

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

July 6, 2005

STATE CLAIM NUMBER: M119258

NAME OF CLAIMANT: Kim D. Ward, LLC

MAILING ADDRESS: 60801 Brosterhouse Road
Bend, Oregon 97702

IDENTIFICATION OF PROPERTY: Township 18S, Range 12E, Section 16
Tax Lots 601 and 606
City of Bend
Deschutes County

OTHER CONTACT INFORMATION: c/o Donald Joe Willis
Schwabe, Williamson & Wyatt, PC
1211 Southwest Fifth Avenue
Portland, Oregon 97204-3795

OTHER INTERESTS IN PROPERTY: Kim D. Ward Jessica Ward
Sally Ward Justin Ward
Dayna Ward Donna Moore

Burlington Northern Rail
City of Bend
Deschutes County

DATE RECEIVED BY DAS: January 11, 2005

180-DAY DEADLINE: July 11, 2005

I. CLAIM

Donald Joe Willis (Schwabe, Williamson & Wyatt, P.C.), acting on behalf of Kim D. Ward, LLC, the claimant, seeks compensation in the amount of \$2,220,000 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 construct high-density residential development in the City of Bend, Deschutes 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 not valid because neither the Land Conservation and Development Commission (the Commission) nor the department have enforced laws that restrict the claimant's use of private real property. Based on this determination, the department does not make any further evaluation or determination on the merits or substance of the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 9, 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 a 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 January 11, 2005 for processing under OAR 125, division 145. The claim identifies multiple provisions of the following: OAR 660, ORS chapters 92 and 227 as restricting the use of the property. 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 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

A letter from Donald Joe Willis, attorney for the claimant, submitted January 11, 2005, on behalf of Kim D. Ward, LLC, indicates that the parents of Kim D. Ward purchased Tax Lot 601 on October 17, 1950, and purchased Tax Lot 606 on June 10, 1952. Also according to the claim letter, Mr. Ward acquired Tax Lots 601 and 606 from his parents on September 26, 1966, and on April 23, 1968, respectively.

On December 27, 1994, Mr. Ward transferred ownership of both parcels to Kim D. Ward, LLC, pursuant to a Warranty Deed.¹

Kim D. Ward, LLC, continues to hold the subject parcels as the current owner and remains a limited liability company in good standing with the State of Oregon.

Conclusions

Based on the record currently before the department, including a letter from the claimant’s attorney, Donald Joe Willis, and based on information submitted by the City of Bend, Kim D. Ward, LLC, is the current owner of two parcels in Deschutes County described as Tax Lots 601 and 606 of Deschutes County tax map 18S-12E-16. The claimant initially acquired an interest in the parcels on December 27, 1994, and is an “owner,” as that term is defined by Section 11(C) of the Measure. Family members, as that term is defined by Section 11(A) of the Measure, have owned the property since 1950 (Tax Lot 601) and 1952 (Tax Lot 606).

¹ Family members mentioned in the claim letter appear to be members of the limited liability company and are neither owners nor claimants under Measure 37 (Kim Ward, Jessica Ward, Sally Ward, Justin Ward, Dayna Ward, and Donna Moore).

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:

“The Wards’ plan for the property is to partition it into three parcels per year and then either sell the partitioned parcels for construction of high-density residential units and appropriate amenities, or to partition the land and build high density residential units on the partitioned parcels as either condominiums or rental units and sell or hold as rental units.”

The claim then identifies several land use regulations, which are alleged to restrict the use of the parcels. Specifically, the claim cites several sections of OAR 660 (Land Conservation and Development), ORS 92 (Subdivisions and Partitions) and ORS 227 (City Planning) as regulations restricting the use of the subject properties. The claim letter also requests that any additional restricting state regulations not identified in the claim be removed, modified or not applied.

Both of the subject parcels are within the urban growth boundary (UGB) of the City of Bend. According to information provided by the City of Bend, both subject parcels were annexed into the city limits in 1998. The City subsequently applied City zoning on the parcels as follows:

Tax Lot 601 – RS (Urban Standard Residential Zone)

Tax Lot 606 – RL (Urban Low Density Residential Zone)

City zoning and comprehensive planning is required by the department in accordance with OAR 660, Division 15, and the applicable sections of ORS 227. However, while the department requires Oregon cities to maintain specific levels of housing and other urban land use types, and to plan and zone property in a manner that complies with the statewide planning goals, those goals do not apply to the use of real property within a city unless the zoning or planning designation of the property is being amended. There is no evidence in the record of the department that there is a pending plan or zone change concerning this property. Similarly, in general, the provisions of ORS 227 do not restrict the use of real property. The claimant has not identified any manner in which a statute codified in ORS 227 restricts the use of the property.

ORS 92.012 requires partitions to be done in accordance with ORS 92.010 to 92.190. ORS 92.016(2) prohibits the sale of a parcel prior to approval of a tentative plat for the partition. ORS 92.025 prohibits the sale of a parcel until the final plat of the partition has been recorded. ORS 92.040 to 92.046 authorize cities and counties to adopt ordinances containing standards for the

partitioning of property. ORS 92.050 and 92.100 set technical requirements for partition plats. All of these statutes may restrict the division of the claimant's property into legal parcels.

No land use regulations that are administered by the department, with the possible exception of certain provisions of ORS 92, restrict the claimant's use of the real property

Conclusions

With the possible exception of ORS 92, the claim does not identify any laws that apply to the claimant's use of the property that are enforced by the department, nor has the claimant described a use of the property that is restricted by state law. (See the discussion of ORS 92 in section V. (4).) Based on the record currently before the department, as the regulating state agency, neither the Commission nor the department has enforced any laws that restrict the use of claimant's real 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

The claim letter does not include an estimate of current fair market value. The claim also does not include an estimate of the value of the property under a land use proposed by the claimant.

The claim asserts a reduction in value of \$2,220,000. The reduction in fair market value is attributed to the two parcels as follows:

\$1,495,000 reduction in the value of Tax Lot 601.

\$725,000 reduction in the value of Tax Lot 606.

The claim does not include an appraisal, market analysis or other analyses to support the claimant's estimate of reduction in value. It is possible that the property increased in value upon annexation into the Bend city limits in 1998.

Conclusions

As determined in Section V. (2) above, the claimant has not identified any laws enforced by the Commission or the department that have restricted the use of the subject property. Without such identification, it is impossible to determine that any laws enforced by the Commission or the department have had the effect of reducing the fair market value of the property.

4. Exemptions under Section 3 of Measure 37

Under Section 3 of Ballot Measure 37 certain types of laws are exempt from the Measure.

Findings of Fact

Under section 3(e) of Measure 37, the measure does not apply to laws enacted prior to the date of acquisition of the property by the owner or a family member of the owner. The property first was acquired by a family member of the claimant on October 17, 1950 (for Tax Lot 601), and June 10, 1952 (for Tax Lot 606). The prohibition on the sale of a lot until a plat has been approved and recorded was in effect when a family member of the claimant acquired the two properties. As a result, the statutory provisions in ORS 92 containing this requirement are exempt under section 3(E) of the measure. The claimant has not identified how other provisions of ORS 92 restrict the claimant's use of the property.

Conclusions

Provisions in ORS 92 that were adopted prior to the family's acquisition of the property in 1950 and 1952 are exempt under Section 3(E) of Measure 37. Other applicable regulations cited in the claim do not appear on their face to be exempt. There may be other specific laws that continue to apply under one or more exemptions in the Measure, or because they are laws 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 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 allowed at the time the present owner acquired the property. The Commission has by rule 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 that are subject to Measure 37 do not restrict the claimant's use of the private real property in a manner that reduces the fair market value of the property.

Conclusion

Based on the record before the department, the claimant, Kim D. Ward, LLC, has not established that it is entitled to relief under Section 1 of Measure 37. Therefore, this claim is denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on June 17, 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.