

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

June 28, 2005

STATE CLAIM NUMBER: M119280

NAME OF CLAIMANT: Robert Ericsson

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P.O. Box 730
Banks, Oregon 97106

IDENTIFICATION OF PROPERTY: Township 19S, Range 02W, Section 32
Tax Lot 100
Lane County

Township 19S, Range 02W, Section 33
Tax Lot 200
Lane County

DATE RECEIVED BY DAS: January 3, 2005

180-DAY DEADLINE: July 2, 2005

I. CLAIM

Robert J. Ericsson, the claimant, seeks compensation in the amount of \$1,500,000 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 the property for sale and residential use. The two parcels, each totaling approximately 10 acres, are located at Tax Lots 100 and 200 of the Green Bluff Estates subdivision, Lane 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 and department staff recommends that, in lieu of compensation, the requirements of certain applicable state laws enforced by the Land Conservation and Development Commission (the Commission) or the

department, specifically Statewide Planning Goal 4 (Forest Lands) and OAR 660, Division 6, not apply to the subject property to the extent necessary to allow Mr. Ericsson to divide the property and establish a dwelling on each lot or parcel to the extent those uses were permitted at the time he acquired the property that is the subject of this claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On April 4, 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 received are not specific to the criteria required under Measure 37 for the department's review of this claim. Because no funds are available to pay compensation, comments regarding the possible impact of the proposed or intended development of the claimants' property are not relevant to the evaluation and determination of the claimant's Ballot Measure 37 claim, and cannot be considered by the department.

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 January 3, 2005 for processing under OAR 125, Division 145. The claim refers to "All state statutes, administrative rules...including but are not limited to, ORS Chapters 197, and 215, OAR 660 including OAR Division 6, Goal 4 Forest lands, the F-2 impacted forest land designations, ORS 215.316-215.327 marginal lands criteria ..." 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 enacted 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, Robert Ericsson, acquired the subject properties on August 28, 1973. The properties, consisting of two non-adjointing parcels, are located in Lane County and are identified as lots 3 and 6 of the Green Bluff Estates subdivision. Lot 3 is further identified on the tax assessor’s map as 19 02 10 33—tax account # 1553872. Lot 6 is further identified as 19 02 10 32—tax account # 1553831. A title report issued by Pioneer National Title Insurance on September 4, 1973, indicates a transfer of property in Lane County to H. Lloyd Ericsson and his son, Robert Ericsson, the claimant. According to the claimant, his father is since deceased. He further says that the purchase was for a larger 97-acre parcel, of which the two subject parcels (about 10-acres each) are portions. Lane County property tax statements indicate that Mr. Ericsson is the current owner of the subject properties.

Conclusions

The claimant, Robert J. Ericsson, is an “owner” of the subject properties as of August 28, 1973, as that term is defined by Section 11(C) of Ballot Measure 37.

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 Fact

The claim states that:

“Essentially, should he desire to do so, owner desires to be allowed to develop the property to the full extent he would have been able to develop the property when it was purchased in 1973.” Claimant states he would have been able to develop one acre lots with dwellings at that time.

The claim identifies “all state statutes...restricting the use of land (and includes a wide range of state and county regulation), as restricting his use of subject property. Claimant specifically identifies “all state statutes, administrative rules...including but are not limited to, ORS 197, and 215, OAR 660 including OAR Division 6, Goal 4 Forest lands, the F-2 impacted forest land designations, ORS 215.316-215.327 (marginal lands criteria).” (See the department’s claim file for a complete list of laws cited by the claimant.)

The subject properties are currently planned and zoned under the Marginal Lands provisions of the Lane County Code under ORS 197.247 (1983 edition, repealed by Chapter 792, Or Laws 1993), ORS 215.317 to 215.337 as allowed by Statewide Goals 3 and 4. Under these provisions, a dwelling is allowed on any parcel created prior to July 1, 1983, or any new parcel created under ORS 215.327. These provisions were acknowledged by the Commission on September 13, 1984 (Acknowledgment Order 84-ACK-201 dated October 3, 1984). Because the claimants’ property is planned and zoned under the provisions of the Marginal Lands statutes, and since the County’s comprehensive plan has been acknowledged by the Commission, Statewide Planning Goals 3 and 4 and the related provisions of OAR 660, Divisions 6, and 33 do not currently apply directly to the property.

The claimant acquired the property on August 28, 1973, which is prior to the requirements of Senate Bill 100, effective October 5, 1973 (Chapter 80, Or Laws 1973) and the Statewide Planning Goals effective January 25, 1975 (OAR 660-015-0000). The provisions of ORS 92 prohibiting the sale of land without the prior approval of a partition or subdivision plat generally date from prior to 1973, when the claimant acquired the property.

The zoning history for the subject 10-acre parcels, beginning with their inclusion in a larger 90-acre tract, according to the claimant, is as follows:

Date	Zoning	Other
1973 (purchase)	Unzoned Area	County development permits and subdivision regulations apply
1976	Farm Forestry 20 district	
1984	Impacted Forest Land, 80-acre	
1991	Marginal Lands, 10-acre	Zoned marginal lands at claimant’s request. Upzone
1995		Claimant creates Green Bluff Estates, Planned Development, divides property into 10-acre parcels

Conclusions

The minimum lot size and dwelling standards established by the Marginal Lands provisions under ORS 197.247 (1983 edition, repealed by Chapter 792, Or Laws 1993), and ORS 215.317 to 215.337, as allowed by Statewide Goals 3 and 4, were all adopted after the claimant acquired his property in 1973, and do not allow the division of the property into parcels less than 10 acres

in size with dwellings on them. Except for the provisions of ORS 92, which generally were in effect when the claimant acquired the property, the cited land use laws, adopted since 1973, restrict the use of the property relative to what was permitted when the property was acquired in 1973.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any law(s) 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 claimant asserts that the fair market value of the subject property has been reduced and that the just compensation due is \$1,500,000. His rationale for this figure states “The demand for compensation has been determined by experience as well as consultation with various real estate market professionals. If the amount of compensation is not agreed, court action is available and appropriate probative evidence will then be submitted.”

The 2004 tax statement from Lane County indicates that the properties’ real market value is \$462,410.

The claimant states that his intent is to develop the properties to the maximum extent allowable at time of purchase in 1973. He has verbally indicated that he thinks at that time he could have developed 1-acre lots. The Lane County staff report on the claim indicates it is difficult to assess what level claimant could have developed to under the unzoned designation of the property at that time. (See the department’s claim file.)

The County report further notes that the property was upzoned to marginal lands designation at claimant’s request in 1988. This had the effect of relaxing the minimum lot size standards from 80 acres to 10 acres, and arguably increasing the value of claimant’s property.

Conclusions

As explained in section V.(1) of this report, the current owner is Robert J. Ericsson, who acquired the property on August 28, 1973. Thus, under Ballot Measure 37, Mr. Ericsson is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. The 2004 tax statement from Lane County shows that the current value of the two approximately 10-acre parcels is \$462,401.

Without an appraisal based on the value of 20, one-acre lots or other explanation, and without substantiation that, in fact, one-acre lots would have been allowed under the unzoned designation in 1973, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, on the assumption that the remaining portions of the claimant’s properties’ value in an unzoned designation today would be greater than in their current Marginal lands 10-acre minimum designation, 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 includes both specific and general references to particular state and County laws, and a general claim based on any state land-use regulations that restrict the use of the property relative to what would have been allowed in 1973, when the property was acquired. Most state laws that qualify as “land use regulations” under the Measure were adopted after 1973, with the exception of some subdivision and partitioning laws in what is now ORS 92, and versions of ORS 215 that applied to property zoned as farm land prior to 1975.

Conclusions

It does appear that the general statutory, goal and rule restrictions on residential development and use of forest land apply to the owner’s anticipated use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37.

The restrictions in ORS 92, however, on the sale of land prior to the approval and filing of a plat, which generally predate 1973, as well as provisions of ORS 215 applicable in 1973, will continue to apply to the property. There may be other specific laws that are exempt and continue to apply under one or more of the exemptions in the Measures, because they were not identified in the claim or because they are not covered by the Measure.

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 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 a 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, 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 conclusion set forth in this report, laws enforced by the Commission or the department restrict the division of the subject properties into parcels or lots, and the use of the property for residential purposes. The claimant cannot create the desired lots out of the subject 10-acre properties, and sell or develop those lots for residential use. The laws enforced by the Commission or department reduce the fair market value of the 10-acre properties to some

extent. The claim asserts this amount to be \$1,500,000. However, because the claim does not provide a specific explanation of how the specified restrictions reduce the fair market value of the properties or what level of development that would have been allowed in 1973, 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 one or more land use regulations to allow, Mr. Ericsson to use the subject property for a use allowed at the time he acquired the property on August 28, 1973.

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 use of the subject property: the Marginal Lands provisions under ORS 197.247 (1983 edition, repealed by Chapter 792, Or Laws 1993), ORS 215.317 to 215.337, Statewide Land Use Planning Goal 4, and the Goal 4 implementing rules in OAR 660, Division 6, to the extent necessary to allow the claimant to divide the properties and establish one or more dwellings on each lot or parcel, all to the extent permitted at the time he acquired the two parcels that are the subject of this claim.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the two subject parcels, subject to those standards in effect on August 28, 1973. Those standards include the provisions of ORS 92 and ORS 215 in effect at that time.
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 215.412 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 excepted 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 June 10, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's 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.