

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation**

August 26, 2005

STATE CLAIM NUMBER: M120066

NAME OF CLAIMANTS: Harley and Charlene Davidson

MAILING ADDRESS: 1173 Vawter Road
Medford, Oregon 97501

PROPERTY IDENTIFICATION: Township 38, Range 2W, Section 01
Tax Lot 1100
Jackson County

OTHER INTEREST IN PROPERTY: Talent Irrigation District
P.O. Box 467
Talent, Oregon 97540

DATE RECEIVED BY DAS: March 9, 2005

180-DAY DEADLINE: September 9, 2005

I. CLAIM

Harley and Charlene Davidson, the claimants, seek compensation in the amount of \$37,000 for a reduction in fair market value of the subject property 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 divide the 4.8-acre property into two parcels, of approximately 2.8 and 2-acres respectively. The property is located at 1173 Vawter Road, in Jackson 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. Department staff recommends, in lieu of compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimants to allow them to divide and develop their property for residential use: the applicable provisions of OAR 660-004-0040. These laws will not apply to the claimants only to the extent necessary to allow Mr. and Ms. Davidson a use of the subject property permitted at the

time they acquired it on February 16, 1957. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 17, 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, no written comments, evidence or information were 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 March 9, 2005, for processing under OAR 125, division 145. The claim identifies Jackson County's Rural Residential Five-Acre (RR-5) zoning that restricts the use of the property 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 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 claimants, Harley and Charlene Davidson, acquired the subject property on February 16, 1957. (See copy of warranty deed in the department’s claim file.) Harley and Charlene Davidson are the current owners of the property, as documented by a July 1, 2004, Jackson County Tax Statement and by the March 17, 2005, a Jackson County staff report on a county claim for compensation under Measure 37 filed by the claimants, which references the assessor’s chain of title records.

Conclusions

The claimants, Harley and Charlene Davidson are the “owners” of the subject property as that term is defined in 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 of Fact

The claimants list the County’s RR-5 zone as the land use regulation restricting the use of the property. The current RR-5 zoning requires five-acre minimum lot sizes and does not allow division of the subject property into two parcels, consistent with Statewide Planning Goal 14 (Urbanization).

As a result of a 1986 Supreme Court decision,¹ in 2000 the Commission amended Statewide Planning Goal 14 and adopted OAR 660 004 0040, which became effective on October 4, 2000. The rule provides that after October 4, 2000, a county minimum lot size requirement in RR zone may not allow a smaller minimum lot size without taking an exception to Goal 14 (OAR 660 004 0040(6)). This rule prevents the subject property from being divided without an exception to Goal 14.

¹ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or App 447 (1986).

Jackson County had not zoned this property and did not have subdivision regulations in effect when the claimant acquired in the property 1957. (See page 2 of the Jackson County order, in claim file.)

Conclusions

Provisions of OAR 660-004-0040 were adopted after the claimants became the owners of the subject property and restrict the division of the subject property. Land use laws adopted since February 16, 1957, restrict the use of the property relative to the uses allowed when they acquired the property on February 16, 1957.

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 claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and that may 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 the claimants seek 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 \$37,000 as the amount of the reduction in the property's fair market value as a result the current regulations that restrict the division of the subject property. This estimate is based on the claimants' estimate of the market value of lots in the area. The claim also includes Jackson County assessment data showing the current real market value of the subject property to be \$247,260.

Conclusions

As explained in section V. 1 of this report, Harley and Charlene Davidson have been owners of the subject property since February 16, 1957. Under Ballot Measure 37, the Davidsons 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 claimants acquired the property restrict division of the subject property. The claim asserts the reduction in value due to the restrictions to be \$37,000. Without an appraisal or other substantiating 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 Jackson County's RR-5 zone and the related provisions of state law that have restricted use of the property and reduced its fair market value. These include Statewide Planning Goal 14 (Urbanization) and OAR 660-004-0040. The laws identified in the claim are not exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimants 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 goal and rule restrictions on the division of the subject property apply to the claimants' use of the property and those laws are not exempt under Section 3(E) of Measure 37.

Laws in effect when the claimants acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. 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 the claimants seek 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 have 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 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, 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 prohibit the division of the subject property into two parcels. The claim asserts these restrictions reduce the fair market value of the subject property by \$37,000. Because the claimants do not provide an appraisal or other substantiating documentation to establish how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, the department acknowledges that state land use laws enacted since the claimants acquired the property have more likely than not 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 the Davidsons to use the subject property for a use permitted at the time they acquired the property on February 16, 1957.

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 Davidson's division of their property: the applicable provisions of OAR 660-004-0040. This rule will not apply to the claimants' use of the property only to the extent necessary to allow the claimants to a use permitted at the time they acquired the property on February 16, 1957.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property subject to the standards in effect on February 16, 1957.
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 claimants first obtain 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 claimants 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 claimants 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 claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 2, 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.