2005

I. SUMMARY OF CLAIM

The claimants, John A. and June A. Hart, seek compensation in the amount of between \$175,000 and \$180,000 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 claimants desire compensation or the right to establish a single-family dwelling on one of their two existing parcels, which total 9.46-acres.¹ The property is located at 22282 S. Upper Highland Road southeast of Oregon City 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 John and June Hart's development of a single-family dwelling on tax lot 1604:

¹ The claimants identify two tax lots as being subject to this Measure 37 claim, tax lots 1602 and 1604. However, according to the claimants, and as verified by the county, these two tax lots are two separate parcels. Tax lot 1602 is presently developed with a dwelling. The claimants indicated in a phone conversation on August 11, 2005, that they desire to place a single dwelling on tax lot 1604, while maintaining the existing dwelling on tax lot 1602. It appears that the request as it relates to tax lot 1602 is only the claimants desire to maintain that existing dwelling. The claimants do not assert that any regulation has restricted the claimants use of tax lot 1602 in a manner that restricts its value. Accordingly, it appears that the claimants do not request relief under Measure 37 as to tax lot 1602.

Statewide Planning Goal 4 (Forestry), ORS 215.700 to 750 and 215.780, and applicable provisions of OAR 660, division 6. These laws will not apply to the claimants only to the extent necessary to allow John and June Hart a use of the property permitted at the time they acquired it in 1969. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On April 13, 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, three 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 28, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's Exclusive Farm Use (EFU), Timber (TBR) and Mixed Agriculture/Farm (AG/F) Zoning as well as OAR 660-006-0026(1)(a) and ORS 215.780(1)(c), as laws that restrict the use of the property and are 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 claimants, John and June Hart, state that they acquired the subject property on July 30, 1969, as evidenced by a satisfaction of mortgage dated November 8, 1977, and a court decree dated September 14, 1981, included with the claim. These documents do not establish that the claimants acquired the subject property on July 30, 1969, but do confirm that they were owners of the property on that date. On June 3, 1993, the claimants transferred ownership of the property into the Hart Family Living Trust, with themselves as trustees. John and June Hart remain the sole trustees of that revocable trust. Transfer to a revocable trust does not constitute a change in ownership for the purposes of this Measure 37 claim. In an August 11, 2005, telephone conversation, the Clackamas County Assessor’s Office confirmed that John and June Hart, as Trustees the Hart Family Trust, are current owners of the subject property.

Conclusions

Based on information submitted with the claim, the claimants, John and June Hart, are “owners” 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 claimants’ 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 claimants or a family member acquired the property.

Findings of Fact

The claim states that the “80-acre minimum lot size in EFU, TBR and AG/F zones...limits building dwellings in these zones.” A conversation with the claimants on August 11, 2005, confirms their desire to construct one single-family dwelling on tax lot 1604. Tax lot 1602 contains an existing dwelling, and it does not appear that the claimants are requesting any relief under Measure 37 as to this parcel.

The claimants’ property is zoned AG/F, which is a mixed agricultural and forestland zone adopted to comply, in part, 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). The claimants indicate that the property contains at least one stand of harvestable timber.

Under OAR 660-006-0050, all the uses permitted under Statewide Planning 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 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 zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6. This includes the dwelling standards asserted by the claimants as restricting the use of the property.

No county zoning applied to the property at the time John and June Hart acquired the property in 1969.

Conclusions

The claimants acquired the subject property on July 30, 1969, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. The property was not zoned in 1969, nor was the property subject to statewide land use goals or their implementing statutes and regulations.

The current provisions applicable to lands zoned AG/F under OAR 660-006-0050, relating to dwelling standards, adopted since the claimants acquired the property in 1969, restrict the use of the property relative to uses allowed when the claimants acquired the property on July 30, 1969. Under these current provisions, the claimants are restricted from developing the property as they could have when they acquired it. Additional land use regulations in ORS 215 and OAR 660, division 6, cited by the claimants were adopted after they acquired the subject property in 1969 and also restrict the use of the property relative to uses allowed when the claimants 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 claimants have identified. There may be other laws that currently apply to the claimants’ use of the property, and that may continue to apply to the claimants’ 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 claimants seek 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 \$175,000 to \$180,000 as the reduction in the property’s fair market value resulting from current regulations. This amount is based on the claimants’ estimate of the market value of one additional home site on the subject property. The claim includes market values of surrounding properties, apparently to substantiate the claimants’ estimate of reduction in value. However, the claim does not include an appraisal or other analysis as support for the claimants’ estimate.

Conclusions

As explained in section V.(1) of this report, the current owner of the subject property is the Hart Family Living Trust. John and June Hart, trustees of the Trust, acquired the property on July 30, 1969. Under Ballot Measure 37, the Harts are 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, laws adopted since the claimants acquired the property restrict development of one single-family home site on the subject property. The claimants estimate the reduction in value due to the restrictions to be \$175,000 to \$180,000.

Without an appraisal based on the value of one additional home site or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand 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 references certain state land use regulations that restrict the use of the property relative to what would have been allowed in 1969 when the property was acquired by John and June Hart. These provisions include Statewide Planning Goal 4 (Forest Lands) and applicable

provisions of ORS 215 and OAR 660, divisions 6, which Clackamas County has implemented through its AG/F zone. None of these laws appear to be exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimants acquired the property.

While not directly raised by the claimants, 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 216.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under subsection (3)(B) 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 farm and forest lands apply to the claimants’ use of the property, and for the most part these laws are not exempt under Section 3(E) 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 are exempt under subsection 3(B) of Measure 37 and will continue to apply to the property.

The laws in effect when the claimants acquired the property are also exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants’ use of the property. There may be other laws that continue to apply to the claimants’ 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 claimants seek 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 claimants have 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 claimants 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 development of a single-family dwelling on tax lot 1604. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$175,000 to \$180,000. However, because the claim does not provide an appraisal or other specific documentation of 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 John and June Hart to use the subject property for a use permitted at the time they 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 John and June Harts' establishment of a single-family dwelling on tax lot 1604: applicable provisions of Statewide Planning Goal 4, ORS 215.700 to 750 and 215.780, and OAR 660, division 6. These land use laws will not apply to John and June Harts' use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on July 30, 1969.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property subject to the standards in effect on July 30, 1969.
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 claimants first obtain 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 claimants 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 claimants 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 claimants 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 claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 31, 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.