BALLOT MEASURE 37 (Chapter 1, Oregon Laws 2005)
CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation
June 8, 2005

STATE CLAIM NUMBER:	M118973
NAME OF CLAIMANTS:	John and Patricia Housego
MAILING ADDRESS:	31130 SE Currin Road Estacada, OR 97023
IDENTIFICATION OF PROPERTY:	31130 SE Currin Road Township 3S Range 4E, Section 22 Tax lots 100, 106 and 107 Clackamas County
OTHER CONTACT INFO:	Penny Housego (daughter) 31130 SE Currin Road Estacada, OR 97023
OTHER INTEREST IN PROPERTY:	Easement along south side of tax lots 106 and 107
DATE RECEIVED BY DAS:	December 15, 2004
180-DAY DEADLINE:	June 13, 2005

I. CLAIM

John W.F. Housego and Patricia Mary Housego, the claimants, seek compensation in the amount of $361,802 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 create two 20-acre home sites on property located at 31130 SE Currin Road, near Estacada in Clackamas County, tax lots 100, 106, and 107 of tax map 3-4E-22. (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 certain state laws enforced by the

Land Conservation and Development Commission (the Commission) or the department, specifically the provisions required in Agriculture/Forest zones under OAR 660-006-050 and 055, and the provisions of ORS 215.780, not apply to the subject property to the extent necessary to allow the Housegos a use of the property permitted at the time they acquired it. As a result, the Housegos' use of the property will be subject to those specified laws in effect when they acquired the property on July 25, 1990 and on June 28, 1991. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 9, 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, there were no written comments, evidence or information 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

The claim was submitted to DAS on December 15, 2004 for processing under OAR 125, Division 145. The claim identifies Clackamas County provisions that implement the requirements of Statewide Goal 4 and OAR 660, Divisions 6 with respect to the approval of land divisions and dwellings on lands zoned for mixed agriculture/forest uses. 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 payment of compensation or relief from specific laws for "owners" as that term is defined in the Measure. Section 11(C) defines "owner" as "the present owner of the property, or any interest therein."

Findings of Fact

The claim includes a statutory warranty deed to demonstrate that John W.F. and Patricia Mary Housego acquired tax lots 106 and 107 on June 22, 1990. An additional deed demonstrates that the Housegos purchased an adjacent parcel, tax lot 100 on June 28, 1991. The total acreage subject in the three tax lots subject to this claim is about 85 acres.

On September 15 1998, the Housegos transferred the same three parcels to the John W.F. Housego Trust and to the Patricia Mary Housego Trust, respectively, as both trustees and trustors.

Conclusions

John W.F. Housego and Patricia Mary Housego are owners of the subject property, as defined by Section 11(C) of Ballot Measure 37, and have owned tax lots 106 and 107 since June 22, 1990 and tax lot 100 since June 28, 1991. The transfer to the revocable trust does not alter ownership for the purpose of determining the date the current owners acquired the property.

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 asserts that when the claimants acquired the properties in 1990 and 1991, it was zoned TTD-20 (Transitional Timber District, twenty-acre minimum parcel size), which would have

allowed them to create 20 acre parcels and additional dwellings on these new parcels.[1] The claimants state that Clackamas County's current Agriculture/Forest (AG/F) zone and the restrictions for farmland it imposes, specifically the "income test," have reduced the value of their property relative to how they could have used it when they purchased it in 1990 and 1991. No specific state laws were cited by the claimant except to reference an "income test" for a dwelling required by the AG/F zone.

Clackamas County's AG/F zone provisions were adopted to comply with Statewide Planning Goal 4 (Forest Lands), and the implementing provisions in 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, Oregon 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. Clackamas County has provided information to the department that the predominant use of the property on January 1, 1993 was most likely farm use and thus, the property would be subject to the requirements for dwellings applicable under exclusive farm use zoning required by Statewide Goal 3 and OAR 660, Division 03. This includes the farm dwelling "income test" asserted by the claimant as restricting the use of the property.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones which implements the 80-acre minimum lot size specified in ORS 215.780. The claimant's property is 85 acres and is currently developed with two dwellings. Under OAR 660-006-055, the claimants property cannot be divided into 20 acre parcels as may have been possible when zoned TTD-20 in 1990/1991. However, it can be divided into two parcels each with a dwelling under ORS 215.780(1)(e) as long as one of the resulting parcels is between 2 to 5 acres in size (Chapter 531, Oregon Laws 2001, effective January 1, 2001).

Conclusions

The current provisions applicable to lands zoned Agricultural/Forest use under OAR 660-006-050 to 055 relating to land divisions and dwelling standards adopted since the claimants acquired the property on June 22, 1990 and on June 28, 1991, restrict the use of the property relative to uses allowed when John and Patricia Housego acquired the property in 1990 and 1991. Under these current provisions, the claimants are restricted from further dividing or developing their property as they could have when they acquired it.

[1] The Transitional Timber District was adopted to comply with Statewide Goal 4, Forest Lands in 1981 (see LCDC Continuance Order dated December 31, 1981, Goal 4 section pp. 26-28). A staff report prepared by Clackamas County indicates that the TTD-20 zoning would have permitted the creation of 20-acre parcels. The County report also indicates that the test for establishing a dwelling in the TTD-20 zone at that time was to "demonstrate through a management plan that a farm or forest use would be occurring on the property." (See the department's claim file for a copy of the County staff report.)

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 subject 85-acre property is currently developed with two dwellings. The claimants propose to construct two additional dwellings on parcels of approximately 20 acres each.

The claim includes an informal market analysis prepared by a real estate broker. The broker estimates an average price per acre for a 40-acre parcel of $4,254 and for 20-acre parcels of $8,859. The broker's calculations conclude that the resulting reduction in value on the subject property is approximately $168,280. (See letter dated February 3, 2005 and included in the department's claim file.)

The claim includes a narrative description of the additional reduction in value due to income requirements placed on the parcels as a test for placing additional dwellings. It is not clear in what manner "income test requirements" reduce the fair market value of the subject property. However, the claimants conclude that the total reduction in value from the restrictions on the use of their property amounts to $361,802.

Conclusions

As explained in section V.(1) of this report, the Housegos are the current owners of the property. Under Ballot Measure 37, the Housegos are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value.

Without an appraisal, or another explanation of the reduction in fair market value, it is not possible to substantiate the amount of reduction in fair market value that has occurred as a result of the laws on which the claim is based. Furthermore, without a final determination of what use was permitted in 1990 and 1991, the extent to which the use of the property has been restricted cannot be determined. It is clear that under current laws, the property cannot be divided and developed to the same extent as proposed, whereas under the 20-acre minimum parcel size standard in effect in 1990 and 1991, it is more likely than not that the property could have been divided, and it is possible that at least one additional home site could be approved. Therefore, 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 laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The claim identifies the County's Agriculture/Forest zone as restricting the use of the subject property relative to what would have been allowed in 1990 and 1991 when the property was acquired. To the extent these laws were enacted after the Housegos acquired the property in 1990 and 1991, these laws do not appear to be exempt, on their face, from Section 3 of Ballot Measure 37.

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. These provisions include 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…" 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 subsection (3) of Measure 37.

Conclusions

Without a specific listing of laws that are the basis for the claim, 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. Those current laws enacted prior to the claimants' acquisition of the property in 1990 and 1991 are exempt. Otherwise, it appears that the general statutory, goal and rule restrictions on land division and placing dwellings on the subject property enacted after the claimants acquired the property would not come under any of the exemptions in 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. 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 to begin with.

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 enacted or 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 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 has by rule 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 prevent the subject property from being divided into 20-acre parcels and developed as home sites. These laws more likely than not have reduced the fair market value of

the subject property to some extent. The claim asserts this amount to be $361,802. However, because the claim does not provide a specific explanation for how the specified restrictions reduce the fair market value of the property from what they could have done under the regulations in place at the time they acquired the property in 1990 and 1991, a specific amount of compensation cannot be determined. Nevertheless, based on the current 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, Measure 37 authorizes the department to modify, remove or not apply one or more land use regulations to the extent necessary to allow John and Patricia Housego to use the subject property for a use permitted at the time they acquired the parcels on June 25, 1990 and June 28, 1991.

On June 25, 1990 and June 28, 1991, the subject land was zoned TTD-20 acre minimum. This zoning district was determined by LCDC to comply with the requirements of Statewide Goal 4 in 1981 and was fully acknowledged under ORS 197.250 and 197.251 on February 9, 1983.[2]

Conclusion

Based on the record before the department, John and Patricia Housego have established that they are entitled to relief. Therefore, department staff recommends, in lieu of compensation and except for ORS 215.730 and those provisions of Goal 4 and its implementing rules under OAR 660, Division 6 that require siting standards for dwellings to protect public health and safety, the requirements of the following specified state laws enforced by the Commission or department and enacted after June 22, 1990 for tax lots 106 and 107, and June 28, 1991 for tax lot 100, not apply to the Housegos' use of the subject property in order to allow them a use of the property permitted at the time they acquired it: ORS 215.780, and OAR 660-006-0050 and OAR 660-006-0055. The Housegos will need to apply to Clackamas County for a partition and approval of residential development on the subject properties pursuant to the provisions of Clackamas County's TTD-20 zoning district applicable to the property on July 25, 1990 (Tax Lots 106 and 107) and on June 28, 1991 (Tax Lot 100).

Any use of the property by the claimants remains subject to the following laws:
(a) those laws not specified in the claim to the State of Oregon, dated December 15, 2004 or discussed in this report; (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 excepted under section (3) of the Measure.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on May 24, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any

[2] See Continuance Order dated December 31, 1981 and Acknowledgment Order 83-ACK-14 dated February 9, 1983 in the department's files.

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.