

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

July 21, 2005

STATE CLAIM NUMBER: M119503

NAME OF CLAIMANT: Karen Siechen

MAILING ADDRESS: 70 Hauoli Street # 303
Wailuka, Maui, Hawaii 96763

IDENTIFICATION OF PROPERTY: Township 2N, Range 1W, Section 31
Tax Lot 1800
Multnomah County

OTHER CONTACT INFORMATION: Arthur E. Coyne, Esq.
1300 Southwest Fifth Avenue
Suite 3000
Portland, Oregon 97220

OTHER INTEREST IN PROPERTY: Ron & Jennifer Rich (leasehold interest)

DATE RECEIVED BY DAS: January 28, 2005

180-DAY DEADLINE: July 27, 2005

I. CLAIM

Karen Siechen, the claimant, seeks compensation in the amount of \$268,900 for the reduction in fair market value of property as a result of certain land use regulations that are alleged to restrict her use of the property. The claimant desires compensation or the right to partition the property for sale. The property is 2.25-acres located at 12615 Northwest Skyline Boulevard north of Cornelius Pass Road in Multnomah 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) finds that the claim is valid. The 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 claimant to allow her to partition the property off from the parent 20-acre parcel: the

applicable provisions of OAR 660-004-0040(7)(c). This rule will not apply to the claimant's use of the property only to the extent necessary to allow Ms. Siechen to partition the property permitted at the time she acquired it. (See Section VI. of this report for the complete recommendation.)

III. COMMENTS RECEIVED

On February 23, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS), provided written notice to property owners surrounding the property subject to this claim. According to DAS, two (2) written comments were received in response to the 10-day notice. None of the comments were specific to the criteria required under Measure 37 to be used in the department's review of this claim. (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 the DAS on January 28, 2005, for processing under OAR 125, division 145. 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 was submitted within two years of December 2, 2004, based on laws enacted prior to December 2, 2004, the effective date of Measure 37, 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. Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claim states that Karen Siechen, the claimant, has owned the subject property since 1980, and that a family member had owned the subject property, along with Tax Lot 1900 (16.85 acres) located east of Skyline Boulevard, since 1939.¹ The claim does not include any documentation of the family member’s prior ownership interest.

To substantiate the claim, a copy of the warranty deed was provided showing the subject property, along with Tax Lot 1900, being transferred to the claimant, Karen Siechen, on June 9, 1980 (Multnomah County Deed Records, Book 1446 Page 1850). A preliminary commitment for title insurance report was included in the claim showing, Karen O. Siechen, having vested title to the subject property as of May 28, 2004.

Conclusions

The claimant, Karen Siechen, is the current “owner” of the subject 2.25-acre property as that term is defined by Section 11(C) of Ballot Measure 37.

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 claimant desires to formally partition the subject 2.25-acre property (Tax Lot 1800) off from the 16.85-acre property known as Tax Lot 1900 so that it can be sold. Because of current regulations, it appears that the claimant is unable to sell the subject property as a separate “parcel” as defined in ORS 215.010(1) without first obtaining approval for a land partition from Multnomah County.

¹ According to information included in the claim, the claimant sold Tax Lot 1900 (16.85) acres to Patrick and Mary Hengen in 1993. The claimant was informed by Multnomah County that they would not issue any building permits for the subject 2.25-acres because it was not formally partitioned from Tax Lot 1900.

The property is currently zoned Multiple Use Agricultural (MUA-20), which is a rural residential designation under the Multnomah County Comprehensive Plan. The MUA-20 zone requires a minimum of 20-acres for the creation of a new lot or parcel (Multnomah County West Hills Rural Plan, Zoning Ordinance, Section 33.2855(A)).² The subject property was part of a larger “parent” parcel that is “split-zoned,” and also located on the east side of Skyline Boulevard. The larger parcel is zoned for forest uses under the County’s Commercial Forest Use (CFU-2) zone.

As a result of a 1986 Supreme Court decision, in 2000 the Commission amended Statewide Planning Goal 14 (Urbanization) and adopted OAR 660-004-0040³ which became effective on October 4, 2000. The rule provides that if on October 4, 2000, a county rural residential zone specifies a minimum lot size of two acres or more, the “area of any new lot or parcel shall equal or exceed the minimum lot size which is already in effect” (OAR 660-004-0040(7)(c)). Because the desired partition would result in a 2.25-acre parcel in the County’s rural residential MUA-20 zone, which has a 20-acre minimum parcel size, the County could determine, under the current rules, that the subject property cannot be divided without an exception to Goal 14.

Some relief from this rule provision is available for lots or parcels having “more than one” permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). However, it is uncertain whether relief from this provision is available to the claimant when only one of the dwellings is located on the subject 2.25-acres (Tax Lot 1800, MUA-20). The other dwelling is located on the 16.85-acres located east of the road (Tax Lot 1900, zoned CFU-2), which is under a different ownership, and subject to Goal 4 (Forest Lands) instead of OAR 660-004-0040.

Under the provisions of Goal 14 in effect when the claimant acquired her interest in the subject property, urban uses of land outside of an urban growth boundary were prohibited. The density of rural residential development that has been allowed under Goal 14 varies, and it is not clear whether the division of this property off from the remaining parcel is consistent with Goal 14. Nevertheless, the enactment and enforcement of OAR 660-004-0040(7)(c) likely restricts the claimant’s use of her property relative to what was permitted when she acquired it in 1980.

Conclusions

OAR 660-004-0040 enacted since the claimant acquired the property in 1980 restrict the partitioning of the subject property relative to the partitioning of the land allowed when the claimant acquired the property in 1980. The restriction cited in this claim is based on the way the rule could be interpreted in this case to a developed unit of land that is physically separated by Skyline Boulevard, and is less than the minimum lot size in the County’s zone.

² According to the claim, Multnomah County cannot approve the creation of the 2.25-acre parcel from the 20-acre parent parcel (which includes Tax Lot 1990 - 16.85-acres located east of the road) without a “Lot Exception” and unless shown that “two dwellings lawfully existed on the lot or parcel prior to November 4, 1993.”² According to Multnomah County, because the dwelling on Tax Lot 1900 was built after November 4, 1993, the subject 2.25-acres (Tax Lot 1800) cannot be created by a land partition under the MUA-20 zone.

³ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or App 447 (1986).

This report address 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 a claimant seeks a land division, 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 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 claimant had a “ready, willing and able buyer available to purchase the subject real property” and “the purchasers were prepared to pay the claimant \$268,900 in an arms-length transaction,” but that the claimant is “unable to sell the property unless the County recognizes two legal lots of record, and, therefore, claimant’s present loss is valued at \$268,900.” A copy of the purchase agreement was included in the claim.

Conclusions

As explained in section V. (1) of this report, the current owner is Karen Siechen, who acquired the property on June 9, 1980. OAR 660-004-0040 prevents the property from being divided into lots less than 10 acres. At the time she acquired the property, Ms. Siechan likely could have partitioned the property from the parent parcel. The prohibition on any land division under OAR 660-004-0040(7)(c) likely reduces the fair market value of the property to some desired extent. Thus, under Ballot Measure 37, Ms. Siechen is due compensation for land use regulations that restrict her from dividing the subject property for sale in a manner that reduces its fair market value. The claimant states that the reduction is \$268,900.

Without an appraisal or other substantiating documentation, 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 laws enforced by the Commission or the department.

4. Exemptions under section 3 of Measure 37

Ballot Measure 37 does not apply to certain laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The land use regulation that is the subject of this claim is OAR 660-004-0040, which set forth the requirements for the creation of new lots or parcels in rural residential areas. Goal 14 was in effect when the claimant acquired the property. As a result, it is exempt under Section 3(E) of Measure 37. As a result, that rule is not exempt under Section 3(E) of Measure 37. (See, *DLCD v. Klamath County*, 38 Or LUBA 769 (2000).) The claimant's use of the property will continue to be subject to Goal 14. OAR 660-004-0040, which was adopted in 2000, is not exempt under Section 3 of Ballot Measure 37.

Conclusions

Laws in effect when the claimant acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply. Goal 14 was enacted before the claimant acquired the property, and as a result is exempt from the Measure under Section 3(E). An amendment to Goal 14 in 2000, authorized the Commission to adopt a rule allowing single family residential development on rural lands under specified circumstances. Before that time, Goal 14 had been held to prohibit residential development in areas outside of urban growth boundaries at densities between one and five acres per lot.⁴ There may be other laws that 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.

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. 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 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 record before the department, laws enforced by the Commission or the department restricts the division of the subject property in the manner described in this claim. The laws

⁴ See *DLCD v. Klamath County*, 38 Or LUBA 769 (2000)

enforced by the Commission or the department reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$268,900. Without an appraisal, 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. Because of these regulations, it appears that the claimant is unable to sell the subject property as a separate “parcel” as defined in ORS 215.010(1) without first obtaining approval for a land partition from Multnomah County.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Karen Siechen to divide the subject property as permitted at the time she acquired the property on June 8, 1980.

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 Karen Siechen’s division of the property: the applicable provisions OAR 660-004-0040(7)(c). The rule will not apply to Ms. Siechan’s division of the property only to the extent necessary to allow her a use of the property permitted at the time she acquired it.
2. The action by the State of Oregon provides the state’s authorization to the claimant to divide the property subject to the standards in effect on June 9, 1980. On that date, the property was subject to applicable provisions of Statewide Planning Goal 14, and the MUA-20 zoning, in effect at that time.
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 215.412 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 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 June 29, 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.