

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

June 29, 2005

STATE CLAIM NUMBER: M119365

NAME OF CLAIMANTS: Colin and Judy Kohlmeyer

MAILING ADDRESS: 12088 SW Springhill Rd.
Gaston, OR 97119

IDENTIFICATION OF PROPERTY: Township 1S, Range 4W, Section 36D
Tax Lot 100
Washington County

DATE RECEIVED BY DAS: January 4, 2005

180-DAY DEADLINE: July 3, 2005

I. CLAIM

Colin and Judy Kohlmeyer, the claimants, seek compensation in the amount of \$100,000 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 claimants desire compensation, or the right to build a residential dwelling. The property is located at the corner of Gaston Road and Hardebeck Road in Gaston, 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. Department staff recommends that, in lieu of compensation, the requirement of certain state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, specifically the OAR 660, Division 33, requirements for farm or non-farm dwellings not apply to the subject property to allow the Kohlmeyers to establish a residential dwelling to the extent that use of the property was permitted at the time they acquired it. As a result, the Kohlmeyers' use of the property will be subject to those specified laws in effect on December 15, 1985. (See recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 10, 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, there were no written comments, evidence or information received by DAS 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

The claim was submitted to DAS on January 4, 2005 for processing under OAR 125, Division 145. The claim identifies requirements in OAR 660-033-0135, "Dwellings in Conjunction with Farm Use," as restricting use of the subject property.

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 payment of compensation or relief from specific laws for “owners” as that term is defined in the Measure. Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

According to the claim, the claimants purchased the property from Mr. Kohlmeyer’s father in 1985, by contract. The subject contract of sale was dated December 15, 1985, and recorded with Washington County.¹ Mr. Kohlmeyer states that his father purchased the property in 1983.

Conclusions

Colin and Judy Kohlmeyer are the “owners” of property that is the subject of the claim, as defined by Section 11(C) of Ballot Measure 37. They acquired the property on December 15, 1985. Based on information in the claim, it appears that the subject property has been in family ownership since 1983, when the claimant’s father purchased the property.

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 states that the Kohlmeyers cannot build a house on their property in Washington County, because of “the \$80,000 farm income for dwelling” requirement (OAR 660-033-0135(7)). Mr. Kohlmeyer states that he received a permit to build a house on subject property in 1986, but allowed the permit to lapse two years later. When he eventually reapplied for the permit in 1995, he was denied a permit because of the \$80,000 income requirement was adopted by the County to meet rules adopted by the Commission in 1994. Mr. Kohlmeyer explains in his claim that the subject property contains a mature hazelnut orchard, but that it does not generate \$80,000 annually in income.

The subject property is a 40.94-acre parcel, that is zoned Exclusive Farm Use (EFU) in Washington County. Based on the requirements of ORS 215.780, adopted in 1993, and effective on March 1, 1994, OAR 660-033-0135(7)(a) (Dwellings in Conjunction with Farm use) requires that on land identified as high value farmland, income generated by the tract must have produced a gross annual income of \$80,000, from the sale of farm products during 2 or 3 of the last five

¹ The claimants supplemented the claim with a fulfillment deed dated January 20, 2005.

years, for a proposed dwelling to be considered customarily considered in conjunction with farm use.

Claimant Colin Kohlmeyer's father purchased the subject property in 1983. At that time the property was zoned EFU. However, at that time Washington County's EFU zone was not acknowledged by the Commission under the standards, for state approval of local comprehensive plans and land use regulation pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged Washington County's local comprehensive plan and land use regulations, including the EFU zone that applied to the subject property, Statewide Planning Goal 3, applied directly to the property when the claimants' family member acquired it in 1983.²

Conclusions

OAR 660-033-0135(7)(a), adopted since the claimants' family acquired the property in 1983, restricts the use of the property relative to the uses allowed when the property was acquired in 1983. The statutory and rule provisions for farm and non-farm dwellings in ORS 215 and OAR 660, Division 33, clearly do not allow a single family dwelling to be approved on the subject property, whereas it is possible that a dwelling could have been approved under the more general provisions of ORS 215.283(1) or ORS 215.283(3) in effect in 1983.

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."

Findings of Fact

The 2004-05 assessed value of subject Washington County property is \$19,760 as shown on the County Assessor's statement. The claimant's assert a value of \$100,000 to the property, with the addition of a "home site", equating this amount to a reduction in fair market value. No appraisal or estimate of comparable properties was submitted with the claim.

Conclusions

As explained in section V.(1) of this report, the current owners are Colin and Judy Kohlmeyer. They acquired the property in 1985 from Mr. Kohlmeyer's father who had owned the property

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), *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 (See *Byrd v. Stringer*, 295 Or 311 (1983). However, insofar as the state and local provisions are materially the same in substance, the local code must be interpreted and applied by the county in a manner that is consistent with state law, and state statutes continue to apply directly to the county's decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

since 1983. Under Ballot Measure 37, the Kohlmeyer's are due compensation for land use laws that restrict the use of the subject property in a manner that reduces their fair market value.

Without an appraisal, or other explanation, based on the value of a dwelling on the subject property, it is not possible to substantiate the specific dollar amount the claimant's demand 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

Statewide Planning Goal 3, ORS 215 and OAR 660, Division 33, in part, pertain to the approval of farm and non-farm dwellings. None of the regulations identified in this claim, either on their face, or as applied to the subject property, are exempt under Section 3 of Ballot Measure 37, except for the provisions of those laws adopted prior to purchase of subject property by the claimants' family in 1983.

Conclusions

Provisions of ORS 215, Goal 3, and OAR Division 5 adopted before 1983, are exempt from Ballot Measure 37 under section 3(E), having been enacted prior to the date of acquisition of the subject property by the claimants' family. There may be other specific laws that continue to apply under one or more of the exceptions in Measure 37, because they were not identified in this claim or because they are laws that are not covered by the Measure.

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 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 to allow the present owner to carry out a use of the property allowed at the time the present owner acquired the property. The Commission has by rule 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 prevent Colin and Judy Kohlmeyer from building a house on their property in Washington County. The laws 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 \$100,000. This amount is not substantiated by any additional information submitted with the claim. Nevertheless, based on the current record for this claim, the department believes that the laws on which the claim is based may 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, Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Colin and Judy Kohlmeyer to use the subject property for a use permitted at the time they acquired the properties on December 15, 1985.

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 the Kohlmeyers to allow establishment of a dwelling: those provisions of Statewide Planning Goal 3 and OAR 660-033-0130(4) and 660-033-0135, applicable to the establishment of dwellings, and enforced after December 15, 1985.
2. The action by the State of Oregon provides the state's authorization to the claimants to establish a dwelling on the property subject to the standards in effect on December 15, 1985. On that date, the property was subject to Statewide Goal 3 and the standards for farm and non-farm dwellings in OAR 660-005-0030 (1985) and ORS 215.283(1)(f) and ORS 215.283(3) (1985).
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 claimants first obtain 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 215.412 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 remains 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 with out limitation, those laws exempted under section (3) of this Measure.
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the property, it may be necessary for them to obtain a decision under Measure 37 from a city, county or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants 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 claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on June 10, 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.