

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

August 8, 2005

STATE CLAIM NUMBER: M119786

NAME OF CLAIMANT: Beverly J. Aspmo, as
Co-trustee of the
Edsell G. Aspmo Trust

MAILING ADDRESS: 371 West Grand Avenue
Astoria, Oregon 97103

NAME OF CLAIMANT: Gary S. Aspmo, as
Co-trustee of the
Edsell G. Aspmo Trust

MAILING ADDRESS: 10160 Southeast 257th Drive
Gresham, Oregon 97080

IDENTIFICATION OF PROPERTY: Township 8N, Range 9W, Section 31
Tax Lot 2900
Clatsop County

OTHER INTERESTS IN THE PROPERTY: BPA and PPL power line easements,
prohibiting structures;

Mineral reservations to Clatsop County,
including the right to surface use.

DATE RECEIVED BY DAS: February 15, 2005

180-DAY DEADLINE: August 14, 2005

I. CLAIM

Beverly J. Aspmo and Gary Aspmo, co-trustees of the Edsell G. Aspmo Credit Shelter Trust are the claimants. They seek compensation in the amount of \$848,184 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 develop the property as a residential subdivision with twenty (20), two- to three-acre lots. The property is

identified as Tax Lot 2900 T8N R9W Section 31 on the Clatsop County Tax Assessor Map (See claim), near the City of Astoria.

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 this claim is valid. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to the division of the subject property into lots or parcels of two or three acres or the approval of dwellings on each lot or parcel created: applicable provisions of ORS 215.705 to 215.755 and 215.780, Statewide Goal 4 and OAR 660-06-0026 to 0055. For Gary S. Aspmo, only those laws that became effective after February 24, 1992 will not apply to his use of the property. The listed land use regulations will not apply to Beverly Aspmo's use of the property only to the extent necessary to allow her a use of the property permitted at the time she acquired it on January 2, 1953 and March 6, 1963. (See the complete recommendation in Section VI. of the report.)

III. COMMENTS RECEIVED

On March 1, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, two 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

The claim was submitted to DAS on February 15, 2005 for processing under OAR 125. The claim identifies Goal 3 and OAR 660-015-000(3) as 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 of 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 claim documents provided by the applicant includes a Pacific Title Company Lotbook Search Report dated January 24, 2005, and two sale deeds that show that title to the subject property is vested in Edsell G. Aspmo and Beverly J. Aspmo, as co-trustees of the Edsell G. Aspmo trust. However, the claim also includes a certification of trust, indicating that a second trust, the Edsell G. Aspmo Credit Shelter Trust was created under the first trust. The co-trustees of the Edsell G. Aspmo Credit Shelter Trust are Beverly J. Aspmo and Gary S. Aspmo (the son of Edsell G. Aspmo). Based on the information in the record, the department finds that the subject property is currently owned by Beverly J. Aspmo and Gary S. Aspmo, Co-Trustees of the Edsell G. Aspmo Credit Shelter Trust.

Edsell G. Aspmo acquired the major part of the property on February 1, 1945. A “Deed Creating Estate in Entirety”, dated January 2, 1953, transferred an undivided half interest in the property to Beverly Aspmo. The remaining portions of the Tax Lot were purchased by Edsell and Beverly Aspmo on March 6, 1963. Those dates establish the family ownership requirement for the claim, and the current ownership date for Beverly Aspmo. Upon the death of Edsell G. Aspmo on February 28, 1992, title vested in the co-trustees of the Edsell G. Aspmo Credit Shelter Trust. That date is the date that Gary S. Aspmo acquired his present ownership interest in the property.

Conclusions

Beverly Aspmo is an “owner” of the subject property as that term is defined in Section 11(C) of Measure 37 and acquired an interest in the major portion of the subject property on

January 2, 1953 and in the remaining blocks within the parcel on March 6, 1963.¹ Gary S. Aspino is an “owner” of the subject property as that term is defined in section 11(C) of Measure 37. He acquired his ownership interest on February 28, 1992.

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 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, “There were no restrictions on the subdivision of this property when purchased in 1945.” An attachment to Section 10 of the DAS Measure 37 Claim Application form has been provided by the claimant, describing the proposed use of the property as subdivision into (20) two- or three-acre lots for residential development.

The claim lists the following state land use regulations as restricting the use of the property since it was acquired; Goal 4 (Forest Lands) and the applicable implementing OAR 660-06-0026, and ORS 215, specifically ORS 215.780. Also listed is Clatsop County Ordinance 80-14, Section 3.510 & Section 5.200, which implement the restrictions on the subdivision of forest resource lands.

Statewide Planning Goal 4 (Forest Lands) and OAR 660, division 6, in conjunction with the required provisions applicable to land zoned for forest use under ORS 215, including ORS 215.705 to 215.755 and 215.780, control uses of lands zoned and planned for forest use. Goal 4 became effective on January 25, 1975, and required Forest Land, as defined by the Goal, to be zoned for forest use (see citations to statutory and rule history under OAR 660-015-0000(4)). The Goal 4 administrative rule (OAR 660, division 6) became effective September 1, 1982.

The Oregon Land Conservation and Development Commission acknowledged the Clatsop County Comprehensive Plan and Zoning Ordinance on January 31, 1985. The current Clatsop County Agriculture Forest Zone partition and dwelling approval standards are based on the requirements contained in OAR 660-06-0055 which first became effective on February 5, 1990, and have since been amended. The applicable element of the Clatsop County Land and Water Development and Use Ordinance implementing Goal 4 and OAR 660, division 6, is 3.510 Agriculture-Forestry Zone (AF) and more specifically 3.550 Forest-80 Zone (F-80), which established a minimum lot size of 80-acres for the subject property when it

¹ The deeds show that Beverly J. Aspino acquired an equal ownership with her husband Edsell Aspino in properties listed as follows: N ½ block No. 8, N ½ block No.9, No. ½ block 37 and all of blocks No.12, 21, 22, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 39 and 40 in the Prospect Park Addition and Prospect Park Extension to the City of Astoria. Blocks No. 41, 42, 43, 44, 45, 52, 53, 54, 55, 56, 57, 58, 59, 61, 68, 69, 70, 71, 72, 73, 74, 75 and 76 in the Spring Hill Extensions to the Prospect Park Addition. The remaining blocks purchased in 1963 are listed as, blocks 23, 24, 35 and S. ½ of 37 of the Prospect Park Extension, and Block 60 of the Spring Hill Extension.

was incorporated into the County code in March 1997. The claimant's property is also subject to ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6 that restrict its zoning, use and partition. The current Clatsop County Agriculture Forest Zone partition and dwelling approval standards found in 3.522, Development and Use Standards, are based on the requirements contained in Statewide Planning Goal 4 and OAR 660-06-0055. The current minimum lot size and dwelling standards established by Statewide Planning Goal 4 and OAR 660-006-0026 and 0027² and the Clatsop County Agriculture Forest Zone do not allow the division of the properties into parcels less than 80-acres in size or the approval of dwellings on smaller parcels.

The department notes that the property is subject to several power line easements that appear to prohibit construction of structures on a significant portion of the property. Portions of the property are also subject to a reservation of mineral rights to Clatsop County, which appear to provide the county with the right to use the surface area of the property if necessary for mining. These encumbrances on the use of the property may, as a practical matter, limit the extent to which residential development may be possible. The department nevertheless finds it more likely than not that some residential development of the property is possible, and that as a result the laws addressed above do restrict the claimants' use of the property.

Conclusions

Lot size and dwelling standards established by Statewide Planning Goal 4, ORS 215, and OAR 660, division 6, adopted since the claimant acquired the property in 1953 and 1963, 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 1953 and 1963. State land use regulations adopted since 1953 and 1963 restrict the use of the property relative to what could have been done when the property was acquired by the Beverly J. Aspmo in 1953 and 1963. Some of these laws (the provisions of ORS 215.705 to 215.755 and 215.780) became effective after February 28, 1992, when Gary Aspmo acquired an interest in the property. However, OAR 660-006-055 was in effect when Gary Aspmo acquired an interest in the property, and will continue to apply to his use of the property.

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 claimants have 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.

² In February 1990, the Commission amended Goal 4 and OAR 660-006 in response to the Oregon Supreme Court in *1000 Friends of Oregon v. LCDC/Lane County*, to include provisions regarding the uses and dwellings allowed in forest zones consistent with OAR 660-060025 and 660-06-027. The Commission amended OAR 660-06-027(1)(a) to clarify when dwellings are necessary in forest zones in March of 1990.

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 states that the fair market value of the subject property has been reduced by \$848,148 as a result of land use laws enacted after the family acquired the property in 1945. According to the claimants, the forest zoning resulted in a reduction in the number of parcels that could be divided from the lots from a single 80-acre parcel to 20 two to three-acre parcels for residential development. The property has been logged in 1946 and most recently in 2004. The claimants assert that they have received a written offer for \$51,815 for the total 86.34-acres, or approximately \$600 per-acre. The claim calculates the property to be worth \$848,148 if subdivided as described. The claimants do not provide any information that the estimate for the value of the subdivided lots is the current fair market value for lots of those dimensions for that area.

Conclusions

As explained in section V.(1) Beverly Aspmo’s ownership was established, for the major portion of the property, in 1953, and for the remaining parcels on March 6, 1963. Gary Aspmo acquired an ownership interest in 1992. Laws enacted and enforced currently by the Commission or department restrict the claimants’ use of the property to some extent, and likely have reduced its fair market value. Under Ballot Measure 37, the claimants are due compensation for land use laws 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 claimant acquired the property restrict division of the subject property. The claim asserts the reduction in value due to the restriction to be \$848,148. However, 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 the following state land use regulations as restricting the use of the property since it was acquired: Goal 4 Forest Lands and the applicable implementing rules (OAR 660-006-0055), and ORS 215, including ORS 215.705 to 215.755 and 215.780.

ORS 215.730(1)(b) establishes approval standards for dwellings on lands zoned for forest use to protect the public health and safety with regard to fire safety, water supply and development on steep slopes. Parallel provisions in Goal 4 and its implementing rules relating to fire safety, are exempt under subsection 3(B) of Measure 37.

Conclusions

The general statutory, goal and rule restrictions on the division and residential use of Forest Land apply to the owners' use of the property, and are not exempt under subsection 3(E) of Measure 37 except as to Gary Aspmo for those laws in effect at the time he acquired an interest in the property. The provisions of ORS 215.730(1)(b), adopted to protect public health and safety are exempt under subsection 3(B) of the Measure and will continue to apply to 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 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(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 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 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 conclusions in this report, laws enforced by the Commission or the department, restrict the division of the subject property into parcels less than 80-acres or the approval of dwellings on smaller parcels. These restrictions reduce the fair market value of the subject property to some extent, though it is unclear what level of development would be allowed

Beverly Aspmo under the laws in effect when she acquired her interest in the property in 1953 and 1963, and allowed Gary Aspmo when he acquired his interest in 1992. The claim asserts this amount to be \$848,148. The claim provides an explanation about how the specified restrictions reduce the fair market value of the property, however, no appraisal or other substantiating documentation was submitted and it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, the department acknowledges that state land use regulations 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 just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow the claimants to use the subject property for a use permitted at the time Beverly Aspmo acquired her interest in the property on January 2, 1953 and March 6, 1963, and Gary Aspmo his interest in the property on February 24, 1992.

Conclusions

Based on the findings and conclusions, and its record in this matter, 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 division of the subject property into lots or parcels of two or three acres or the approval of dwellings on each lot or parcel created: applicable provisions of ORS 215.705 to 215.755 and 215.780, Statewide Goal 4 and OAR 660-06-0026 to 0055. For Gary S. Aspmo, only those laws that became effective after February 24, 1992 will not apply to his use of the property. The listed land use regulations will not apply to Beverly Aspmo's use of the property only to the extent necessary to allow her a use of the property permitted at the time she acquired it on January 2, 1953 and March 6, 1963.
2. The action by the State of Oregon provides the state's authorization to the claimants Beverly Aspmo and Gary Aspmo to use the property. The authorization to Beverly Aspmo is subject to the standards in effect on January 2, 1953, for the major portion of the property and April 8, 1963, for the remaining blocks. The authorization of Gary Aspmo is subject to those standard in effect on February 24, 1992. Gary Aspmo's use of the property is subject to Statewide Planning Goal 4 and the version of OAR 660-006 in effect on that date. Both claimants' use is subject to the fire safety siting standards for dwellings on forest land in ORS 215, Goal 4 and the Goal 4 implementing rules.
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 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 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 18, 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.