

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

June 7, 2005

STATE CLAIM NUMBER: M118922

NAME OF CLAIMANT: Patricia Ann Beach
(aka Patricia Ann Beach Williams)

MAILING ADDRESS: 7783 Spring Valley Road NW
Salem, Oregon 97304

IDENTIFICATION OF PROPERTY: 7783 Spring Valley Road NW
Township 6S, Range 4W, Section 13
Tax lot 703, Polk County

**OTHER CONTACT INFORMATION
FOR CLAIMANT:** Jeffrey M. Strickland
Attorney at Law
494 State Street, #230
Salem, Oregon 97301-3654

OTHER INTERESTS IN PROPERTY: Non-exclusive access easement for
the benefit of the adjacent James and
Laurel Lace parcel (tax lot 702) and
the Beaches.

Thirty foot-wide non-exclusive
access and utility easement on the
Lace property reserved for the
benefit of the Beach property.

Overhead power line easement.

DATE RECEIVED BY DAS: December 10, 2004

180-DAY DEADLINE: June 8, 2005

I. CLAIM

Patricia Ann Beach, the claimant, seeks compensation in the amount of \$205,000 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 partition her property into three parcels of approximately five acres, eight acres, and six acres. The property is located at 7783 Spring Valley Road NW, in Polk County, Oregon and is described by the Polk County Tax Assessor as T6S, R4W, Section 13, Tax Lot 703. (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 the claim is valid. Department staff recommends that, in lieu of compensation, not applying certain land use regulations enforced by the Land Conservation and Development Commission (the Commission) or the department, specifically Statewide Planning Goal 3 (Agricultural Lands), ORS Chapter 215, and OAR 660, Division 33, to the extent necessary to allow Ms. Beach a use of the property permitted at the time she acquired it on January 25, 1986. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On February 10, 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, no written comments, evidence or information were 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

This claim was submitted to DAS on December 10, 2004 for processing under OAR 125, Division 145. The claim identifies Polk County's exclusive farm use zoning and state 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 regulation 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, Patricia Ann Beach, acquired the subject property from her parents, Durlyn and Estelle Beach, on January 25, 1986. The claimant's parents acquired the property on September 14, 1949. A September 23, 2004 preliminary title report for the subject property shows Patricia Ann Williams, also known as Patricia Ann Beach Williams, as the current owner.

Conclusions

Durlyn and Estelle Beach are "family" members and the claimant, Patricia Ann Beach, is an "owner" of the subject property, as those terms are defined in Section 11 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 is based on Polk County's Exclusive Farm Use (EFU) zone and state laws that restrict the use of the property. The subject property is zoned EFU as required by Goal 3 (Agricultural Lands) in accord with OAR 660, Division 33, and ORS 215. 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, be zoned EFU pursuant to ORS 215 (see OAR 660-015-0000(3)).

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 less than 80 acres and establish standards governing the allowance of farm or non-farm dwellings on existing or any proposed parcels. There were no state land use regulations in ORS 215,¹ or under any rules adopted by the Commission applicable to the property when the claimant's parents acquired the property in 1949.

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 exclusive farm use 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 (see citations of administrative rule history for OAR 660-033-0130 and 0135).

Conclusions

The minimum lot size and dwelling standards established by Statewide Planning Goal 3, current provisions of ORS 215, and OAR 660, Division 33, restrict the division of the property into parcels less than 80 acres in size and restrict the residential use of the property relative to what was permitted in 1949. The state land use regulations specified in the claim restrict the use of the property from what could have been done when the property was acquired by the claimant's family in 1949.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any laws 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."

¹ In 1947, the Oregon Legislature authorized counties to adopt zoning districts, within which it was unlawful to construct or maintain a building or carry on a trade not authorized by the county. 1947 Or Laws, Ch. 558. Those statutes were codified in ORS 215 in 1953, but no longer exist. To the department's knowledge, Polk County had not adopted zoning districts on or before September 14, 1949.

Findings of Fact

The claim states that the current fair market value of the subject property is \$329,000. This is based on a September 9, 2004 offer the claimant received to purchase the property for \$329,000.

The claimant has estimated the value of the property without the restricting regulations based on her proposal to divide the subject 19.56 acres “into no more than a total of three parcels; one approximately five acres; one approximately eight acres; and one approximately six acres consisting of the present homesite, barn, and outbuildings.” She indicates a value of the three potential parcels as \$100,000 for a five-acre parcel, \$165,000 for an eight-acre parcel, and \$269,000 for a six-acre parcel with the existing dwellings and other buildings. The claimant estimates that the total potential value of three proposed parcels is \$534,000. The claimant then subtracts the estimated current value of \$329,000 for the total 19.56-acre parcel from the potential value of three additional parcels to arrive at a reduction in value of \$205,000 due to land use regulations enforced by the Commission or the department.

There is no certified appraisal to substantiate the claimed values either before or with state land use regulations.

Conclusions

As explained in section V.(1) of this report, Patricia Ann Beach is the current owner of the subject property. She acquired the property on January 25, 1986 from her parents, Durlyn and Estelle Beach. Thus, under Ballot Measure 37, Patricia Ann Beach is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value.

Without an appraisal based on the value of the three proposed 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 laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

Although the claim is not specific about the state land use regulations that have restricted the use of the property and reduced its fair market value, the claim does specify Polk

County's EFU zoning. The comparable state land use regulations related to the County's EFU zone are Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, Division 33. All of these regulations were enacted after the family acquired the property in 1949. None of them, either on their face or as applied to the subject property, appear to be exempt under Section 3 of Measure 37.

Conclusions

Without identification of the specific laws that are the basis for the claim, it is impossible 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 owner's anticipated use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure, because they were not raised in this claim, or because they are laws that are not covered by the Measure to begin with.

VI. FORM OF RELIEF

Section 1 of Measure 37 requires 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 by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions 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 three parcels out of the current 19.56-acre lot. The laws enacted or enforced by the Commission or department reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$205,000. However, because the claim does not provide a 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 more likely than not 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. Beach to use the subject property for a use allowed when she acquired the property on January 25, 1986.

Conclusions

Based on the record before the department, Ms. Beach has established that she is entitled to relief. Therefore department staff recommends, in lieu of compensation, not applying the requirements of applicable state laws enforced by the Commission or the department, specifically Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, Division 033 to the extent necessary to allow Ms. Beach a use of the property permitted at the time she acquired it on January 25, 1986. As a result, the claimant's use of the property will be subject to those specified laws that were in effect on that date.

Statewide Planning Goal 3 became effective on January 25, 1975 and was applicable to legislative land use decisions and some quasi-judicial land use decisions, on a site-specific basis prior to the Commission's acknowledgment of Polk County's EFU-20 and FF (Farm Forest) zones on April 22, 1988 (see Endnote ¹). Until the County's land use regulations were acknowledged by the Commission in 1988, both the County's zoning code and Goal 3 applied to the use of the property to determine what uses were permitted.²

On January 25, 1986, the property was subject to Statewide Goal 3 and the minimum lot size standard specified therein (effective January 25, 1975). Therefore, staff recommends that the department not apply the current provisions of Statewide Goal 3, ORS 215.780, and OAR 660-033-100 to the extent necessary to allow Ms. Beach to divide the property and develop it for residential use as permitted at the time she acquired it. Ms. Beach will be allowed to divide the property and use it for residential use only as permitted at the time she acquired it. The laws that define what Ms. Beach was permitted to do at that time include the provisions of Goal 3 applicable at the time of her acquisition of the property in 1986. These earlier provisions require that the resulting parcels be either: (1) "appropriate for the continuation of the existing commercial agricultural enterprise in the area;" or (2) shown to comply with the standards for the creation of non-farm parcels under ORS 215.263 (1975 Edition).

At the time the claimant acquired the property on January 25, 1986, the Goal 3 "commercial" standard (i.e., "appropriate for the continuation of the existing commercial agricultural enterprise in the area") applied directly to the subject property for the

² See *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), and *Alexanderson v. Polk County*, 289 Or 427, rev. denied, 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1, (1985). After the County's plan and land use regulations were acknowledged by the Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions (*Byrd v. Stringer*, 295 Or 311 (1983)). However, the applicable statutes continue to apply, and insofar as the local implementing provisions are materially the same as the rules, the local provisions must be interpreted consistent with the substance of the rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

creation of new farm parcels or for new dwellings on pre-existing parcels (OAR 660-05-020 and 025, effective July 21, 1982). These laws determine what division of the property was permitted at the time Ms. Beach acquired it.

The applicable statutory standards for the approval of farm or non-farm dwellings on January 25, 1986 are set forth in ORS 215.283(1)(f) and 215.283(3) (1985 edition) and OAR 660, Division 5 (effective July 21, 1982, amended May 7, 1986, and repealed August 7, 1993).³ These laws determine what residential development was permitted at the time Ms. Beach acquired the property.

Any use of the property by the claimant remains subject to the following laws: (a) those laws not specified in this claim to the State of Oregon, dated December 10, 2004 or identified in this report; (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.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on May 17, 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.

Endnote

ⁱ The Land Conservation and Development Commission (the Commission) acknowledged the county's EFU zone to be in compliance with Statewide Planning Goal 3 on March 25, 1981. However, the Commission's 1981 acknowledgment order was appealed to the Marion County Circuit Court. On August 3, 1984, Marion County Circuit Court affirmed in part and remanded in part the Commission's 1981 acknowledgment of the county's EFU zone (*1000 Friends of Oregon, Friends of Polk County and Marilyn Stringer v. LCDC and Polk County*, Marion County Circuit Court No. 126, 792 (August 3, 1984)).

³ Before a farm dwelling may be established on agricultural land, the farm use to which the dwelling relates must "be existing" (*Matteo 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 94 Or App 33, November 23, 1988). Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use (*Matteo v. Polk County*, 14 Or LUBA 67, 73 (1985). Guidance on the application and interpretation of the applicable statutory and rule standards for non-farm dwellings for Polk County in 1986 can be found in the County's Exclusive Farm Use Zone, which in 1978 under Ordinance No. 219 incorporated the appropriate provision for farm dwellings, i.e., "single-family dwelling or a mobile home...in conjunction with farm use." Guidance on the application and interpretation of Statewide Planning Goal 3 (effective January 25, 1975) and OAR 660, Division 5 (effective July 21, 1982) for the approval of a farm parcel or the approval of a farm dwelling on an existing lot or parcel for Polk County can be found in Ordinance No. 87-26, which amended the Comprehensive Land Use Plan, Ordinance No.217 to adopt revised Goal 3 language and a "Commercial Agricultural Justification Statement" as an amendment to the Agricultural Lands Background Report of the Comprehensive Plan (December 23, 1987).

On February 12, 1986 (a few weeks after the claimant acquired the property), the Oregon Court of Appeals reversed the Circuit Court’s decisions and remanded the Commission’s 1981 acknowledgment of the county’s EFU zone, except with respect to the “Homestead Exemption” provisions that were upheld by both courts.

The court specifically reversed the Circuit Court and the Commission regarding the farmland division standards. The court found that the standards failed because they did not restrict divisions to those that are appropriate for the “existing agricultural enterprise” within the area. As part of this issue, the court struck down the county’s EFU and FF land division standards permitting division of intensive agricultural activities and for those required to obtain construction financing for farm housing. The Circuit Court had struck down other land division standards in the same section of the EFU and FF zones (and these had not been appealed). Source: Department of Land Conservation and Development April 10, 1986 Report to the Land Conservation and Development Commission on Polk County’s Remand from the Court of Appeals. The following table summarizes the courts decisions relative to each of the “assignments of error” (objections) filed by the Petitioners in this appeal:

TABLE: APPEAL OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION’S MARCH 25, 1981 ACKNOWLEDGMENT OF POLK COUNTY’S COMPREHENSIVE PLAN AND LAND USE REGULATIONS

Ass #	Assignments of Error Raised by Petitioners	Marion County Circuit Court Decision	Oregon Court of Appeals Decision
1	6,067-Acre Need Exception violated goals - lacks findings	Assignment of error - well taken	Polk County-on cross appeal was not sustained
2	6,067-Acre Need Exception violated goals - lacks conclusion	Assignment of error - well taken	Polk County-on cross appeal - was not sustained
3	6,067-Acre Need Exception violated goals – inconsistent with LCDC policy	Assignment of error - well taken	Polk County-on cross appeal - was not sustained
4	6,067-Acre Need Exception - lacks substantial evidence in record	Assignment of error - well taken	Polk County-on cross appeal - was not sustained
5	EFU/FF zones provisions for dwellings in conjunction with farm use on existing lots violate Goal 3 “commercial” standard	Assignment of error – not well taken	Circuit Court decision Reversed
6	LCDC conclusion that EFU/FF zones comply with Goal 3 not supported by clear statement of findings setting basis for conclusion	Assignment of error – not well taken	Circuit Court decision Reversed
7	EFU “Homestead Exemption” provisions comply with ORS 215.213	Assignment of error – not well taken	Circuit Court decision Upheld
8	EFU zone provisions for new parcels do not comply with Goal 3	Assignment of error - well taken	Polk County-on cross appeal - was not sustained
9	FF zone provisions for new parcels do not comply with Goal 3	Assignment of error - well taken	Polk County-on cross appeal - was not sustained
10	EFU/FF zone provisions for dividing property to dispose of second dwelling violate Goal 3	Assignment of error - well taken	Polk County-on cross appeal - was not sustained
11	EFU/FF zone provisions for divisions based on physical features violate Goal 3	Assignment of error - well taken	Polk County-on cross appeal - was not sustained
12	EFU/FF zone provisions for divisions for “labor intensive” agricultural farm use violate Goal 3	Assignment of error - well taken as to forest use in FF zone, and not well taken in EFU or agricultural use in FF zone	Polk County-on cross appeal - was not sustained. Circuit Court decision regarding EFU and agricultural use in FF zone was reversed
13	EFU divisions based on construction financing violate Goal 3	Assignment of error – not well taken	Circuit Court decision reversed
14	LCDC disregarded Goal violations	Assignment of error – not well taken	Not challenged

SOURCE: *1000 Friends of Oregon, Friends of Polk County, and Marilyn Stringer v. LCDC and Polk County*, Marion County Circuit Court No. 126, 792 (August 3, 1984), and Oregon Court of Appeals, CA A33638 (February 12, 1986).

On April 24, 1986, in response to the Oregon Court of Appeals remand of the county's EFU zone, the Commission issued a continuance order directing Polk County to revise the zone to comply with Statewide Planning Goal 3 (LCDC Order 86-CONT-037, signed May 6, 1986).

On December 23, 1987, Polk County revised its agricultural lands element of the comprehensive plan and EFU zone to comply with the Commission's 1986 continuance order (County Ordinance 87-26 and 87-27). On February 17, 1988, the Commission acknowledged Polk County's revised comprehensive plan and EFU Zone as complying with Statewide Planning Goal 3 and OAR 660, Division 5 (Commission Order 88-ACK-347, order signed April 22, 1988).