

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

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

September 15, 2005

STATE CLAIM NUMBER: M120291

NAME OF CLAIMANT: Julie A. Bolkan

MAILING ADDRESS: 4525 Camellia Street
Eugene, Oregon 97478

PROPERTY IDENTIFICATION: Township 3S, Range 2E, Section 13A
Tax Lot 00100
Clackamas County

OTHER CONTACT INFORMATION: Duff Main
1630 Beaver Creek Road, Suite H
Oregon City, Oregon 97045

DATE RECEIVED BY DAS: March 24, 2005

180-DAY DEADLINE: September 11, 2005

I. SUMMARY OF CLAIM

The claimant, Julie Bolkan, seeks compensation in the amount of \$1,052,200 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 desires compensation or the right to subdivide the 26.9-acre property into 13 approximately one- to two-acre parcels and to develop a dwelling on each parcel. The property is located at the intersection of Henrici Road and Bogynski Road 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 Ms. Bolkan's division of the 26.9-acre property into 13 approximately one- to two-acre parcels: Statewide Planning Goals 4 (Forest Lands) and 14 (Urbanization), ORS 215, and applicable provisions of OAR 660, division 6. These laws will not apply to the claimant only to the extent necessary to allow Ms. Bolkan a use of the property permitted at the time she acquired it in 1966. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On April 11, 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 were received in response to the 10-day notice.

The comments are relevant to 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 24, 2005, for processing under OAR 125, division 145. The claim cites ORS 215.705 and 215.780(1)(c) and OAR 660-006-0026(1)(a) and -0027(1) as laws that restrict the use of the property and are the basis of this 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, Julie Bolkan, acquired the subject property on April 30, 1966, as reflected by a warranty deed included with the claim. A Clackamas County Tax Statement for tax year 2004-2005 indicates that Julie Bolkan is a current owner of the property.

Conclusions

The claimant, Julie Bolkan, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of April 30, 1966.

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 cites to ORS 215.705 and 215.780(1)(c) and OAR 660-006-0026(1)(a) and -0027(1), as the state laws that have restricted the property so that it cannot be subdivided into one- to two-acre lots.

The claimant’s property currently is a mixed agricultural and forest (AG/F) zone adopted to comply with Statewide Goal 4 (Forest Lands) and the implementing provisions of OAR 660-006-0050 (effective February 5, 1990) and subsequently amended on March 1, 1994, to comply with the provisions of HB 3661 (Chapter 792, Or Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Statewide Goals 3 and 4 are allowed except that either the Goal 3 or 4 dwelling approval standards are applicable based on the predominant use of the tract on January 1, 1993. No information was provided to the department regarding the predominant use of the property on January 1, 1993. Depending on the predominant use on January 1, 1993, the property is currently subject to either the requirements for dwellings applicable under exclusive farm use zoning required by Statewide Goal 3 and OAR 660, division 33, or forest zone provisions required by Statewide Goal 4 and OAR 660, division 6. This includes the dwelling standards asserted by the claimant as restricting the use of the property.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the 80-acre minimum lot size specified in ORS 215.780. Under OAR 660-006-055, the claimant's property cannot be divided into parcels smaller than 80 acres as may have been possible under the county zones applied in 1966.

Statewide Planning Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses and also became effective on January 25, 1975.

At the time the claimant acquired the subject property in 1966, it was not zoned. The first zoning district applied to the property was Rural (Agricultural) Single Family Residential (RA-1) as of December 14, 1967. The property was rezoned to Transitional Timber (TT-20) on June 19, 1980. On August 25, 1994, the property was rezoned to its current AG/F zoning to meet the requirements of HB 3661 (2003).

Conclusions

The current provisions applicable to lands zoned AG/F under ORS 215 and OAR 660 division 6, relating to land divisions and dwelling standards adopted since the claimant acquired the property on April 30, 1966, restrict the use of the property relative to uses allowed when the claimant acquired the property. Under these current provisions, the claimant is restricted from further dividing or developing her property as she could have when she acquired it.

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 informal estimate of \$1,052,200 as the reduction in the property's fair market value as a result of restrictions imposed since she acquired the property. This amount is based on the claimant's estimate of the market value of one- to two-acre lots in the area, less cost of development. The claim includes a letter from a real estate company indicating that the estimated value of the property subject to current regulation is \$279,000 and that the estimated value without the current regulations would be \$1,311,200.

Conclusions

As explained in Section V.(1) of this report, the current owner is Julie Bolkan, who acquired the property on April 30, 1966. Under Ballot Measure 37, Julie Bolkan 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, laws adopted since the claimant acquired the property restrict division of the subject property and residential development on each new lot. The claimant estimates the reduction in value due to the restrictions to be \$1,052,200.

Without an appraisal based on the value of one- to two-acre lots or other 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 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 cites state land use regulations that restrict the use of the property relative to what would have been allowed in 1966 when the claimant acquired the property. These provisions include Statewide Planning Goals 4 (Forest Lands) and 14 (Urbanization), and applicable provisions of ORS 215 and OAR 660, division 6, which Clackamas County has implemented through its AG/F zone. None of these laws appear to be exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimant acquired the property.

Comments received in response to the DAS notice (see also Section III of this report) included references to the steepness of the subject property and county regulation of development on steep slopes. Such regulations may be exempt under Section 3(B) of Measure 37 to the extent they address public health and safety. A commenter also addressed salmon habitat protection regarding area streams. Salmon habitat protection is administered by the federal government in response to the Endangered Species Act (ESA) and if there are any such regulations applicable to the subject property, they may be exempt under Section 3(C) of Measure 37 because the ESA is a federal law.

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 appears that the general statutory, goal and rule restrictions on residential development and use of forestland apply to the claimant's use of the property, and in general none of these laws are exempt under Section 3(E) of Measure 37. Regulations that are required to comply with federal law and regulations for the protection of public health and safety are exempt under Sections 3(B) and (C).

Laws in effect when the claimant acquired the property are exempt under Section 3(E) of Measure 37, and will also 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 26.9-acre property into one- to two-acre parcels and the development of dwellings on those parcels. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$1,052,200. 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 Ms. Bolkan to use the subject property for a use permitted at the time she acquired it on April 30, 1966.

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 Julie Bolkan's division and development of the subject 26.9-acre property: applicable provisions of Statewide Planning Goals 3, 4, and 14, ORS 215, and OAR 660, divisions 6 and 33 enacted after October 12, 1965. These land use regulations will not apply to Ms. Bolkan's use of her property only to the extent necessary to allow the claimant a use permitted at the time she acquired the property April 30, 1966.
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 April 30, 1966.
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 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 August 30, 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.