

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

June 8, 2005

STATE CLAIM NUMBER: M118963

NAME OF CLAIMANT: Opal Alice Burkhard

MAILING ADDRESS: 513 East 2nd Street
Rainier, Oregon 97048

IDENTIFICATION OF PROPERTY: 70961 Neer City Road
Township 3S Range 3W, Section 7
Tax lot 3307-700, Columbia County

**OTHER CONTACT INFORMATION
FOR CLAIMANT:** Florence M. Gestrin
1893 21st Ave. SE #53
Albany, Oregon 97322

DATE RECEIVED BY DAS: December 13, 2004

180-DAY DEADLINE: June 11, 2005

I. CLAIM

Opal Alice Burkhard, the claimant, seeks compensation in the amount of \$1,200,000 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 property for sale and residential use. The property is located at 70961 Neer City Road, Rainier, Oregon in Columbia 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 certain applicable state laws enacted or enforced by the Land Conservation and Development Commission (the Commission) or the department, specifically Statewide Planning Goal 4 (Forest Lands) and OAR 660, Division 6 not apply to the subject property to the extent necessary to allow

Ms. Burkhard a use of the property permitted at the time she acquired the property that is the subject of this claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On February 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, 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 13, 2004 for processing under OAR 125, Division 145. The claim identifies “PF 76 (now PF 80), timber land and farm land laws”, and “land use 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 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, Opal Alice Burkhard, and her late husband, Louis, acquired the subject property from Columbia County on March 13, 1946. The property is located at 70961 Neer City Road, Rainier, Oregon (see Correction Deed, dated March 13, 1946). A copy of the Real Property Tax Statement from Columbia County for the time period from July 1, 2004 to June 30, 2005 shows that the claimant is the listed owner of the subject property, Columbia County Tax Lot Account Code # 6211-000-0100, 116 acres.

Conclusions

The claimant, Opal Alice Burkhard, is an “owner” of the subject property known as Columbia County Tax Lot Account Code # 6211-000-0100, as that term is defined by Section 11(C) 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 Fact

The claim states that:

“It is my desire to divide the property for sale as Rural Residential in parcels approximately four acres in size. Some parcels could be larger and some possibly smaller, but four acres would be the expected general size” (Letter of claimant, December 2, 2004).

The claim identifies “all land use restrictive laws, state and county PF-76, and any restrictions caused by farm use laws,” that “restrict the use and reduce the value of the property” as the basis for the claim.

Statewide Planning Goal 4, (Forest Lands) (OAR 660-015-0000(4)), provisions of state subdivision and partition laws in ORS 92, and laws applicable to land zoned for forest use under ORS 215, including ORS 215.705 to 215.755 and 215.780, and OAR 660, Division 6,

restrict the right of an owner to divide the property for the purpose of sale and residential use. Goal 4 became effective on January 25, 1975, and required forest land as defined by the goal to be zoned for forest use (see citations to statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rule (OAR 660, Division 6) became effective September 1, 1982 and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Or Laws 1993) and were adopted into OAR 660-006-0026 and 0027 on March 1, 1994 (see citations to rule history under OAR 660-015-0000(4)). The provisions of ORS 92 prohibiting the sale of land without the prior approval of a partition or subdivision plat, generally date from prior to 1946, when the claimant acquired the property.

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 0027 establish an 80-acre minimum lot size for the creation of a new parcel in a forest zone and also establish the standards for dwellings in forest zones under Statewide Planning Goal 4. The Columbia County (PF-76) Primary Forest Zone zoning standards are based on the standards contained in Statewide Planning Goal 4 and OAR 660, Division 6.

The Commission acknowledged Columbia County's comprehensive plan and land use regulations to be in compliance with the Statewide Planning Goals by order dated July 25, 1985. The Columbia County comprehensive plan designates the subject Burkhard property as forest land in compliance with Statewide Planning Goal 4. Further, the claimant's property is "forest land" as defined under Statewide Goal 4 because it is predominantly composed of Natural Resource Conservation Service (NRCS) soils, Goble silt loams, "which are suitable for commercial forest uses" (see soils map and soil descriptions for property from the "Soil Survey of Columbia County Area, Oregon, Sheet # 16" United States Department of Agriculture – Natural Resources Conservation Service). According to the NRCS Soil Survey narrative, Goble silt loams are a good soil for the commercial production of Douglas fir trees, but can develop a hardpan that may restrict the use of the soils for on-site septic systems.

Conclusions

The minimum lot size and dwelling standards established by Statewide Planning Goal 4 and OAR 660-006-0026 and 0027, and by provisions of ORS chapter 215, were all adopted after the claimant acquired her property in 1946 and do not allow the division of the property into parcels less than 80 acres in size or the approval of dwellings on 4-acre parcels. Except for the provisions of ORS 92, which generally were in effect when the claimant acquired the property, land use laws, adopted since 1946, restrict the use of the property relative to the uses allowed when the property was acquired in 1946.

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

Based on a preliminary comparative market analysis included with the claim and the 2004 county tax statement, the claimant asserts that, the fair market value of the subject property has been reduced and that the just compensation due is \$1,200,000. According to the letter submitted by the claimant, the property is worth between \$185,000 - \$225,000 on the market as forestland. The 2004 tax statement from Columbia County shows that the property and structures are worth \$265,200. (See also the comparative market analysis by John Scott Realty submitted with the claim.)

If divided into 4-acre lots, the claimant states that the property would be worth a maximum of \$1,740,000, apparently using the comparative market analysis as a basis for this assertion. Staff calculates the difference between these figures at \$1,474,800. The claimant's letter states that she is willing to settle on \$1,200,000 as the reduction in fair market value caused by the land use regulations (see claimant's letter of December 2, 2004). The claimant's letters and forms provide no further explanation or reasoning as to the difference between staff's calculated reduction in fair market value of \$1,474,800, and the indicated "willing to settle for" figure of \$1,200,000.

Conclusions

As explained in section V.(1) of this report, the current owner is Opal Alice Burkhard who acquired the property on March 13, 1946, from Columbia County (see Correction deed). Thus, under Ballot Measure 37, Opal Alice Burkhard is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. The 2004 tax statement from Columbia County shows that the current value of the 116-acre property and the existing structure(s) is \$265,200.

Without an appraisal based on the value of twenty-nine 4-acre lots or other explanation, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, including the comparative market analysis, 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 enacted or 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 both specific reference to particular County ordinances, and a general claim based on any state land-use regulations that restrict the use of the property relative to what would have been allowed in 1946 when the property was acquired. These provisions are in the Columbia County PF-76 Primary Forest Zone as required by Statewide Planning Goal 4

(Forest Lands). Most laws that qualify as “land use regulations” under the Measure were adopted after 1946, with the exception of some subdivision and partitioning laws in what is now ORS chapter 92.

While not directly raised by the claimant, the department notes that ORS 215.730 and OAR 660, Division 6 include standards for siting dwellings in forest zones. This provision includes fire protection standards for dwellings and for surrounding forest lands. Section 3 (B) of Measure 37 specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes...” The department finds that siting standards for dwellings in forest zones in ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, Division 6) are exempt under subsection (3) of Measure 37.

Conclusions

Without a specific proposed use or a specific listing of 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 residential development and use of forest 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.

The restrictions in ORS chapter 92, however, on the sale of land prior to the approval and filing of a plat, generally predate 1946, and so will continue to apply to the property. In addition, the siting requirements of ORS 215.730, Goal 4 and its implementing rules related to dwelling siting standards based on health and safety will also continue to apply. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure, or because they are laws that are not covered by the Measure to begin with.

VI. FORM OF RELIEF

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if 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 enacted or 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 4-acre lots out of the subject 116-acre property, and sell or develop those lots for residential use. The laws enacted or enforced by the Commission or department reduce the fair market value of the 116-acre property to some extent. The claim asserts this amount to be \$1,200,000.

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 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. Burkhard to use the subject property for a use allowed at the time she acquired the property on March 13, 1946.

Conclusions

Based on the record before the department, Ms. Burkhard has established that she is entitled to relief. Therefore department staff recommends that, in lieu of compensation, and except for ORS 215.730 and those provisions of Goal 4 and its implementing rules (OAR 660, Division 6) relating to siting standards for dwellings for the protection of public health and safety, the requirements of applicable state laws enacted or enforced by the Commission or the department, specifically Statewide Planning Goal 4 (Forest Lands) and OAR 660, Division 6 not apply to the subject property to the extent necessary to allow Ms. Burkhard a use of the property permitted at the time she acquired the property that is the subject of this claim.

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 13, 2004; (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 excepted 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 5, 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.