

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

July 11, 2005

STATE CLAIM NUMBER: M119332

NAME OF CLAIMANTS: Barbara Fleming
Jo Fleming

MAILING ADDRESS: 2408 East Street
Baker City, Oregon 97814

IDENTIFICATION OF PROPERTY: Township 8S, Range 42E
Tax Lot 3400, Baker County

DATE RECEIVED BY DAS: January 18, 2005

180-DAY DEADLINE: July 17, 2005

I. CLAIM

Jo Fleming and Barbara Fleming, the claimants, seek compensation in an undetermined amount 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 develop two single-family dwellings on their property. (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 laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimants in order to allow them to develop two single-family dwellings on their property, to the extent that this use was permitted as of February 5, 1993 (for Barbara Fleming) and as of August 9, 2004 (for Jo Fleming): OAR 660-033-0135(7). (See Section VI. of this report for the complete recommendation.)

III. COMMENTS ON CLAIM

Comments Received

On March 9, 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, two comments were received in response to the 10-day notice. General comments were received that are not specific to the criteria required under Measure 37 for the department's review of this claim. Because no funds are available to pay compensation, comments regarding the possible impact of the proposed or intended development of the claimants' property are not relevant to the evaluation and determination of the claimants' Ballot Measure 37 claim, and cannot be considered by the department. (See comment letters 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

The claim was submitted to DAS on January 18, 2005, for processing under OAR 125, division 145. The claim does not list specific land use regulations restricting the use of the property. However, in a phone conversation with Department staff, the claimants indicated that they believe land use regulations prevent them from establishing two dwellings on the property.¹ Laws restricting the establishment of dwellings in exclusive farm zones were enacted prior to December 2, 2004, the effective date of Measure 37. Only laws enacted prior to December 2, 2004, are the basis for this claim. (See citations to statutory and rule history in the Oregon Revised Statutes and Administrative Rules.)

¹ Phone conversations between DLCD staff and claimants May 16, 2005 and May 25, 2005 indicate that the claimants intend to continue an existing farm operation but desire to construct two dwellings on the farm parcel in order to facilitate the agricultural operation.

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on laws enacted 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 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

Glenn and Barbara Fleming acquired the subject property by warranty deed on February 4, 1993. (See documents included in the claim file.) Jo Fleming acquired an interest in the subject property on August 9, 2004, pursuant to a Quitclaim Deed conveying the property from Glenn and Barbara Fleming to Barbara Fleming and Jo Fleming. (See documents included in the claim file.)

Conclusions

The claimants, Barbara Fleming and Jo Fleming, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. Barbara Fleming is an owner as of February 4, 1993. Jo Fleming is an owner as of August 9, 2004. Barbara and Glenn Fleming are also “family members” of Jo Fleming, as defined by Section 11(A) 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

Claim materials do not cite specific land use regulations that restrict the use of the property. Conversations with the claimants, however, clarify their desire to establish two single-family dwellings on the 80-acre parcel. The claimants do not seek permission to divide the property.

The property is currently zoned Exclusive Farm Use (EFU) under Baker County’s Comprehensive Plan. The County’s EFU zone establishes criteria for the placement of dwellings on lands reserved for EFU, including a 160-acre minimum parcel size for the establishment of any dwellings. The County’s EFU zone implements OAR 660-033-0130 and 0135 as well as the provisions of ORS 215.283 and ORS 215.700-705.

OAR 660-033-0135 requires for the approval of a dwelling “customarily provided in conjunction with farm use” on non 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.

Barbara Fleming acquired the subject property on February 4, 1993. OAR 660-033-0135 (7) became effective on March 1, 1994, interpreting the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f) (1991 Edition).

It is not clear whether the claimants could have constructed a dwelling on the subject property under the standards in effect when Barbara Fleming acquired it on February 4, 1993. The applicable statutory and administrative rule standards for the approval of a farm dwelling in effect on that date are found in ORS 215.283(1)(f) (1991 edition) and OAR 660, division 5 (1986 edition, repealed August 7, 1993). Specifically, ORS 215.283(1) (f) provided standards for a “dwelling customarily provided in conjunction with farm use.” OAR 660-05-030 further required that such a dwelling: (1) be located on a parcel 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 explained in OAR 660-05-030(4). (See OAR 660, Division 5, 1986 edition.)²

Conclusions

OAR 660-033-0135 (7) clearly does not allow a single family dwelling to be approved on the subject property. It is possible that a dwelling could have been approved under the more general provisions of ORS 215.283(1) (f) and OAR 660, division 5 in effect on February 4, 1993, when Barbara Fleming acquired the subject property. OAR 660-033-0135(7) was in effect on August 9, 2004, when Jo Fleming acquired an interest in the subject 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 law 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

No information has been submitted to explain the basis for asserting a reduction in the fair market value of the property. The claimants indicate that their ability to farm the parcel is

² An indication of the correct application and interpretation of the applicable statutory and rule standards in Baker County on the date the claimants acquired the subject property can be found in the County’s acknowledged EFU Zone, which incorporated the applicable provisions of OAR 660, division 5. Relevant state statutes remain applicable after acknowledgment 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).)

significantly hindered by land use regulations prohibiting them from living on the actively farmed parcel.

Conclusions

As explained under Section V. (2) of this report, 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 Barbara Fleming acquired the property in February 4, 1993. OAR 660-033-0135(7) clearly does not allow a dwelling on the subject property but it is possible that a dwelling could be approved under the more general provisions in effect when the property was acquired in 1993.

No appraisal or other explanation of the reduction in fair market value was provided with the claim. 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 Ballot 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

OAR 660-033-0135(7) pertains to the approval of dwellings customarily provided in conjunction with farm use under ORS 215.283(1)(f). OAR 60-033-0135(7) does not appear to be, either on its face or as applied to the subject property, exempt under Section 3 of Ballot Measure 37. However, ORS 215.283(1)(f) (1991 Edition) was in effect when Barbara Fleming acquired the property in 1993 and, as a result, is exempt under section 3(E) of Measure 37.

Conclusions

OAR 660-033-0135(7) does not appear to be exempt under Section 3 of Ballot Measure ORS 215.283(1)(f) (1991 Edition) is exempt because it was enacted before the claimants or a family member acquired the property. 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.

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 a 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 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 placement of dwellings on the subject property. These laws, more likely than not, have reduced the fair market value of the property to some extent. However, because the claim does not provide a specific explanation for how the specific restrictions reduce the fair market value of the property from what the claimants Barbara Fleming and Jo Fleming could have done under the regulations in place at the time they acquired the property in 1993 and 2004, respectively, 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 claimants to use the subject property for a use permitted at the time they acquired the property on February 4, 1993, for Barbara Fleming, and on August 9, 2004, for Jo Fleming.

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 claimants' use of their property: OAR 660-033-0135(7) to allow claimant Barbara Fleming to develop two residential dwellings on the subject property to the extent that use was permitted at the time she acquired the property on February 4, 1993; and to allow Jo Fleming a use permitted at the time she acquired the property on August 9, 2004.
2. The action by the State of Oregon provides the State's authorization to the claimants to use the property subject to the standards in effect when they acquired the property. Specifically, on February 4, 1993, when claimant Barbara Fleming acquired the property, the property was subject to ORS 215.283(1) (f) (1991 edition) and OAR 660-05-030 (1986 edition). Pursuant to those regulations in effect when she acquired the property, Barbara Fleming is authorized to apply to Baker County for a single-family dwelling pursuant to ORS 215.283(1)(f) (1991 edition) and OAR 660, division 5 (1986 Edition, repealed August 7, 1993) or under the acknowledged Baker County EFU zone (prior to amendment by County Ordinance 1994-011), both applicable to the property on February 4, 1993. On August 9, 2004, when claimant Jo Fleming acquired the property, the property was subject to the goals, statutes and rules, and to the applicable implementing standards currently in place. Therefore, Jo Fleming is authorized to apply to Baker County for a single-family dwelling pursuant to ORS 215.283(1) (f) (2003 edition) and OAR 660, division 5 (2003 Edition) or under the acknowledged Baker County EFU zone (2004 Edition), both applicable to the property on August 9, 2004.

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 215.412 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 remains 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, in order for the claimants to use the Property, it may be necessary for the claimants 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 June 23, 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.