

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

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

August 11, 2005

STATE CLAIM NUMBER: M119867

NAME OF CLAIMANTS: Emily and Bruce Bergey

MAILING ADDRESS: 7700 Southwest River Road
Hillsboro, Oregon 97123

PROPERTY IDENTIFICATION: Township 1S, Range 2W, Section 15
Tax Lot 1508
Washington County

DATE RECEIVED BY DAS: February 22, 2005

180-DAY DEADLINE: August 21, 2005

I. CLAIM

Emily and Bruce Bergey, the claimants, seek compensation in the amount of \$250,000 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 develop one single family dwelling on their 4.81-acre property. The property is identified as Township 1S, Range 2W, Section 15, Tax Lot 1508 in Washington 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 Bergey's establishment of a dwelling on their property: the applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660 division 33 that took effect after the date the current owners, Emily and Bruce Bergey, acquired the property on June 28, 2001. These state laws will not apply to the subject property only to the extent necessary to allow the claimants' a use of the property permitted at the time they acquired it on June 28, 2001. The department acknowledges that the relief recommended in this order will not allow that claimants to use the property in the manner they describe in their claim. (See Section VI. of this report for the complete recommendation.)

III. COMMENTS ON CLAIM

Comments Received

On March 16, 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 22, 2005 for processing under OAR 125, division 145. The claim lists land use regulations, specifically OAR 660 division 33, that restrict the use of the property 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

The subject property, also known as Lot 11 of Madison Acres, contains 4.81 acres. Emily and Bruce Bergey acquired the subject property on June 28, 2001, from Bill Bergey (see recorded Washington County document, number 2001063389, in the department claim file). Bill Bergey is a “family member” (as that term is defined under Measure 37) of the claimants.

The Bergeys’ claim identifies a family acquisition date for the subject property as October 1984. However, according to the chain of title document from the Washington County’s Assessor’s Office, family ownership began in 1986. On February 18, 1986, Bill Bergey acquired ownership of subject property by assignment of contract from Thunder Development, Inc. (Washington County record # 86-5403).

Conclusions

The claimants, Emily and Bruce Bergey are “owners” of the subject property as of June 28, 2001, as that term is defined by Section 11 (C) of Ballot Measure 37, with family ownership beginning in 1986.

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, division 33, and the \$80,000 farm, income requirement “removed the approval to build a farm dwelling.” 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 owners’ 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(6) also applies to farm dwellings in counties that have adopted marginal lands under ORS 197.247 (1991 Edition), which includes Washington County.

OAR 660-033-0135 (6) and (7) became effective on March 1, 1994, and implement the statutory standard for a primary farm dwelling in an Exclusive Farm Use zone under ORS 215.283(1)(f). The claimants’ applied for a farm dwelling under OAR 660-033-0135(7) in 1995. Washington County indicated that LCDC rules the \$80,000 gross farm income requirement applied the subject property.

The claimants’ family acquired the subject property on February 18, 1986. The applicable statutory and administrative rule standards for the approval of a farm dwelling in effect on that date are found in ORS 215.213(1) and OAR 660, division 5 (1986 edition, repealed August 7, 1993). Specifically, ORS 215.213 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).¹

Conclusions

OAR 660-033-0135(6) and (7) and provisions of ORS 215.213 were all adopted after the property was acquired by the claimant’s family in 1986 and do not allow a single family dwelling to be approved on the subject property.

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 a claimant seeks 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 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

According to the claimants, the fair market value of their property has been reduced by \$250,000 because they cannot qualify for the approval of a dwelling under OAR 660-033-0135(6) and (7). An appraisal was submitted, estimating the “as is” value of the property at \$249,000. The assessed real market value of the property is \$4,160 according to the Washington County 2005 Tax Statement for subject property.

Conclusions

As explained in section V.(1) of this report, Emily and Bruce Bergey became the current owners of the subject property as of June 28, 2001. Family ownership dates to 1986. Thus, under Ballot Measure 37, the Bergeys are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in section V.(2) of this report, laws adopted since the claimant acquired the property restrict placement of a dwelling on the subject property. The claim asserts the reduction in value

¹ *Mateo v. Polk County*, 11 Or LUBA 259, 263 (1984) *affirmed without opinion*, 70 Or App 179 (September 14, 1984) and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 98 Or App 33, (November 23, 1988).

due to the restriction to be \$250,000. However, based on the information currently in the claim, it is not possible to substantiate the specific dollar amount the claimants demand 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 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

Neither OAR 660-033-0135 nor ORS 215.213 appear to be exempt under subsection 3(E) of Ballot 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 claimants' use of the property. Many provisions of ORS 215 were adopted prior to 1986, and so will continue to apply to the property. There may be other laws that 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 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.

Conclusions

OAR 660-033-0135 is not exempt under subsection 3(E) of Ballot 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 claimant should be aware that the less information he has 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 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 laws more likely than not have reduced the fair market value of the property to some extent. The claim asserts this amount to be \$250,000 and includes an appraisal based on comparable properties. 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, relative to the date of family ownership in 1986.

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 June 28, 2001.

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 Emily and Bruce Bergey to allow them to apply to Washington County for approval of a dwelling on the property: the applicable provisions of ORS 215, Statewide Planning Goal 3 (Agricultural Lands), and OAR 660, division 33, that took effect after the date the claimants acquired the property, on June 28, 2001. These laws will not apply to the claimants' use of the property only to the extent necessary to allow them a use of the property permitted at the time they acquired it on June 28, 2001. The department acknowledges that the relief recommended in this report will not allow the Bergeys to use the property as 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 on June 28, 2001. On that date, the property was subject to the provisions of ORS 215 that were then in effect, Statewide Planning Goal 3, and the standards for farm and non-farm dwellings in effect on that date, specifically, the standards in OAR 660 division 33.
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 227.1 60, 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 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 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 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 July 25, 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.