

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

September 22, 2005

STATE CLAIM NUMBER: M120460

NAME OF CLAIMANT: Keith W. Jons, Jr.

MAILING ADDRESS: 20959 SE Curtis Road
Clackamas, Oregon 97015

PROPERTY IDENTIFICATION: Township 2S, Range 3E, Section 9C
Tax Lot 1900
Clackamas County

DATE RECEIVED BY DAS: April 5, 2005

180-DAY DEADLINE: October 2, 2005

I. CLAIM

The claimant, Keith W. Jons, Jr., seeks compensation in the amount of \$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 his 8.07-acre property into two 2.5-acre parcels and one 3.07-acre parcel for single-family residential development. The property is located at 20959 SE Curtis Road, Clackamas, 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. In lieu of compensation, department staff recommends not applying the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department to Keith Jons' division and development of the subject property: Statewide Planning Goal 3, provisions of ORS 215 and OAR 660, division 33, enacted after March 20, 1989. These laws will not apply to the claimant, only to the extent necessary to allow Keith Jons a use of the property permitted at the time he acquired it in 1989. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On April 20, 2005, pursuant to OAR 125-145-0080 the Department of Administrative Services (DAS) provided notice to the owners of surrounding properties. According to DAS, there was one written comment, evidence or information received by DAS in response to the 10-day notice.

The comment does 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 letter 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 criterion 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 criterion, whichever is later.

Findings of Fact

The claim was submitted to the DAS on April 5, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's Exclusive Farm Use (EFU) zone, as the law that restricts the use of the property and is 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, Keith W. Jons, Jr., acquired an interest in the subject property on March 20, 1989, as reflected by a Bargain and Sale Deed included with the claim. A copy of a Title Report dated January 20, 2005, indicates that Keith W. Jons, Jr., is the current owner of the subject property.

Conclusions

The claimant, Keith W. Jons, Jr., is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of March 20, 1989.

2. The Laws that are the Basis for the 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 indicates that Keith Jons would like to divide his 8.07-acre property into three parcels for residential development. The claim is based on Clackamas County’s current EFU zone and the applicable provisions of state law that require such zoning. The claimant’s property is zoned EFU as required by Statewide Planning 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. Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660, division 33 as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80 acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU 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 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, which was then part of an approximately ten-acre parcel, on March 20, 1989. At that time the property was zoned EFU-20. The county's EFU-20 zone was acknowledged by the Commission pursuant to ORS 197.250 and ORS 197.251. Although the property was zoned EFU-20, Clackamas County agreed to divide it into two parcels after the claimant and his father acquired it in 1989.¹ The claimant now owns the larger of the two resulting parcels.

The applicable statutory and administrative rule standards for the approval of a farm or non-farm dwelling in effect on March 20, 1989, are found in ORS 215.283(1)(f). Uses permitted in EFU Zones in non-marginal lands counties (1983), and OAR 660, division 5 (1986 edition, repealed August 7, 1993). Specifically, ORS 215.283(1)(f) provides for "a dwelling customarily provided in conjunction with farm use." OAR 660-05-030 further required that such a dwelling: (1) be located on a parcel which is large enough to satisfy the Goal 3 minimum lot size standard, i.e. "appropriate for the continuation of the existing Commercial Agricultural Enterprise within the area," as explained in OAR 660-05-030(4).

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33 were all enacted after Keith Jons acquired the subject property on March 20, 1989, and do not allow the division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by Keith Jons in 1989. In 1989, the property was subject to the requirements of the county's EFU-20 zone, which were adopted pursuant to the provisions of ORS 215, Goal 3 (Agricultural Lands) and OAR 660, division 5, then in effect. The County staff report dated April 29, 2005, on Keith Jon's Measure 37 claim to Clackamas County, notes that the EFU-20 zone, in 1989 "allowed non-farm land divisions into parcels smaller than 20-acres and establishment of a dwelling" and that "it might be possible to approve a request to divide and develop the property under the 1989 EFU regulations."

¹ Keith Jons said in an August 28, 2005, phone conversation with staff that he is not sure why the County agreed to do that, although he remembers a "study" indicating the parcel was too small to farm. In addition, he has a statement from the County in 1989, (see claim file) that removes the property from farm use value for the 1989-90 Tax Assessment Roll.

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 a 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 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

The claim includes an informal estimate of \$300,000 as the reduction in the property's fair market value as a result of current regulations. This estimate is based on the claimant's conclusion that division of his property into three parcels will result in greater value than the property has with the current restrictions.

Conclusions

As explained in Section V.(1) of this report, the current owner is Keith Jons, who acquired the property on March 20, 1989. Under Ballot Measure 37, Keith Jons 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, laws adopted since 1989, restrict the claimant's ability to divide the property. According to the claim, the restriction results in a reduction of \$300,000 in the value of the property.

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 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 EFU zone, and the state regulations that the EFU zone implements, including Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33. These state regulations are not exempt under

Section 3(E) of Measure 37 to the extent they were enacted after the claimant acquired the property on March 29, 1989. Those provisions of ORS 215, Goal 3 and OAR 660, division 5, in effect on March 20, 1989 are exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimant acquired the 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 does appear 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 these laws are not exempt under Section 3(E) of Measure 37 to the extent they were enacted after the claimant acquired the property. Provisions of ORS 215, Statewide Planning Goal 3, and OAR 660, division 5, in effect when the claimant acquired the property in 1989 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.

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 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 division of the subject property into three parcels and residential development of those parcels. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$300,000. However, because the claim does not provide an appraisal or other 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 Keith Jons to use the subject property for a use permitted at the time he acquired the property on March 20, 1989.

Conclusions

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 the claimant's division and residential development of the 8.07-acre property: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, enacted after March 20, 1989. These land use regulations will not apply to Keith Jons' use of his property only to the extent necessary to allow him a use permitted at the time he acquired the property on March 20, 1989.
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 March 20, 1989. On that date, the property was subject to applicable provisions of ORS 215 then in effect, Statewide Planning Goal 3 (Agriculture) and OAR 660, division 5 (1986 edition).
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 September 8, 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.