

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation**

August 11, 2005

STATE CLAIM NUMBER: M119866

NAME OF CLAIMANT: Matt Bergey

MAILING ADDRESS: 7700 Southwest River Road
Hillsboro Oregon 97123

IDENTIFICATION OF PROPERTY: Township 1S, Range 2W, Section 15
Tax Lot 1506
Washington County

DATE RECEIVED BY DAS: February 22, 2005

180-DAY DEADLINE: August 21, 2005

I. CLAIM

Matt Bergey, the claimant, seeks compensation in the amount of \$250,000 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 develop one single family dwelling on his 4.85-acre property. The property is located at Township 1S, Range 2W, Section 15, and Tax Lot 1506 in 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 requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Mr. Bergey to allow him to establish a dwelling on the subject property: applicable provisions of Statewide Planning Goal 3, (Agricultural Lands), ORS 215.213, 215.284, 215.317, and OAR 660, division 033. These laws will not apply to the claimant only to the extent necessary to allow Matt Bergey a use of the property permitted at the time he acquired it on November 28, 1994. The department acknowledges that the relief recommended in this report will not allow Mr. Bergey to use the property in the manner set forth in the claim. (See Section VI. of this report for the complete recommendation.)

III. COMMENTS ON CLAIM

Comments Received

On March 16, 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, there were no written comments, evidence or information 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

The claim was submitted to DAS on February 22, 2005 for processing under OAR 125, division 145. The claim lists land use regulations, specifically OAR 660-033-0135(7), that restrict the use of the property as the basis of 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 to statutory and rule history in the Oregon Revised Statutes and Administrative Rules.)

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on laws 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 lands for “owners” as 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 subject property, also known as Lot 10 of Madison Acres, is a 4.85-acre parcel. Matt Bergey acquired the subject property on November 28, 1994, from Henry Henninger, his grandfather, by Special Warranty Deed, recorded Washington County document #95001980. (See claim file.) Henry Henninger acquired the property in 1991 from Bruce Bergey. On October 5, 1984, Bruce Bergey entered into a contract to purchase subject property and several adjoining lots. Bruce Bergey is Matt Bergey's father. Both Bruce Bergey and Henry Henninger are family members of Matt Bergey under Measure 37. Family ownership of the property began in 1984.

Conclusions

The claimant, Matt Bergey, is an "owner" of the subject property as of November 28, 1994, as that term is defined by Section 11 (C) of Ballot Measure 37. Bruce Bergey is a "family member" as to Matt Bergey, as the term is defined by Section 11(A) of Ballot Measure 37. Family ownership of the property begins on October 5, 1984.

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 OAR 660, division 033, specifically the \$80,000 farm income requirement "removed the approval to build a dwelling related to farming." OAR 660-033-0135 (7) requires for the approval of a dwelling "customarily provided in conjunction with farm use" on high-value farmland that the owner demonstrate, in part, that the owner's farm operation produced at least \$80,000 in gross annual income from the sale of farm products in the last two or three of the last five years

The claim is based, in part, on Washington County's current 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 033, 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 Goal 3 and ORS 215.213, 215.284, and 215.317, and OAR 660, division 33, establish standards for allowing the existing parcel to have farm or non farm dwellings on them.

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 215.317. OAR 660-033-0135 (7) requires for the approval of a dwelling "customarily provided in

conjunction with farm use” on high-value farmland that the owner demonstrate, in part, that the owner’s farm operation produced at least \$80,000 in gross annual income from the sale of farm products in the last two or three of the last five years. The claimant applied to Washington County for a special use approval for a dwelling in conjunction with farm use in 1995. In a 1997 letter to applicant, Washington County indicated that rules for placing a dwelling on high value farmland, including the \$80,000 gross farm income requirement under OAR 660-033-0135(7) applied to the subject property.

OAR 660-033-0130(4) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993.

The claimant acquired the subject property on November 28, 1994. The claimant’s family acquired the subject property on October 5, 1984. The applicable statutory and administrative rule standards for the approval of a farm dwelling in effect on October 5, 1984 are found in ORS 215.213 and OAR 660, division 5 (1983 edition, repealed August 7, 1993). Specifically, ORS 215.213 provided standards for a “dwelling customarily provided in conjunction with farm use.” OAR 660-05-030 further required that such a dwelling: (1) be located on a parcel large enough to satisfy the Goal 3 minimum lot size standard, i.e. “appropriate for the continuation of the existing Commercial Agricultural Enterprise within the area” as explained in OAR 660-05-015; and (2) be situated on a parcel currently employed for farm use as explained in OAR 660-05-030(4).¹

Conclusions

Correspondence between Washington County and the claimant indicate that claimant’s land is high-value farm land. OAR 660-033-0135(7) and provisions of ORS 215.213 were all adopted after the property was acquired by the claimant’s family in 1984, and do not allow a single family farm dwelling to be approved on the subject property. As a result, the department concludes that state land use regulations restrict the claimant’s use of the property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimant has identified. There may be other laws that currently apply to the claimant’s use of the property, and that may continue to apply to the claimant’s use of the property, that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When a claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

¹ *Mateo 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* 98 Or App 33, (November 23, 1988).

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 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

According to the claimant, the fair market value of his property has been reduced by \$250,000 because he cannot qualify for the approval of a dwelling under OAR 660-033-0135(7). An appraisal was submitted, estimating the “as is” value of the property at \$249,000. The assessed real market value of the property is \$3,880 according to the Washington County 2005 Tax Statement for subject property.

Conclusions

As explained in section V.(1) of this report, Matt Bergey is the current owner of the subject property as of November 28, 1994. Family ownership dates to 1984. Thus, under Ballot Measure 37, Mr. Bergey 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 placement of a dwelling on the subject property. The claim asserts the reduction in value due to the restrictions to be \$250,000. However, based on current information, 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 Ballot 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

OAR 660-033-0135 (7) pertains to the approval of dwellings customarily provided in conjunction with farm use under ORS 215.213. As this law became effective after 1984, it is not exempt under subsection 3(E) of Ballot Measure 37. ORS 215.213 (1983 edition), was in effect at the time a family member of the claimant acquired the property, as were most provisions of Statewide Planning Goal 3.

Conclusions

OAR 660-033-0135(7) is not exempt under subsection 3(E) of Ballot Measure 37. Laws in effect when the claimant, or a family member of the claimant, acquired the property are exempt under subsection 3(E) of Measure 37 and will continue to apply to the claimant’s use of the

property. Some provisions of ORS 215 and most provisions of Goal 3 were adopted prior to 1984, and so will continue to apply to the claimant's use of property. There may be other laws that continue to apply to the claimant's use of the property that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When a claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimant has identified. Similarly, this report only addresses the exemptions provided for under section (3) of Measure 37 that are clearly applicable given the information provided to the department in the claim. The claimant should be aware that the less information he has provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the property.

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, the Director must provide only non-monetary relief unless and until funds are appropriated 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 restrict the placement of a dwelling on the subject property. These laws more likely than not have reduced the fair market value of the property to some extent. The claim asserts this amount to be \$250,000 and includes an appraisal based on comparable properties. Based on the current record for this claim, the department finds 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, relative to family ownership in 1984.

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 the claimant and current owner to use the subject property for a use permitted at the time he acquired the property on November 28, 1994.

Conclusions

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, will not apply to allow Matt Bergey to apply to Washington County for approval of a dwelling on the property: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands); ORS 215.213, 215.284, and ORS 215.317; and OAR 660, division 033 that took effect after the present owner Matt Bergey acquired the property on November 28, 1994. These laws will not apply to the claimant to the extent necessary to allow Matt Bergey a use of the subject property permitted at the time he acquired the property on November 28, 1994. The department acknowledges that the relief recommended in this report will not allow Mr. Bergey 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 the claimant to use the property subject to the standards in effect on November 28, 1994. On that date, the property was subject to the provisions of ORS 215 that were in effect, Statewide Planning Goal 3 (Agricultural Lands), and the standards for farm and non-farm dwellings in effect on that date, specifically, the standards in OAR 660, division 33 including OAR 660-033-0135(7).
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 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 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 25, 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.