

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

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

September 12, 2005

STATE CLAIM NUMBER: M119643

NAMES OF CLAIMANTS: Gavin Pratt
5681 SE Rancho
Hillsboro, Oregon 97123

Jeanette Barnes
13294 SW Westfall Road
Sherwood, Oregon 97140

PROPERTY IDENTIFICATION: Township 3S, Range 1W, Section 16,
Tax Lot 500
Clackamas County

DATE RECEIVED BY DAS: March 22, 2005

180-DAY DEADLINE: September 18, 2005

I. SUMMARY OF CLAIM

The claimants, Gavin Pratt and Jeanette Barnes, seek compensation in the amount of \$750,000 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 divide the 13.92-acre property into three parcels and to construct a single family dwelling on each parcel. The property is located at 13294 SW Westfall Road, near Sherwood, in Clackamas 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 claimants' division and development of the subject property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215.263, 215.284

and 215.780, and OAR 660, division 33, enacted after January 7, 2005. These laws will not apply to Mr. Pratt and Ms. Barnes only to the extent necessary to allow them a use permitted at the time they acquired the subject property on January 7, 2005. The department acknowledges that the relief recommended in this report will not allow the claimants to use the property in the manner requested in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 24, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties.

Written comments have been provided by three (3) parties. All written comments oppose a land division of the subject property. (See comments in the departments claim file.)

The comments do not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law.

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 22, 2005, for processing under OAR 125, division 145. The claim identifies “All ORS and ORA [sic] since 1953” 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 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 claim asserts that the subject property was acquired by claimants’ parents in 1953. However, no documentation has been provided to confirm exactly when the Pratt family took ownership. Information has been provided in the form of a Clackamas County Tax Statement that the property was owned by Beulah R. Pratt as recently as 2004.

For purposes of this review, the department accepts that the subject property was acquired by the Pratt family before state land use laws were adopted. The department also accepts that Beulah R. Pratt was claimant Gavin Pratt’s mother, although this fact is not clearly documented by the claim. The claimants, Gavin Pratt and Jeanette Barnes, acquired the subject property through a Personal Representative’s Deed dated January 7, 2005, and filed with the Clackamas County Clerk’s Office on January 13, 2005. (See the department’s claim file.) Because no information has been provided to the department regarding the date of Beulah Pratt’s death, the department considers the date of Personal Representative’s deed as the date the claimants acquired the property.

Conclusions

Beulah R. Pratt, a “family member” of the claimants, acquired an interest in the property in or around 1953, prior to adoption of state land use planning laws. The property has evidently remained in family ownership since that date. From the information provided in the claim, the claimants, Gavin Pratt and Jeanette Barnes, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of January 7, 2005.

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 is based on Clackamas County's current Exclusive Farm Use (EFU) Zone and the limits the zone places on the subject property. The claimants' property is zoned EFU as required by Statewide Planning Goal 3 in accord with OAR 660, division 33, and ORS 215 because the claimants' property is "Agricultural Land" as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.213, 215.263, and 215.780, and OAR 660, division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80-acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (1993 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and implements the statutory standard for a primary dwelling in an EFU zone under ORS 215.283.

OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. Subsequent amendments to comply with HB 3326 (Chapter 704, Oregon Laws 2001, and effective January 1, 2002) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

When the claimants' family first acquired the property in or around 1953, Statewide Planning Goal 3, the statutory requirements in ORS 215 and the administrative rules were not in effect.

Conclusions

Minimum lot size and dwelling standards established under the applicable provisions of Statewide Planning Goal 3, OAR 660, division 33, and ORS 215, were adopted after the claimants' family acquired the property. These laws restrict the use of the property from what could have been done when the property was acquired by the claimants' family.

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 claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and that may continue to apply to the claimants' 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 claimants seek 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 \$750,000, as the reduction in fair market value as a result of regulations imposed after the claimants’ family acquired the property. This amount appears to be based on the claimants’ conversation with a realtor. No appraisal or other documentation has been included to substantiate this claim.

Conclusions

As explained in Section V. (1) of this report, the claimants, Gavin Pratt and Jeanette Barnes, are the current owners of the subject property, as of January 7, 2005. Based on limited information, family members acquired the property in or around 1953. Under Ballot Measure 37, Gavin Pratt and Jeanette Barnes are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value.

Without a certified appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. 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.

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 is based on Clackamas County’s EFU zone and the related provisions of state law that have restricted use of the property and reduced its fair market value since the claimants’ family acquired the property in or around 1953. These are Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33. All of the specific state land use regulations on which the claim is based were enacted after the claimants’ family acquired the property, and restrict the use of the property in a manner that likely reduces its fair market value. None of the laws identified in the claim are exempt under Section 3(E) of Ballot Measure 37.

Conclusions

It appears that the general statutory, goal and rule restrictions on dividing the subject property and developing it for residential purposes apply to the claimants' use of the property and that none of these laws were in effect before the claimants' family acquired the property. As a result, these laws are not exempt under Section 3(E) of Measure 37. Laws in effect when the claimants' family acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the property.

There may be laws that continue to apply to the claimants' 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 claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, 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 claimants have 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 claimants 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 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 owners to carry out a use of the property permitted at the time the current owners 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 and development of the subject property. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$750,000. However, because the claim does not provide an appraisal or other substantiating 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 Mr. Pratt and Ms. Barnes to use the subject property for a use permitted at the time they acquired the property on January 7, 2005.

At the time the claimants acquired an interest in the property it was zoned EFU by Clackamas County and subject to the current lot size and dwelling standards in ORS 215 and OAR 660, division 33, as required by Statewide Planning Goal 3, and as described above 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 laws to the claimants' division and development of the subject property: applicable provisions of Statewide Planning Goal 3, ORS 215.263, 215.284 and 215.780, and OAR 660, division 33, enacted after January 7, 2005. The department acknowledges that the recommendation in this report will not allow Mr. Pratt and Ms. Barnes to use the property in the manner set forth in the claim.
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 the claimants acquired the subject property on January 7, 2005. At that time, the property was subject to applicable provisions of Statewide Planning Goal 3, ORS 215, and ORS 660, division 33 currently in effect.
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 215.402 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 claimants 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 claimants to use the property, it may be necessary for them to obtain a decision under Measure 37 from a city and/or county and/or metropolitan service district that enforce 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 August 23, 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.