

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

August 1, 2005

STATE CLAIM NUMBER: M119669

NAME OF CLAIMANT: Karen Bitz

MAILING ADDRESS: 103 Stowers Lane
Molalla OR 97038

IDENTIFICATION OF PROPERTY: Township 3S, Range 2E, Section 30
Tax Lot 1000
Clackamas County

DATE RECEIVED BY DAS: February 9, 2005

180-DAY DEADLINE: August 7, 2005

I. CLAIM

Karen Bitz, the claimant, seeks compensation in the amount of \$1,300,000 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 subdivide the property into residential lots or to establish a non-farm related commercial use. The 4.21-acre property is located at 22060 South Parrot Creek 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 following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimant to allow her to divide her property or to develop it for commercial use: Statewide Planning Goal 3 (Agricultural Lands), applicable provisions of ORS 215 and OAR 660, division 33, enacted after March 27, 2002. These laws will not apply to the claimant's use of the property only to the extent necessary to allow Karen Bitz a use of the property permitted at the time she acquired the subject property on March 27, 2002. The department acknowledges that the relief recommended in this report will not allow the claimant to use her property in the manner set forth in her claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 23, 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, three written comments, evidence or information were received in response to the 10-day notice. Comments pertinent to the analysis of the claim are referenced in the appropriate sections of this report. Because no funds have been made available for payment of compensation, comments regarding the possible impact of the proposed or intended development of the claimant's property are not relevant to the evaluation and determination of the claimant's Ballot Measure 37 claim. (See comment letters 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 February 9, 2005 for processing under OAR 125, division 145. The claim includes a list of land use regulations (see claim) all of which were enacted prior to December 2, 2004, the effective date of Measure 37. (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, Karen Bitz, acquired the property on March 27, 2002, from her father, Herbert D. Fee. The claim includes the County record of the transfer to Karen Bitz, dated March 27, 2002, but no deed, contract, or other document. The claim includes a Warranty Deed dated June 3, 1964, transferring real property to Herbert D. and Ellen M. Fee. The claim also includes a current Clackamas County Property Tax Account Summary, which shows Karen Bitz as the current owner of the property.

Conclusions

The claimant, Karen Bitz, is an “owner” of the property that is the subject of this claim as that term is defined under Section 11(C) of Ballot Measure 37, as of March 27, 2002. Herbert D. Fee, who acquired the property on June 3, 1964, is a “family member” as that term is defined under Section 11(A) 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 states that the claimant wishes to subdivide into residential lots or to establish a non-farm related commercial use. The property was acquired by a family member of the claimant on June 3, 1964. The claim identifies restrictions on the claimant’s ability to subdivide the property into residential lots or to establish a non-farm related commercial use as the uses claimant states were allowed under past county zoning, including the RA-1 zone (1974), FF-10 zone (1980).

The claim is based, in part, on Clackamas County’s current Exclusive Farm Use (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 be zoned EFU pursuant to ORS 215.

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 for allowing the existing or any proposed parcel(s) to have farm or non farm dwellings on them. In addition, ORS 215.283 limits commercial uses of land zoned EFU to commercial uses in conjunction with farm use.

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 215.283(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. Subsequent amendments to comply with HB 3326, (chapter 704, Oregon Laws 2001, and effective January 1, 2002) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

The claimant's family acquired the subject property in 1964. At that time, Statewide Planning Goal 3 and administrative rules were not in effect. Provisions of ORS 215 in effect as of 1963 may have applied to the subject property.

Conclusion

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions of OAR 660, division 33, and provisions of ORS 215 enacted after 1964 were all enacted after family members of claimant Karen Bitz acquired ownership of the subject property in June 1964 and do not allow the division of the property or the desired commercial use of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by family members in 1964.

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 unsubstantiated estimate of a loss of value of \$1,300,000 caused by laws prohibiting subdivision of the subject property into residential lots or a non-farm related commercial use.

Conclusions

As explained in section V.(1) of this report, the current owner is Karen Bitz, who acquired the property in 2002. Family members have owned the property since 1964. Thus, under Ballot Measure 37, Karen Bitz is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Karen Bitz estimates the loss in value at \$1,300,000.

The claim does not provide an analysis of the subject property's fair market value with current land use restrictions. Without a specific appraisal or other verification of the value of the property, 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

The claim includes a reference to Clackamas County zoning and State laws that restrict the use of the property relative to what would have been allowed in 1964, when the property was acquired by Karen Bitz's family. 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 Section 3 of Ballot Measure 37, with the exception of some provisions of ORS 215, which were adopted prior to the family's 1964 acquisition of the property.

Conclusions

The general statutory, goal and rule restrictions on the property zoned apply to the claimant's use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37. Provisions of ORS 215 adopted prior to 1964 are exempt under Section 3 (E) of the Measure and will continue to apply to the property. 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.

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 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, that 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 prohibit subdivision and limit commercial uses on property zoned for EFU. The laws enforced by the Commission or the department reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$1,300,000. This amount is not substantiated by an appraisal or any other documentation. 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 all or parts of certain land use regulations to allow Karen Bitz to use the subject property for a use permitted at the time she acquired the property on March 27, 2002. The current requirements for division of farm land and allowed commercial uses of land zoned for exclusive farm use are the same as when Ms. Biz acquired the property in 2002.

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 claimant's division of the property for residential use or for development of a commercial use on the subject property: the provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, Division 33, enacted after March 27, 2002. These land use regulation will not apply to Ms. Bitz's use of the property only to the extent necessary to allow the claimant to use the property as permitted at the time she acquired it on March 27, 2002. The department acknowledges that relief recommended in this report will not allow the claimant to use the property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to use the subject property, subject to the laws in effect when she acquired the property on March 27, 2002 and to any other laws that are exempt under section 3(E) of Measure 37.
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 215.412 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property posed 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 DLCD; 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 July 8, 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.
