

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

August 4, 2005

STATE CLAIM NUMBER: M119744

NAME OF CLAIMANT: Paul Unger

MAILING ADDRESS: 4445 Southwest Puma Drive
Forest Grove, Oregon 97116

IDENTIFICATION OF PROPERTY: Township 1S, Range 4W, Section 11
Tax Lot 400
Washington County

DATE RECEIVED BY DAS: February 14, 2005

180-DAY DEADLINE: August 13, 2005

I. CLAIM

Paul Unger, the claimant, seeks compensation in the amount of \$700,000 for the reduction in fair market value of his subject property 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 19.53-acre property into 20, approximately one-acre lots with dwellings. The property is located at 1353 Southwest Stringtown Road, in Washington County, Oregon near the City of Forest Grove. (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 by the department, not apply to Mr. Unger to allow him to divide the property into 20 lots of approximately one acre each and to develop a dwelling on each lot: the applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215.203, 215.213, and 215.780, and OAR 660, division 33. These laws will not apply to the claimant's use of the property only to the extent necessary to allow Mr. Unger a use of the property permitted at the time he acquired it in 1972. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 2, 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, one written comment was received 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 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 February 14, 2005 for processing under OAR 125, division 145. The claim cites two Washington County zones, GFU-38 and FRC-38, alleged to restrict the use of the property as the basis for the claim. Those zoning designations are both exclusive farm use zones, required by state law. 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, Paul Unger acquired the subject property on January 18, 1972. (See land sale contract and May 12, 1992, fulfillment deed in department claim file.)

Conclusions

The claimant, Paul Unger is an “owner” of the subject property as that term is defined in Section 11(C) of Ballot Measure 37, as of January 18, 1972.

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 claimant, Paul Unger, identifies “GFU 38” and FRC-38 Washington County zones that claimant says took effect on January 1, 1974, as restricting his ability to divide his 19.53-acre property into one-acre lots.

The claim appears to be based on Washington County’s current Exclusive Farm Use (EFU) zoning for the property. These zoning designations are required by state law. The claimant’s property is currently zoned EFU as required by Goal 3 in accord with OAR 660, division 33, and ORS 215 because the claimants’ 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 215.203, 215.213, and 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 new parcel(s) or lot(s) 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 215.213.

OAR 660-033-0130(4) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993.

Statewide Planning Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses and also became effective on January 25, 1975.

The claimant acquired the subject property on January 18, 1972, prior to the establishment of the Statewide Planning Goals and their implementing rules. Some provisions of ORS 215 were in effect prior to 1972, including ORS 215.203 and ORS 215.213. The County zoning that applied to the subject property in 1972 was F-1, which was a qualified farm use zone, but which, at that time, did not have a minimum lot size and allowed dwellings by right. However, under the provisions of ORS 215.203 and 215.213 in effect on January 18, 1972, use of the claimant's property was limited to farm uses, as defined in ORS 215.203, and those non-farm uses allowed under the version of ORS 215.213 then in effect. These statutes allowed a dwelling only upon a showing that the dwelling would customarily be provided in conjunction with a farm use of the property in question.

Conclusions

Lot size and dwelling standards established by Statewide Planning Goal 3, amendments to ORS 215 after 1972, and OAR 660, division 33, adopted since the claimant acquired the property in 1972, do not allow the division of the property into parcels less than 80-acres in size or allow the approval of dwellings as may have been possible in 1972. Goal 14 does not allow urban level of uses outside of urban growth boundaries. The County's EFU zone is based on the standards required by Goals 3 and 14, ORS 215 and OAR 660, division 33. Land use laws adopted since 1972 restrict the use of the property from what could have been done when the property was acquired by the claimant in 1972.

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(s) 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 permit 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

Mr. Unger asserts the reduction in value for his property amounts to \$700,000. He asserts that the property “Could sell for a million if one acre lots were sold.” However, no appraisal or other evidence was attached to the claim to substantiate the estimated loss in fair market value of \$700,000. Washington County 2004-2005 Tax Statement for the property indicates a real market land value of \$7,090 and a total real market value of \$78,350, including the residence on the property.

Conclusions

As explained in section V. (1) of this report, the current owner is Paul Unger who acquired the property in 1972. Thus, under Ballot Measure 37, Mr. Unger is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Mr. Unger estimates the loss in value at \$700,000.

Without an appraisal or verification of Mr. Unger’s estimate of the property’s value when subdivided, 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 laws. 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 Washington County’s EFU zone and the related provisions of state law that have restricted use of the property and reduced its fair market value. These are Statewide Planning Goals 3, “Agricultural Lands,” and 14, “Urbanization” and applicable provisions of ORS 215 and OAR 660, division 33. Most of these specific state land use regulations were enacted after the claimants acquired the property in 1972, and restrict the use of the property in a manner that likely reduces its fair market value. With the exception of provisions ORS 215 in effect when the claimant acquired the property, none of the laws identified in the claim appear to be exempt under Section 3 of Ballot Measure 37. The versions of ORS 215.203 and ORS 215.213 which were in effect when the claimant acquired the property in 1972 will continue to apply to the property.

Conclusions

It appears that the general statutory, goal and rule restrictions on the division, residential development and use of Agricultural Land apply to the claimant’s use of the property, and for the most part these laws would not come under any of the exemption under subsection 3(E) of

Measure 37. The version of ORS 215 in effect when the claimant acquired the property will continue to apply to the property under section 3(E).

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 an owner of property 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(s) 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. Claimants should be aware that the less information they provide 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 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 to allow the present owner to carry out a use of the property allowed 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 restrict the division of the subject property into parcels or lots, and the use of the property for residential purposes. The claim asserts the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$700,000. However because the claim does not provide an appraisal or other substantiating documentation for how the 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 more likely than not 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. Unger to use the subject property for a use permitted at the time he acquired the property on January 18, 1972.

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 Mr. Unger's division of the subject property or to the establishment of a single family dwelling on each lot or parcel created: applicable provisions of Statewide Planning Goals 3 and 14, ORS 215.203, 215.213, and 215.780 and OAR 660, division 33, that took effect on or after January 18, 1972. These land use regulations will not apply to Mr. Unger's use of the property only to the extent necessary to allow him a use permitted at the time he acquired the property on January 18, 1972.
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 January 18, 1972. The standards that apply to the property include ORS 215.203 and 215.213 (1971 ed.).
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 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 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 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 July 14, 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.