

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Amended Final Staff Report and Recommendation

August 5, 2005

STATE CLAIM NUMBER: M118914

NAME OF CLAIMANTS: Eugene and Barbara Prete

MAILING ADDRESS: P.O. Box 2148
Sisters, Oregon 97759

IDENTIFICATION OF PROPERTY: 67955 Cloverdale Road
T.15S, R.10E, Section 24, W.M.
Tax Lot 406
Deschutes County

**OTHER CONTACT INFORMATION
FOR CLAIMANTS:** Ross Day
Oregonians in Action Legal Center
P.O. Box 230637
Tigard, Oregon 97223

DATE RECEIVED BY DAS: December 6, 2004

180-DAY DEADLINE: June 4, 2005

I. CLAIM

Eugene and Barbara Prete, the claimants, seek compensation in the amount of \$383,000 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 claimants desire compensation or the right to build a dwelling in conjunction with farm use on the subject property. The property is located at 67955 Cloverdale Road, in Deschutes County, Oregon, near the City of Sisters. (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 the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of certain

state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, specifically ORS 215.284 and Statewide Planning Goal 3 (Agricultural Lands) and OAR 660, Division 33, not apply to the subject property to the extent necessary to allow the Pretes a use of the property permitted at the time they acquired it on October 9, 1990. As a result, the Prete's use of the property will be subject to those specified laws in effect on October 9, 1990. (See the complete recommendation in Section VI. of this report).

III. COMMENTS ON THE CLAIM

Comments Received

On March 4, 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, 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 December 6, 2004 for processing under OAR 125, Division 145. The claim identifies Deschutes County Code Chapters 18.16.040 and 18.16.050, enacted in 1991, as preventing the Pretes from "building a dwelling in conjunction with farm use on their 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

Eugene and Barbara Prete, trustees of the E & B Prete Revocable Trust, acquired ownership of the property on October 9, 1990. (See warranty deed included with claim.) A Deschutes County Tax Assessor Statement for subject property for 2003-2004 lists the Pretes, in their capacity as trustees, as the current owners of the subject property. (See claim.)

The property includes 20 acres of land located at 67955 Cloverdale Road, in Deschutes County near the City of Sisters, and is further identified as parcel 1, tax lot 406 on Deschutes County Assessor’s Map 15-10-24. The property is zoned Exclusive Farm Use-TRB, and is designated Agriculture on the Deschutes County Comprehensive Plan Map. (See Hearing Officer’s Report, 2002 in the department’s claim file.)

Conclusions

The claimants, Eugene and Barbara Prete, are “owners,” as defined by Section 11(C) of Ballot Measure 37, of the subject property, located at 67955 Cloverdale Road, Sisters, Oregon, as trustees of the E & B Revocable Trust. They have had an ownership interest in the property since October 9, 1990.

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 Fact

The claimants state that the current provisions of the Deschutes County Code, County Zoning Ordinance Chapter 18.16 Exclusive Farm Use (EFU) Zones, sub .040--

Limitations on Conditional Uses, and .050--Dwellings in EFU “have prevented them from building a dwelling in conjunction with a farm use on their property, a right they had prior to the adoption of the aforementioned restrictions.” No specific state laws were cited in the Prete’s claim. However, Deschutes County’s EFU zone provisions were adopted to comply with Statewide Planning Goal 3 (Agricultural Lands) and the provisions in OAR 660, Division 33 applicable to farm and non-farm dwellings. These current provisions became effective on August 7, 1993 and March 1, 1994 and implement the statutory standards for farm and nonfarm dwellings in an exclusive farm use zone under ORS 215.283(1)(f) and ORS 215.284. (See citations of administrative rule history for OAR 660, Division 33.)

OAR 660-033-0135(7) requires, for the approval of a dwelling “customarily provided in conjunction with farm use” on high-value farmland, that the owner demonstrate, in part, that the owner’s farm operation produced at least \$80,000 in gross annual income from the sale of farm products in the last two or three of the last five years. Because of the income requirements of OAR 660-033-0135(7), as implemented through the county’s zoning code, the claimants did not apply for a farm dwelling. Instead they applied for a non-farm dwelling, which was denied by Deschutes County on January 24, 2002. (See decision of the Deschutes County Hearings Officer CU-01-79 included in the department’s claim file.)

OAR 660-033-0130(4)(c) implements the statutory standards for the approval of a non-farm dwelling under ORS 215.284 and generally requires that the proposed dwelling (1) not interfere with nearby farm or forest practices, and (2) be situated on a portion of the parcel generally unsuitable for farm use and (3) not alter the land use pattern in the area.

The claimants acquired the subject property on October 9, 1990. The statutory requirements and rules for farm and non-farm dwellings that determined what uses of the claimants’ property were permitted on October 9, 1990 are found in ORS 215.283(1)(f) and ORS 215.283(3) (1989 edition), and OAR 660, Division 5 (1986 Edition, repealed August 7, 1993).

OAR 660-05-030 required that such a dwelling: (1) be located on a parcel which is large enough to satisfy the Goal 3 minimum lot size standard, i.e., “appropriate for the continuation of the existing commercial agricultural enterprise within the area” as explained in OAR 660-05-015, and (2) be situated on a parcel currently employed for farm use as set forth in OAR 660-05-030(4). (See OAR 660-05, 1986 Edition.)¹ Under ORS 215.283(1)(f), a farm dwelling may be allowed on agricultural land only if the farm

¹ The applicable state statutory and rule standards in Deschutes County on the date the claimants acquired the subject property can be found in the County’s acknowledged Exclusive Farm Use Zone which incorporated the applicable provisions of OAR 660, Division 5 (Deschutes County Ordinance # PL-15, Deschutes County Zoning Ordinance, 1979), as amended by Ordinance #87-013, Revising Provisions for Dwellings in Exclusive Farm Use (EFU) Zones (1987). Relevant state statutes remain directly applicable to the use of the property after acknowledgement, and interpretation of the local county code provisions must reflect any statutory requirements not embodied in the local law (see *Kenagy v. Benton County*, 115 OR App 131 (1992)).

use to which the dwelling relates has already been established. This statute was in effect in 1989 and continues in effect today.

Conclusions

The current provisions of ORS 215.284 and OAR 660-033-0135(7) and OAR 660-033-0130(4)(c) were adopted after the claimants acquired the property in 1990, and do not allow claimants to site a farm or nonfarm dwelling on their 20-acre parcel (the objective stated in their claim). It is possible that a dwelling could have been approved under the more general provisions of ORS.215.283(1)(f), ORS 215.283(3) (1989 Edition) and OAR 660, Division 5 (1986 Edition) and the Deschutes County regulations that were in effect on October 9, 1990 when the claimants acquired the property. As a result, there are state laws that may restrict the Pretes' use of their property relative to the uses permitted at the time they acquired the property.

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

According to the claim, the fair market value of the subject property has been reduced by \$383,000 because the claimants cannot qualify for the approval of a farm or non-farm dwelling under ORS 215.283(1)(f) and ORS 215.284, and OAR 660-033-0135(7) and OAR 660-033-0130(4)(c).

No information has been submitted to explain the basis for the estimated reduction in value. Information from the Deschutes County Tax Assessor's web site identifies the 2004 real market value of the property and improvements as \$185,000.

Conclusions

As explained in section V.(1) of this report, the current owners are Eugene and Barbara Prete who acquired the property on October 9, 1990. Under Ballot Measure 37, the Pretes are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value. According to the 2004 tax statement from Deschutes County, the current value of the 20-acre property and the existing improvements is \$185,000.

Without an appraisal based on the value of a residential dwelling or another explanation of the reduction in fair market value, it is not possible to substantiate the amount of reduction in fair market value that has occurred as a result of the laws specified in the claim. Furthermore, without a final determination of what use of the property was permitted on October 9, 1990, the extent to which the use of the property has been restrict

cannot be determined. It is not clear whether the claimants would have qualified for the approval of a dwelling on their property under the standards in effect when they acquired it in 1990. However, OAR 660-033-0135(7) and OAR 660-033-0130(4)(c), as currently implemented by the Deschutes County ordinance, clearly does not allow a dwelling on the subject property, whereas it is possible that a dwelling could be approved under the more general provisions in effect when the Pretes acquired the property. Therefore, based on the submitted information, the department determines that it is more likely than not that there has been some restriction of the use of the property and 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 identifies the County's exclusive farm use zoning as restricting the use of the subject property relative to what would have been allowed in 1990 when the property was acquired. The provisions in the County's zone implement OAR 660, Division 33, and related provisions of state statutes and Goal 3 (Agricultural Land). Some of these laws were enacted after the Pretes acquired the property in 1990. However, ORS 215.283(1)(f) was enacted prior to 1990, as was much of Goal 3. Current state laws that restrict the use of the property that were enacted prior to October 9, 1990 are exempt under section (3)(E) of Measure 37.

Conclusions

Without a specific listing of laws that are the basis for the claim or a description of a specific use of the property, it is impossible for the department to determine what laws may restrict the 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 and goal restrictions on placing a farm dwelling are exempt under section (3)(E) of Measure 37. There may be other specific laws that are exempt and continue to apply under one or more of the exemptions in the Measure or because they are laws that are not covered by the Measure to begin with.

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 conclusion set forth in this report, laws enforced by the Commission or the department restrict the placement of a dwelling on the subject property. These laws more likely than not have reduced the fair market value of the property to some extent. The claim asserts this amount to be \$383,000. However, because the claim does not provide a specific explanation for how the specified restrictions reduce the fair market value of the property from what they could have done under the regulations in place at the time they acquired the property in 1990, a specific amount of compensation cannot be determined. Nevertheless, based on the current record for this claim, the department finds 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 one or more land use regulations to allow the Pretes to use the subject property for a use permitted at the time they acquired the property on October 9, 1990.

Conclusion

Based on the record before the department, the Pretes have established that they are entitled to relief. Therefore, department staff recommends that, in lieu of compensation, the requirements of applicable state laws enacted after October 9, 1990 and enforced by the department, specifically the provisions of OAR 660, Division 33, relating to the division and residential development of agricultural land, not apply to the subject property to the extent necessary to allow the Pretes a use of the property permitted at the time they acquired it. The Pretes will need to apply to Deschutes County for a single-family dwelling pursuant to the dwelling standards in place at the time they acquired the property that is the subject of this claim in order to obtain a final determination of what use of the property is permitted. On October 9, 1990 the property was subject to ORS 215.283(1)(f), ORS 215.283(3) (1989 edition) and OAR 660-05-030 (1986 edition).²

Any use of the property by the claimant remains subject to the following laws: (a) those laws not specified in their claim to the State of Oregon, dated December 6, 2004; (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.

² What these standards would allow is set forth in Subsection 3 of Section 4.040 (EFU-20) of the acknowledged Deschutes County EFU Zone Ordinance No. PL-15, as amended by Ordinance No. 87-013 Section 4, June 10, 1987.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on May 13, 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.