

**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: M119674

NAME OF CLAIMANT: Alice Sulak

MAILING ADDRESS: 6331 Riverside Drive
McMinnville, Oregon 97128

IDENTIFICATION OF PROPERTY: Township 4S, Range 2W, Section 1D
Tax Lot 200
Marion County

OTHER CONTACT INFORMATION: Jim Sulak
1275 East 18th
McMinnville, Oregon 97128

DATE RECEIVED BY DAS: February 9, 2005

180-DAY DEADLINE: August 8, 2005

I. CLAIM

The claimant, Alice Sulak, seeks compensation in the amount of \$326,400 for a 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 create three additional parcels on 11.7 acres of the 62.26 acre property, and to establish a single-family residence on each of the three parcels. The property is located in the 9300 Block of Champoeg Road, NE, in Marion 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 this claim is valid. Department staff recommends, in lieu of just compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimant to allow her to divide the property to create three additional parcels and to develop each resulting parcel with one single-family residence: applicable provisions of Statewide Planning Goal 3, ORS 215.263, 215.284 and 215.780, and OAR 660, division 33.

These laws will not apply to the claimant only to the extent necessary to allow her a use of the subject property permitted at the time she acquired it on June 27, 1952. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On February 23, 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, two (2) written comments, evidence or information were received in response to the 10-day notice. Neighboring property owners expressed concerns about conflicts with existing surrounding land use, adverse effects on water resources, and damage to archaeological resources, concerns about floodplain development, and alleged irregularities in DAS's notification of neighbors for comment. Comments received that are specific to the criteria required under Measure 37 for the department's review of this claim are discussed in the appropriate section 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 files.)

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 identifies Marion County's Exclusive Farm Use (EFU) 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 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 of 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 and her late husband, Miles Sulak, acquired the property on June 27, 1952. (See warranty deed dated June 27, 1952, included in the claim materials).¹ A current year tax statement (July 1, 2004 through June 30, 2005) from Marion County shows Alice Sulak as the current owner of the subject property.

Conclusions

The claimant, Alice Sulak is an “owner” of the subject property as that term is defined in Section 11 of Ballot Measure 37, as of June 27, 1952.

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.

¹ A second deed, also conveying the subject property to Alice Sulak and Miles Sulak, dated October 19, 1961, was also included with the claim. An explanation of the two deeds was requested in a written request to the claimant dated April 13, 2005. In response, the claimant explained that the October 19, 1961 deed of rescission was the result of the settlement of a lawsuit involving an agreement to sell property. The party buying the property found that no river access was involved, and consequently sued Miles Sulak to rescind the agreement and return the property to the Sulaks. According to the claimant, as a result of the settlement, the property was never legally conveyed to the purchaser. The deed of rescission issued in 1961 specifically states that no actual conveyance of the property was ever accomplished (see deed of rescission dated October 19, 1961, included with the claim materials and faxed letter of clarification from the claimant dated April 15, 2005). Consequently, the claimant has owned the property since the original June 27, 1952 acquisition date.

Findings of Fact

The claim states that Alice Sulak cannot create and develop three additional parcels because Marion County's EFU zoning does not allow "parceling" of the 62.26-acre property into three (3) additional, smaller parcels in the southerly areas of the property that the claimant says cannot be farmed for a variety of reasons.²

The claimant's 62.26-acre property is zoned by Marion County as EFU (chapter 136 - Marion County Code) in compliance with Statewide Planning Goal 3, ORS 215.283 and OAR 660, division 33, with a minimum lot size of 80-acres required by ORS 215.780(1). 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 62.26-acre 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.

Statewide Planning Goal 3 (Agricultural Lands) became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU pursuant to ORS 215. 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 acquired the subject property in 1952. The laws that currently restrict the claimant's ability to divide and develop the property were not in effect when she acquired it.

Conclusions

Lot size and dwelling standards established by Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, adopted since the claimant acquired the property in 1952, do not allow

² The claim cites section 36.010 of the Marion County zoning code; however, 36.010 does not address EFU zoning. Rather, it contains information about how to make an application to the county. Section 136.010 is the county's EFU zone. In response to a request for clarification from DLCD Staff the claimant stated that the claim is based on Section 136 of the Marion County code (EFU zoning) and also cites ORS 215.283 and OAR 660, division 33.

the division of the property into parcels less than 80 acres in size or allow the approval of dwellings as may have been possible in 1952. The County's EFU zone is based on the standards required by Goal 3, ORS 215 and OAR 660, division 33. Land use laws adopted since 1952 restrict the use of the property from what could have been done when the property was acquired by the claimant in 1952.

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 claim includes a Marion County tax assessment, which lists the property's current real market value, with current regulations, at approximately \$574,000 (see attachment to claim). A May 3, 2005 supplement to the claim includes an appraisal for the property, which lists the current real market value of the property at \$500,000, or a current rounded figure of \$8000 per-acre. Based on the value of the 3 additional lots that cannot be created because of the current 80-acre minimum EFU zoning, the claimant alleges a loss of fair market value of \$326,400 for the 11.7-acres that she desires divide into three additional lots.

It was not immediately clear from the claim materials what percentage of the site is considered buildable land. A written narrative attached to the claim states that the property is too steep, subject to erosion, and not practical for farming. The claim did not state how this would affect the suitability of the property for residential use. The written clarification letter and the May 3, 2005 appraisal states that it is the southerly 11.7-acres of the property adjacent to Champoeg Road that are not very suitable for farming, and it is that area (11.7-acres) that the claimant wishes to divide into three buildable lots.

A comment letter received in response to the DAS notice notes that much of the property is probably in the floodplain of the Willamette River based on the degree of flooding on the site during the 1964 and 1996 flood events (see the department's claim file for the comment letter). It appears to staff that the southerly portion of the property that the claimant wishes to divide into three additional lots is higher in elevation than the approximately 50-acres of the northerly portion of the site adjacent to the Willamette River. An examination of the FIRM (Flood Insurance Rate Map) maps for the area of Marion County (Map Number 41047C0050 G and Map Number 41047C0130 G) shows that a large segment of the property is in the 100-year floodplain of the Willamette River. Some of the northerly portion of the site directly adjacent to the river is in the mapped floodway, and as such, would not be buildable without extensive additional engineering studies. It appears that the portion of the property that the claimant wishes to divide into three additional lots may be only partially in the mapped 100-year flood plain of the Willamette River, but not the floodway.

Conclusions

As explained in section V.(1) of this report, Alice Sulak is the current owner of the subject property as of June 27, 1952. Thus, under Ballot Measure 37, Ms. Sulak is due compensation for land use laws 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) of this report, laws adopted since the claimant acquired the property restrict division of the subject property. The claim asserts the reduction in value due to the restriction to be \$326,400. However, site characteristics may limit the development potential of the subject property and may mitigate the amount of the reduction in fair market value resulting from laws adopted since 1952. 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 land use regulations. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The claim is based on Marion County's EFU zone and the related provisions of state law that have restricted use of the property and reduced its fair market value. These are Statewide Planning Goal 3, "Agricultural Lands," and applicable provisions of ORS 215 and OAR 660, division 33. All of the specific state land use regulations cited in the claim were enacted after the claimant acquired the property in 1952, and do restrict the use of the property in a manner that likely reduces its fair market value. None of the laws identified in the claim appear to be exempt under Section 3(E) of Ballot Measure 37.

The claim notes that the subject property is subject to erosion and is too steep for farming, but it is difficult to substantiate this from aerial photographs. As described in Section V.(3) of this report, portions of the subject property are in a mapped floodplain. As a general matter, laws adopted to address public health and safety concerns, such as steep slopes, unstable soil conditions or flood hazards, are exempt under Section 3 of Measure 37 and will continue to apply to the subject property. Until the owner has a specific proposal for developing the property, the department is not able to make a final determination concerning what laws may restrict the use of the property, and which of those laws that do apply are exempt.

Conclusions

It appears that the general statutory, goal and rule restrictions on the division, residential development and use of agricultural land apply to the claimants' use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37. Laws adopted to address public health and safety concerns such as steep slopes, unstable soil conditions or flood hazards are exempt under Section 3 of Measure 37 and will continue to apply to the subject 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 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 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 the 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, prohibit the creation of three new parcels and the placement of dwellings on them. These restrictions reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$326,400. The claim provides an appraisal and an explanation about how the specified restrictions reduce the fair market value of the property. However, due to site characteristics, it is not clear how much of the property is actually developable and it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, the department acknowledges that state land use laws 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 just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow Ms. Sulak to use the subject property for a use permitted at the time she acquired the property on June 27, 1952.

Conclusions

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 Ms. Sulak's division of 11.7 acres of her 62.26 acre property into three additional parcels or to the establishment of a single family dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3, ORS 215.263, 215.284 and 215.780, and OAR 660, division 33. These land use laws will not apply to Ms. Sulak's use of her property only to the extent necessary to allow her a use permitted at the time she acquired the property.
2. The action by the State of Oregon provides the states authorization to the claimant to use her property subject to the standards in effect on June 27, 1952. In addition, laws adopted to address public health and safety issues related to floodplains, steep slopes and unstable soils on the

subject property will continue to apply. Other laws may continue to apply as well, depending on the specific nature of development proposed for the property.

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 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 them 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.