

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

September 26, 2005

STATE CLAIM NUMBER: M120481

NAME OF CLAIMANT: Manuela Bonnet, as trustee under the
Bonnet Living Trust (dated April 13, 1995)

MAILING ADDRESS: 34325 SW Firdale Road
Cornelius, Oregon 97113

PROPERTY IDENTIFICATION: Township 1S, Range 3E, Section 34
Tax Lot 502
Washington County

OTHER CONTACT INFORMATION: Thomas Sherwood, Esq.
12402 SW Chadler Drive
Tigard, Oregon 97224

DATE RECEIVED BY DAS: April 6, 2005

180-DAY DEADLINE: October 3, 2005

I. CLAIM

The claimant, Manuela Bonnet, as trustee under the Bonnet Living Trust (dated April 13, 1995) (hereafter, Manuela Bonnet), seeks compensation in the amount of \$145,000 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 claimant desires compensation or the right to divide the five-acre property in two parcels for residential use. The five-acre property is located at 34325 Firdale Road, near Cornelius, 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 and 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 Manuela Bonnet to allow her to divide her property into two parcels and to develop an additional dwelling: applicable provisions of Statewide Planning Goals 3 (Agricultural

Lands) and 14 (Urbanization), ORS 215.213, 215.263, 215.700 to 215.710, and 215.780 and OAR 660, division 33 enacted after February 2, 1973. These laws will not apply to the claimant's use of the property to the extent necessary to allow Manuela Bonnet a use of the subject property permitted at the time she acquired the property on February 2, 1973. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 12, 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, one written comment was received in response to the 10-day notice. The comment does not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. The comment simply requests not to be notified again. (See comment letter in the department's claim file.)

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 April 6, 2005, for processing under OAR 125, division 145. The claim identifies state provisions for Exclusive Farm Use (EFU) Zoning and the county's 1962 zoning code 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 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 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, Manuela Bonnet, acquired an interest in the subject property as Manuela Taylor together with James A. Taylor, Jr. on February 2, 1973, by land sales contract. A copy of a Title Report for the subject property dated January 26, 2005, is in the department’s claim file and confirms that Ms. Bonnet is the current owner of the subject property. Manuela Bonnet acquired full title to the property on May 11, 1992 through dissolution of marriage.¹ A deed transferring ownership to the Bonnet Living Trust, a revocable living trust, established by the claimant, on April 13, 1995, also is included in the claim file. Transfer of the subject property into a revocable living trust does not constitute a change in ownership for purposes of reviewing this Measure 37 claim.

Conclusions

The claimant, Manuela Bonnet, is a current “owner” of the subject property as that term is defined by Section 11(C) of Ballot Measure 37. Ms. Bonnet acquired the property on February 2, 1973.

2. The Laws that Are the Basis for the Claim

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 Fact

The claim lists a large number of statutes, Commission rules and county land use regulations, some applicable and some not, to the claimant’s division of her property and to the establishment of a dwelling. The laws listed include all editions of ORS 197 and 215 and amendments thereto

¹ Use of maiden name “Bonnet” restored by judgment of the Court (see Title Report).

enacted since February 2, 1973; LCDC administrative rules divisions 1, 2, 3, 4, 5, 6, 8, 11, 12, 15, 18, 21, 23, 25, 26, 30, 33, 45 and 125² and all amendments thereof adopted at any time following May 29, 1973 (signing date for SB 100³), and all Washington County land use regulations within the meaning of Measure 37 adopted or enforced since February 2, 1973.⁴ The department's report addresses only those state land use laws that restrict Ms. Bonnet's division of the subject property into two parcels and the establishment of a dwelling.

The claim is based, in part, on Washington County's current EFU zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU as required by Goal 3 in accord with OAR 660, division 33, and ORS 215, because the claimant's 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 is zoned EFU pursuant to ORS 215.

Current land use regulations, particularly Goal 3 and ORS 215.213, 215.263, 215.700 to 215.710, 215.780 and OAR 660, division 33, 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 parcel(s) to have farm or non-farm dwellings on them. In addition, Goal 14 generally prohibits urban development on lands outside of urban growth boundaries. The proposed use of the property – the creation of two parcels of one and four acres for residential use is likely, in part, an urban use of land that would be prohibited under Goal 14.

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) 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 interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.213. OAR 660-033-0130(4) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993.

The claimant acquired the subject property on February 2, 1973. At that time the property was zoned Agriculture (F-1) by Washington County. The F-1 Zone authorized the division of the subject property residential uses.

The claim also identifies ORS 197.175(2) as a state land use regulation restricting the claimant's use of the property. The statutes in ORS 197 generally do not limit or prohibit particular uses of property and nothing in this claim identifies how 197.175(2) restricts Manuela Bonnet's division of the property into two parcels and the establishment of a new dwelling. ORS 197.175(2) does

² OAR 125 is a rule of the Department of Administrative Services and is not administrated by the commission.

³ SB 100 did not become effective until October 5, 1973.

⁴ The State of Oregon and DLCD do not have the authority to waive local land use regulations under Measure 37.

require counties to enact land use regulations that comply with the Statewide Land Use Planning Goals and to make land use decisions in compliance with those goals where the county's acknowledged plan is not being applied. However, so long as the state is not applying the goals applicable to the claimant's use of the property, a county is not required to act in compliance with the goal at least with regard to the claimant's use of the property. As a result, ORS 197.175(2) does not restrict the claimant's use of the property.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by ORS 215.263, 215.700 to 710 and 215.780, Statewide Planning Goals 3 (Agricultural Lands) (OAR 660-015-0000(3)) and 14 (Urbanization) (OAR 660-015-0000(14)), as well as the Goal 3 and 14 implementing rules now found in OAR 660, divisions 004 and 033 enacted after Manuela Bonnet acquired ownership of the subject property on February 2, 1973 do not allow the division of the property or the establishment of an additional dwelling, thereby restricting the use of the property relative to the uses allowed when the property was acquired by Manuela Bonnet in 1973.

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 the claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and 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 law(s) 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 \$145,000 for the reduction in the property's fair market value, as a result of current regulations. This estimate is based on an appraisal dated March 10, 2005, prepared by Mallory Appraisals, Inc. The appraisal estimates the value the property divided into a one- and four-acre-parcels with residences on each one as compared with the value of the existing five-acre parcel (\$610,000 - \$365,000 = \$145,000). (See appraisal in the department's claim file.)

Conclusions

As explained in Section V.(1) of this report, the current owner, Ms. Bonnet, acquired the property on February 2, 1973. Under Ballot Measure 37, Ms. Bonnet 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), land use restrictions adopted since 1973, restrict the claimant's ability to divide the subject property. The claim includes an appraisal that estimates the reduction in the value of the property due to restrictions as \$145,000.

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 laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The claim includes references to many state land use regulations that restrict the use of the property relative to what would have been allowed in 1973 when the property was acquired by the

Ms. Bonnet. These provisions include Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33. None of these laws appear to be exempt under subsection 3(E) of the measure, with the exception of provisions of ORS 215 that applied to the subject property prior to 1973.

Conclusions

Without more specific details about the proposed use, it is impossible for the Commission or 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 residential development and use of Agricultural Land apply to the owner's anticipated use of the property, and for the most part these laws would not come under subsection 3(E) of Measure 37.

Laws in effect when the claimant acquired the property, including provision of ORS 215 in place prior to 1973, 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 what 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, the 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 enacted or 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 by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusion 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 residential parcels from the five-acre property, and sell, or develop those lots for residential use. The laws enforced by the Commission or department reduce the fair market value of the five-acre property to some extent, although it is unclear what level of development would be allowed under the laws in effect on February 2, 1973, when the claimant acquired the property. The claim asserts this amount to be \$145,000. 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 one or more land use regulations to allow Ms. Bonnet to use the subject property for a use allowed at the time she acquired the property on February 2, 1973.

As explained in Section V.(2) of this report, when the claimant acquired the property on February 2, 1973, the property was zoned Agriculture (F-1) by Washington County.

Conclusions

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, will not apply to Ms. Bonnet's division of the subject property into two parcels and the establishment of an additional dwelling: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215.213, 215.263, 215.700 to 215.710 and 215.780, and OAR 660, division 33, that took effect after February 2, 1973. These laws will not apply to the claimant's

use of the property to the extent necessary to allow her a use of the subject property permitted on the date she acquired it.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the property subject to the standards in effect on February 2, 1973. On February 2, 1973, the property was zoned Agriculture (F-1) by Washington County.

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 September 9, 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.