

**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: M120236

NAME OF CLAIMANT: Barbara A. Olson

MAILING ADDRESS: 35524 Zephyr Way
Pleasant Hill, Oregon 97455

OTHER CONTACT INFORMATION: Edward P. Fitch, Attorney at law
Bryant, Emerson and Fitch
888 W. Evergreen Avenue
Redmond, Oregon 97756-1013

PROPERTY IDENTIFICATION: Township 15S, Range 11E, Section 18
Tax Lots 700 and 800
Deschutes County

DATE RECEIVED BY DAS: March 21, 2005

180-DAY DEADLINE: September 17, 2005

I. SUMMARY OF THE CLAIM

The claimant, Barbara Olson, seeks compensation in the amount of \$7,000,000 for a 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 desires compensation or the right to divide her property containing approximately 172.18-acres into 30, five-acre lots and develop a dwelling on each lot. The property is located at 17442 Jordan Road and 68246 Cloverdale Road, east of the City of Sisters, in Deschutes 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 Barbara Olson's division of the property for residential development: applicable

provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow Ms. Olson a use of the property permitted at the time she acquired it in 2002. The department acknowledges that the relief recommended in this report will not allow Ms. Olson to use the property in the manner set forth in this claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 2, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, four written comments, evidence or information were received in response to the 10-day notice.

The comments are relevant to whether a state law restricts the claimant's use of the property, whether the restriction of the claimant's use of the property reduces the fair market value of the property, and whether the law(s) that are the basis for the claim are exempt under Section 3 of Measure 37. The comments have been considered by the department in preparing this report.

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 21, 2005, for processing under OAR 125, division 145. The claim identifies "all regulations and ordinances restricting ability of claimant to subdivide property" as the laws that restrict the use of the property as the basis for 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 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 claimant, Barbara Olson, is the present owner of the subject property. She acquired the subject property on October 18, 2002, by Deed from the successor trustees of the Cyrus Loving Trust. Prior to that time, the property was owned by the successor trustees of the Cyrus Loving Trust, for the benefit of the trust. Ms. Olson was one of the successor trustees, and owned a share of the trust assets in her individual capacity, but did not own an interest in the subject property in her individual capacity.

The Cyrus Loving Trust acquired the property on May 21, 1991, when Willard H. Cyrus and Florence Mae Cyrus¹ established the trust and conveyed the subject property to themselves as trustees of the trust by Deed. Willard and Mae Cyrus acquired an interest in the property by Deed on January 26, 1968, from Melvin and Inez Cyrus, who acquired ownership by Deed on March 19, 1960.²

A February 15, 2005 preliminary Title Report and Deschutes County Assessor records substantiate that Barbara Olson is the current owner of the property.³

Conclusions

The claimant, Barbara Olson, is an “owner” of the subject property, as that term is defined by Subsection 11(C) of Ballot Measure 37. Barbara Olson became the owner on as of October 18, 2002. The claimant’s family members acquired ownership on January 26, 1968 by Bargain and Sale deed from Melvin and Inez Cyrus to Willard and Mae Cyrus. Willard and Mae Cyrus, and

¹ Also known as Mae Cyrus and F. Mae Cyrus.

² On July 13, 2005, department staff asked claimant’s lawyers by letter to explain the relationships of the various people whose names appear on Deeds submitted with the claim. The department received a response on August 9, 2005. The response states that Barbara Olson is the daughter of William and Mae Cyrus, but does not identify whether Melvin and Inez Cyrus are family members of the claimant. As a result, this report does not treat Melvin and Inez Cyrus as family members of the claimant.

³ See copies of documents in the department’s claim file.

the Cyrus Loving Trust are “family members” of the current owner as that term is defined in Subsection 11(A) of Ballot Measure 37 because the individuals are claimant, Barbara Olson’s, parents, and the Cyrus Loving Trust is a legal entity owned by one or a combination of these family members.

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 very generally cites “all regulations and ordinances restricting ability of claimant to subdivide property.”

Based on information in a corresponding claim filed with Deschutes County, the claim is based, in part, on Deschutes County’s current Exclusive Farm Use (EFU) zone, Sisters/Cloverdale (SC) sub-zone, and the applicable provisions of state law that require such zoning. The claimant’s property is zoned EFU as required by Statewide Planning Goal 3 in accordance with OAR 660, division 33 and ORS 215 because the claimant’s property is “Agricultural Land” as defined by Goal 3.⁴ Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal are zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660, division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels smaller than 80-acres, and establish standards for allowing the existing or any proposed parcel(s) 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 (2003 edition) established 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 interpreted the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). 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, 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.)

⁴ The claimant’s property contains predominantly Class II-VI soils. See Soil Survey of Upper Deschutes River Area, Oregon, USDA NRCS, 2002, Sheet #63 and Table V.

The claimant acquired the subject property on October 18, 2002. At that time, the property was subject to the current zoning, Deschutes County's EFU-SC, as well as Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) (OAR 660-015-0000(3)) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted after claimant Barbara Olson's family acquired ownership of the subject property in 1968 and do not allow the division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by Barbara Olson's family in 1968. In 1968, the property was not subject to any County zoning.

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. 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 the 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 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 estimate of \$7,000,000 as the reduction in fair market value due to current regulations. The claim does not include an estimate of the current fair market value with land use restrictions, nor does it include the value of the property without those restrictions.⁵ There is no appraisal or other specific explanation to substantiate the amount demanded for compensation.⁶

⁵ Deschutes County Assessor records show real market values of \$186,160 for tax lot 700 (102.98-acres, with a manufactured home) and \$136,260 for tax lot 800 (69.20-acres, with a dwelling built in 1900), for a total value of \$322,420 with current land use regulations.

⁶ On July 13, 2005, department staff requested additional information on valuation from claimant's lawyer by letter. No response has been received to date.

Conclusions

As explained in Section V. (1) of this report, the current owner is Barbara Olson, who acquired the property on October 18, 2002, and Barbara Olson's family members acquired the property in 1968. Under Ballot Measure 37, Ms. Olson is due compensation for land use regulations 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, land use laws adopted since Barbara Olson's family members acquired the subject property in 1968, restrict her ability to divide the property for residential development.

Without an appraisal or other explanation based on both the current value of the property and the value of the property divided into five-acre lots, 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 enforced by the Commission or the department.

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 contains a general reference to any state land use regulations that restrict the use of the property relative to what would have been allowed in 1968 when the property was acquired by Barbara Olson's family members. These provisions include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Deschutes County has implemented through its EFU zone. None of these laws appear to be exempt under Subsection 3(E) of Ballot Measure 37.

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that the general statutory, goal and rule restrictions on division, residential development, and use of farm land apply to the claimant's use of the property, and for the most part these laws are not exempt under Subsection 3(E) of Measure 37.

Laws in effect when the claimant's family acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimant's use of 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 the 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.

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. The claimant should be aware that the less information she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her 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 owner to carry out a use of the property permitted at the time the current 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 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 of the subject property into parcels or lots, and the use of the property for residential purposes. The claimant cannot create the desired five-acre lots out of the subject property, or develop those lots for residential use, because laws enacted after the claimant acquired the property prohibit lot sizes that small. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$7,000,000. However, because the claim does not provide an appraisal or other specific explanation 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 Barbara Olson to use the subject property for a use permitted at the time she acquired the property on October 18, 2002. The laws in effect on that date include applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33. Laws adopted since 2002, do not restrict the use of the subject property since Ms. Olson acquired it in October 2002.

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 Barbara Olson's division of the 172.18-acre property into approximately 30, five-acre lots or to the establishment of a dwelling on each lot or parcel created: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, enacted after October 18, 2002. These land use regulations will not apply to Barbara Olson's use of her property only to the extent necessary to allow the claimant a use permitted at the time she acquired the property on October 18, 2002. The department acknowledges that the relief recommended by this report will not allow the claimant 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 claimant to use her property subject to the standards in effect on October 18, 2002. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33 then 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 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 215.402 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 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 Deschutes County or other jurisdiction 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 Deschutes County or other 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 August 122 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.