

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

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

August 31, 2005

STATE CLAIM NUMBER: M120105

NAME OF CLAIMANT: Kenneth Vaughn

MAILING ADDRESS: 2620 NW Woodcrest
Albany, Oregon 97321

PROPERTY IDENTIFICATION: Township 13S, Range 2W, Section 7
Tax Lot 300
Township 13S, Range 2W, Section 18
Tax Lot 100
Linn County

OTHER INTEREST IN PROPERTY: Linda J. Vaughn (wife)

DATE RECEIVED BY DAS: March 11, 2005

180-DAY DEADLINE: September 7, 2005

I. SUMMARY OF CLAIM

The claimant, Mr. Kenneth Vaughn asks for compensation in the amount of \$800,000 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 subdivide the 232-acre property into 20-acre parcels and to develop a dwelling on each parcel. The property is located on Brownsville Road about three miles north of Brownsville, in Linn 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 that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to Mr. Vaughn's division of the property into 20-acre parcels and to his development of a dwelling on each parcel: Statewide Planning Goals 3 (Agricultural Lands), ORS 215, and applicable provisions of OAR 660, division 33. These laws will not apply to the claimant only to

the extent necessary to allow Mr. Vaughn a use of the property permitted at the time he acquired it on September 28, 1972. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 18, 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.

Some of the comments and evidence are relevant to whether there is a basis for granting relief under Measure 37. A geotechnical assessment report was submitted that may bear on the total number of parcels that can be created and developed with dwellings on the subject property without destabilizing existing development on adjacent property. These comments have been considered by the department in preparing this report. (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

This claim was submitted to DAS on March 11, 2005, for processing under OAR 125, division 145. The claim indirectly identifies Goal 3 and applicable provisions of ORS 215 and OAR 660 division 33 as laws that restrict 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 claimant, Kenneth Vaughn, acquired the subject property on September 28, 1972, as reflected by a Warranty Deed included with the claim. A copy of a Linn County Measure 37 staff report dated July 20, 2005, indicates that Kenneth Vaughn is a current owner of the subject property. (See staff report from County in the department’s claim file.)

Conclusions

The claimant, Mr. Kenneth Vaughn is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of September 28, 1972.

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 states that prior to the imposition of Exclusive Farm Use (EFU) zoning, he could divide his property into 11 parcels, and that the property’s current EFU zoning allows him to divide his property into only 3 parcels.

The claim is based on Linn County’s current EFU zone and the applicable provisions of state law that require such zoning. The claimant’s property is zoned EFU as required by Goal 3 in accord with OAR 660, division 33 and ORS 215 because the claimant’s 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 215.263, 215.284, 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 proposed parcel(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 implements the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f).

OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. Subsequent amendments to comply with HB 3326, (Chapter 704, Oregon Laws 2001, and effective January 1, 2002) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660 033 0100, 0130 and 0135.)

The claimant acquired the subject property on September 28, 1972, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. Depending on the local zoning in effect at that time, provisions of ORS 215, enacted in 1963 may have applied to the subject property in 1972. According to the claimant, when he acquired the property, local zoning allowed him to divide his property into 20-acre parcels.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33 were all enacted after Kenneth Vaughn acquired ownership of the subject property in September 1972, and restrict the use of the property relative to the uses allowed when he acquired the property 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 the 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.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any land use regulation 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 \$800,000 as the property’s fair market value, in the absence of current regulations. This amount is based on the claimant’s estimate of the market value of lots in the area, less the cost of development.

Conclusions

As explained in section V. (1) of this report, the current owner is Kenneth Vaughn who acquired the property on September 28, 1972. Under Ballot Measure 37, Kenneth Vaughn is due compensation for land use regulations 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 and development for residential use. The claimant estimates the reduction in value due to the restrictions to be \$800,000.

Without an appraisal or other substantiating documentation based on the value of the desired 20-acre lots, 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 includes a general reference to any state land use regulations that restrict the use of the property relative to what would have been allowed in 1972 when the property was acquired by Kenneth Vaughn. These provisions include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Linn County has implemented through its EFU zone. With the exception of provisions of ORS 215 in effect when the property was acquired, none of these laws appear to be exempt under Section 3(E) of Ballot Measure 37. Provisions of what is now ORS 215 adopted before September 1972 are exempt under Section 3 (E) of the Measure and will continue to apply to 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 appears that the general statutory, goal and rule restrictions on the division and residential development of farm land apply to the claimant's use of the property, and for the most part, these laws are not exempt under section 3(E) of Measure 37. Provisions of ORS 215 in effect when the claimant acquired the property in 1972, are exempt under Section 3(E) of the measure and will continue to apply to the property.

Other laws in effect when the claimant acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimant's use of 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, including laws that restrict or prohibit activities for the protection of public health and safety, which are exempt under Section 3(B). 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 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 uses 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. The claimant 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 in order to allow the present owner to carry out a use of the property permitted at the time the current 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 restrict the division of the subject property into parcels or lots, and the use of the property for residential purposes. The claimant cannot create the desired 20-acre lots out of the subject property, or develop those lots for residential use because of laws enacted after the claimant acquired the property. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$800,000. However, because

the claim does 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, 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 certain land use regulations to allow Mr. Kenneth Vaughn to use the subject property for a use permitted at the time he acquired the property on September 28, 1972.

Conclusion

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. Vaughn's division of the 232-acre property into 20-acre parcels or to the establishment of a single family dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33 enacted after September 28, 1972. These land use regulations will not apply to Mr. Vaughn's use of his property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property on September 28, 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 September 28, 1972. On that date, the property was subject to applicable provisions of ORS 215 then in effect.
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 215.402 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 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 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 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.