

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

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

September 2, 2005

STATE CLAIM NUMBER: M120133
Report A

NAME OF CLAIMANT: Ms. Pearl Zerr

MAILING ADDRESS: 3352 Griffin Creek Road
Medford, Oregon 97501

PROPERTY IDENTIFICATION: Township 38S, Range 4W, Section 9,
Tax Lot 406
Jackson County

OTHER CONTACT INFORMATION: Gary Zerr
18033 North Applegate Road
Grants Pass, Oregon 97527

DATE RECEIVED BY DAS: March 14, 2005

180-DAY DEADLINE: September 10, 2005

I. SUMMARY OF CLAIM

The claimant, Ms. Pearl Zerr, seeks compensation in the amount of about \$168,000 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 22-acre property into three parcels for residential use (one 12-acre parcel with the existing dwelling and two five-acre parcels for additional dwellings). The property is located at 5376 West Griffin Creek Road, Medford, 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 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 the claimant's division of the property for residential development: Statewide Planning Goal 4 (Forest Lands), ORS 215.705 to 215.755, 215.780, and applicable provisions of

OAR 660, division 6. These laws will not apply to the claimant only to the extent necessary to allow Ms. Zerr a use of the property permitted at the time she acquired it in 1975. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 21, 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

This claim was submitted to DAS on March 14, 2005, for processing under OAR 125, division 145. The claim identifies the Jackson County “OSD” zone adopted in 1975 as laws that restrict the use of the property and are 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, Ms. Pearl Zerr, acquired the subject property on April 1, 1975 as documented by a Warranty Deed included with the claim. Two current property Tax Statements list Ms. Pearl M. Zerr, “Trustee FBO,” as the current owner of the property.¹ (See Deed and Tax Statement in the department’s claim file.)

Conclusions

The claimant, Ms. Pearl Zerr is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of April 1, 1975.

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 was not submitted on a state claim form but was submitted with a cover letter along with the claim form and supporting information submitted to Jackson County. The letter states that “the property was zoned OSD in 1975 and was “repeatedly ‘down zoned,’ and we were ultimately unable to divide or build on the property under the current zoning.” No specific state laws were cited as the ones that restricted the 22-acre property so that it cannot be divided into three parcels for residential use.

The claim is based, in part, on Jackson County’s current WR (Woodland Resource) zone that implements Statewide Planning Goal 4 (Forest Lands) and the provisions of state law that require such zoning. The claimant’s property is zoned WR as required by Goal 4 in accord with OAR 660, division 6 and ORS 215 because the claimant’s property is “Forest Land” as defined by Goal 4.² Goal 4 became effective on January 25, 1975, and required that Forest Land as defined by the Goal be zoned for forest use.

¹ No information about the nature of the trust or when the property was put into the trust or a copy of the trust was submitted with the claim.

² The claimant’s property is “Forest Land” because it contains NRCS (Natural Resources Conservation Service) soils suitable for forest use (see Soil Survey for Jackson County, Sheet 88, dated August 1993).

The Forest Land administrative rule, OAR 660, division 6, became effective September 1, 1982. ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993) and were implemented by OAR 660-006-0026 and 0027 on March 1, 1994. (See citations to rule history under OAR 660-006-0026 and 0027.) 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. Together, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 0027 establish an 80-acre minimum lot size for the creation of a new parcel in a forest zone and also establish the standards for dwellings in forest zones.

The claimant acquired the subject property on April 1, 1975. At that time the property was zoned Open Space Development-5 (OSD) by Jackson County. Under the OSD-5 zone, new five-acre parcels were permitted and residential use was allowed on all parcels. However, the County's OSD-5 zone that applied to the property at that time was not acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251. The Commission acknowledged the Jackson County Comprehensive Plan and land use regulations as complying with the Statewide Planning Goals on April 22, 1983 (Acknowledgment Order 83-ACK-93 signed May 16, 1983). Since the Commission had not acknowledged Jackson County's comprehensive plan and land use regulations, including the OSD-5 zone, when the claimant acquired the property on April 1, 1975, Statewide Planning Goal 4 applied directly to property on the date of acquisition.³ In 1975, Goal 4, in general, required local land use regulations to "conserve Forest Lands for forest uses." Specifically, Goal 4 only allowed land divisions that would protect commercial Forest Lands for Commercial Forest uses. Dwellings in forest zones can only be allowed if found to be "necessary and accessory" to one of the enumerated forest uses as defined by Goal 4.⁴

Thus, the opportunity to divide the property and to place residential dwelling on the property when the claimants acquired it in 1975 was limited to land divisions and dwellings that were

³ Statewide Planning Goal 3 became effective on January 25, 1975, and was applicable to legislative land use decisions and some quasi-judicial land use decisions where site specific goal provisions applied prior to the Commission's acknowledgment of the County's Goal 3 program on February 9, 1979 (*Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, rev. denied, 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985)). After the County's plan and land use regulations were acknowledged by Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions, (*Byrd v. Stringer*, 295 Or 311, (1983)). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same in substance, the applicable rules must be interpreted and applied by the County in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

⁴ Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for Forest Lands as well as those that were not necessary and accessory to an enumerated forest use, *Lamb v. Lane County*, 7 Or LUBA 137 (1983). Dwellings in Forest Lands were required to be "necessary and accessory" to show that such dwellings comply with the Goal 4 requirement that local land use regulations must "conserve Forest Lands for forest uses *1000 Friends v. LCDC/Curry County*, 301 Or 447 (1986). A dwelling that may "enhance" forest uses is not "necessary and accessory" to a forest use to the extent required by Goal 4, *1000 Friends of Oregon v. LCDC/Lane County*, 305 Or 384 (1988).

consistent with the provisions of Statewide Planning Goal 4 that were in effect in 1975.⁵

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 4 (Forest Lands) and provisions applicable to land zoned for forest use in ORS 215 and OAR 660, division 6 were all enacted after the claimant, Ms. Zerr acquired ownership of the subject property in 1975, and do not allow the division of the property for residential use, thereby restricting the use of the property relative to the uses allowed when the property was acquired by in 1975. In 1975, the property was subject to Statewide Planning Goal 4 (Forest Lands).

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. 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 about \$168,000 as the property's fair market value, in the absence of current regulations. This reduction is based on the claimant's estimate of the market value of small lots in the area (about \$150,000 for a 5-acre lot or about \$450,000 for the 22-acres). The claimant states that Jackson County established the real market value of the subject property at \$282,000. The reduction in fair market value is estimated as follows: \$450,000 minus \$282,000 equals \$168,000.

Conclusions

As explained in Section V.(1) of this report, the current owner is Ms. Pearl Zerr who acquired the property in 1975. Under Ballot Measure 37, Ms. Zerr 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), current state land use laws restrict division of the subject property and development for residential uses.

⁵ For guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective September 1, 1982 and in *Lamb v. Lane County*, 7 Or LUBA 137 (1983), *1000 Friends v. LCDC/Curry County*, 301 Or 447 (1986), and *1000 Friends of Oregon v. LCDC/Lane County*, 305 Or 384 (1988). Another indication of the appropriate standards that applied to the property in 1975 are the land division and dwelling standards in Jackson County's later-acknowledged forest zone (WR-20), acknowledged by the Commission on April 22, 1983 (Acknowledgment Order 83-ACK-93 dated April May 16, 1983).

Without an appraisal which determines the reduction in the fair market value of the subject property that results from the application of the current land use regulations to the property that do not allow the 22-acres to be divided into three parcels for residential use, it is not possible to determine 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 identified state land use regulations that are the basis of this claim include Statewide Planning Goal 4 (Forest Lands), and applicable provisions of ORS 215 and OAR 660, division 6, which Jackson County has implemented through its current WR zone. Except for those provisions of Goal 4 and ORS 215 in effect when the claimant acquired the property in 1975, these identified regulations are not exempt under Section 3(E) of Measure 37.

While not directly raised by the claimant, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. Those provisions include fire protection standards for dwellings and for surrounding Forest Lands. The County's review of these claims notes that the subject property is "within a mapped wildfire hazard area."⁶ Section 3(B) of Measure 37 specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes..." The department finds that siting standards for dwellings in forest zones in ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under subsection (3) of Measure 37.

Conclusions

It is not possible for the department to determine all the laws that 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 statutory, goal and rule restrictions on residential development and use of Forest Land apply to the claimant's use of the property, and except to the extent these laws were enacted before the claimant acquired the property, these laws are not exempt under Section 3(E) of Measure 37.

⁶Jackson County Order No. 329-05 dated July 20, 2005, Exhibit A, p. 2.

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. In addition, the siting requirements of ORS 215.730, Goal 4 and its implementing rules related to dwelling siting standards based on public health and safety are exempt under Section 3(B) and will also continue to apply. 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 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. 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 she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her 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 divide the 22-acres into three parcels for residential use (one 12-acre with the existing dwelling and two five-acre parcels for additional dwellings) because the current laws enacted after the claimant acquired the property prohibit lot sizes with dwellings that small. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by at least \$168,000. However, because the claim does not provide an appraisal or other specific documentation for 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 the claimant to use the subject property for a use permitted at the time she acquired the property on April 1, 1975.

The claimant acquired the subject property on April 1, 1975, when it was subject to Statewide Goal 4 (Forest Lands) and the requirements described in Section V. (2) of this report.

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 current laws to Ms. Zerr's division of the 22-acres into three parcels for residential use: Statewide Planning Goal 4 (Forest Lands), ORS 215.705 to 215.755, 215.780, and applicable provisions of OAR 660, division 6 enacted after April 1, 1975, except for those provisions of ORS 215.730, Goal 4 and its implementing rules relating to dwelling siting standards that are based on public health and safety and are exempt under Section 3(B) of Measure 37. These land use regulations will not apply to Ms. Zerr's use of her property only to the extent necessary to allow the claimant a use permitted at the time she acquired the property on April 1, 1975.
2. The action by the State of Oregon provides the state's authorization to the claimant to use her property subject to the standards in effect on April 1, 1975. On that date, the property was subject to Statewide Goal 4 (Forest Lands) and the requirements described in Section V.(2) of this report..
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 her 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 10, 2005. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' 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.