

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

August 5, 2005

STATE CLAIM NUMBER: M119787

NAME OF CLAIMANT: Kathleen Mulqueeney

MAILING ADDRESS: 3525 SW 123rd
Beaverton, Oregon 97005

IDENTIFICATION OF PROPERTY: Township 4S, Range 1E, Section 34
Tax Lot 200
Clackamas County

DATE RECEIVED BY DAS: February 15, 2005

180-DAY DEADLINE: August 14, 2005

I. CLAIM

Kathleen Mulqueeney, the claimant, seeks compensation 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 seeks compensation or the right to develop one single family dwelling on her property, located 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, and subject to the claimant providing confirmation of ownership and reduction in value, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to Ms. Mulqueeney's establishment of a single family dwelling on the property: OAR 660-033-0135(7). This law will not apply to the claimant's use of the property only to the extent necessary to allow Ms. Mulqueeney a use of the property permitted at the time she acquired it on October 9, 1991. (See Section VI. of this report for the complete recommendation.)

III. COMMENTS ON CLAIM

Comments Received

On March 15, 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, there were no written comments, evidence or information 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 February 15, 2005 for processing under OAR 125, division 145. The claim identifies OAR 660-033-0135 as the basis of 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 to statutory and rule history in the Oregon Revised Statutes and Administrative Rules.)

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 lands 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

Kathleen Mulqueeny acquired the subject property on October 9, 1991, which is reflected in a Warranty Deed submitted by the Claimant. Clackamas County planning staff has stated that the county assessor's office has a recorded deed dated October 23, 1991. The Clackamas County Assessor's office confirmed by phone that Ms. Mulqueeny is the current owner of the subject property, according to their files.

Conclusions

The claimant, Kathleen Mulqueeny is the "owner" of the subject property as of October 9, 1991, as that term is defined by Section 11 (C) 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

The claim states that OAR 660-033-0135, Dwellings in Conjunction with Farm Use, restricts the use of her property. 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. OAR 660-033-0135(7) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an exclusive farm use zone under ORS 215.283(1)(f).¹

It is not clear, however, whether the claimant could have constructed a dwelling on the subject property under the standards in effect when she acquired it on October 9, 1991. 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) 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.)

¹ Under ORS 197.646 (chapter 612, Section 7, Oregon Laws 1991), OAR 660-033-0135(7) was applicable to the claimant's property following its adoption. However, as required under ORS 197.646, the County amended its comprehensive plan and land use regulations to implement OAR 660-033-0135(7). Following the County's implementation of OAR 660-033-0135(7), the state rule was no longer directly applicable to county decisions made consistent with its ordinance.

Conclusions

OAR 660-033-0135(7) clearly does not allow a single family dwelling to be approved on the subject property, whereas, 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 October 9, 1991, when the claimant acquired the subject property. Thus, it is likely that laws enforced by the Commission or the department restrict the use of the property relative to the uses allowed in 1991 when the claimant 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 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

The claimant has not identified a specific amount of compensation due for the reduction in fair market value as a result of land use laws that have restricted the use of the subject property. Claimant indicates offers for her property in recent years in excess of \$20,000. She contacted a realtor who indicated a greater value if a dwelling were on subject property.

Conclusions

As explained in section V. (1) of this report, Kathleen Mulqueeny is the current owner of the subject property. Thus, under Ballot Measure 37, Ms. Mulqueeny is due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value. The claimant has provided some information on the reduction in fair market value as a result of land use laws that restrict the partition of their property for use as a home site. Nevertheless, based on the findings and conclusions in section V.(2) of this report, it is more likely than not that laws adopted since the claimant acquired the property in 1991, restrict establishment of a dwelling. Since the claimant has provided some evidence of a reduction in value, it appears 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

The claim is based on OAR 660-033-0135(7), which regulates the approval of dwellings customarily provided in conjunction with farm use under ORS 215.283(1)(f). It does not appear

that OAR 660-033-0135(7) is exempt under Section 3 of Ballot Measure 37. However, ORS 215.283(1)(f) and was in effect when the claimant acquired the property, as were the requirements of OAR 660 Division 5, which implemented that statute in 1991. Laws in effect when the claimant acquired the property are exempt under Section 3(E) of Ballot Measure 37.

Conclusions

OAR 660-033-0135(7) does not appear to be exempt under Section 3 of Ballot Measure 37. Laws in effect in 1991 when the claimant acquired the property, including ORS 215.283 and the provisions of OAR 660, Division 5 then in effect, are exempt, and will continue to apply to the claimant's use of 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 a dwelling on the subject property. These appear to reduce the fair market value of the property to some extent. The claimant has provided some evidence of a reduction in value caused by these restrictions and it is more likely than not that they 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 Ms. Mulqueeny to use the subject property for a use permitted at the time she acquired the property on October 23, 1991, provided that she provides documentation verifying the date she acquired the subject property.

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 allow Kathleen Mulqueeny to establish a dwelling on her property: OAR 660-33-

0135(7). This law will not apply to the subject property only to the extent necessary to allow the claimant a use permitted at the time she acquired the property, on October 9, 1991.

2. The action by the State of Oregon provides the State's authorization to allow the claimant to use the property subject to the standards in effect on October 9, 1991. On that date, the property was subject to the provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, Division 5. These include the requirement that any dwelling be "customarily provided in conjunction with farm use."

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 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 with out limitation, those laws exempted under section (3) of this 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 them 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 July 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.