

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

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

September 12 , 2005

STATE CLAIM NUMBER: M120239

NAME OF CLAIMANT: 5 Way LLC

MAILING ADDRESS: Post Office Box 425
Baker City, Oregon 97814

PROPERTY IDENTIFICATION: Township 12S, Range 45E, Section 27
Tax Lot 100
Baker County

OTHER CONTACT INFORMATION: Michael R. "Mike" Nelson
Post Office Box 762
Baker City, Oregon 97814

DATE RECEIVED BY DAS: March 21, 2005

180-DAY DEADLINE: September 17, 2005

I. SUMMARY OF CLAIM

The claimant, 5 Way LLC, seeks compensation in the amount of \$450,000 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 64-acre property into five-acre lots and to develop a recreational dwelling on each lot. The property is located at 33735 Snake River Road, north of the City of Huntington, in Baker 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 not valid because neither the Land Conservation and Development Commission (the Commission) nor the department have enforced laws after January 1, 2004, when the claimant acquired the property, that restrict the claimant's use of private real property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 25, 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 March 21, 2005, for processing under OAR 125, division 145. The claim identifies OAR 660, division 33, ORS 197 and ORS 215 as 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 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

Michael R. Nelson, Lewis A. Yocum, Joseph O. Rudi, Carney Lansford, and Alan Schmeitz (Nelson, et al) acquired the property by Contract of Sale dated January 19, 1983. (See contract included in the claim.)

On January 1, 2004, Nelson, et al, transferred ownership of the property to the claimant, 5 Way LLC, as reflected by Statutory Bargain and Sale Deeds recorded with Baker County in June and July of 2004. (See department claim file). 5 Way LLC is an active limited-liability company registered with the Oregon Secretary of State.¹

Information from the Baker County Assessor's office indicates that 5 Way LLC remains the current owner of the subject property.

Conclusions

The claimant, 5 Way LLC, is an "owner" of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of January 1, 2004.

Although a corporation can be a "family member" of an owner as that term is defined by Section 11(C) of Ballot Measure 37, an "owner" that is a corporate entity cannot claim an individual as a "family member," as defined in Section 11(A) of the measure. Therefore, none of the individuals who transferred the subject property into 5 Way LLC can be considered a "family member" of 5 Way LLC.

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 cites OAR 660-33-130 and 135, ORS 197 and ORS 215 as land use laws restricting the use of the subject property.²

¹ The claimant LCC is registered with the Oregon Corporation Commission under the name "Five Way LLC."

² The claim cites to "OAR 660-03-130" as a restricting regulation. Department staff concluded that this is a typographical error, and that the intended citation is to OAR 660-33-130, which currently applies to the use of the subject property.

The claim is based on Baker 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 Statewide Planning 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 215.³

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 160-acres (for designated range land) and establish standards for allowing the existing or any proposed parcel(s) to have farm or non-farm dwellings on them.

ORS 215.780 established a 160-acre minimum size for the creation of new lots or parcels in EFU zones on designated range land, 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.)

5 Way LLC acquired the subject property on January 1, 2004. At that time the property was zoned for Agricultural use by Baker County and the use of the property was limited by the provisions of Statewide Planning Goals and County zoning currently in effect.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU, as established in ORS 215 and OAR 660, division 33, were enacted before 5 Way LLC acquired the subject property on January 1, 2004. These laws do not allow the division of the property, nor do they allow non-farm dwellings on agriculturally zoned property. Based on the current record, the claimant has not established that current laws 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 acquired it on January 1, 2004.

³The claim also cites to ORS 197. That chapter provides authorization to cities and counties to adopt comprehensive plans, and establishes procedural requirements for review and appeal of land use applications. The claim does not establish how ORS 197, in itself, restricts the use of the subject 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.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any land use regulation 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 estimated \$450,000 reduction in the property's fair market value, as a result of current regulations that restrict the use of the property. This estimate is based on the claimant's estimate of the market value and is based on the sales of similar five-acre parcels. The estimate assumes a reduction in value based upon regulations in effect in 1983. The claim does not include an appraisal or other analyses to substantiate the claimant's estimate of the current real market value of the subject property or of the alleged reduction in value.

Conclusions

As explained in Section V.(1) of this report, the current owner is 5 Way LLC, which acquired the property on January 1, 2004. Under Ballot Measure 37, the claimant is not due compensation because no land use regulations adopted since the claimant acquired the property on January 1, 2004, have the effect of reducing the fair market value of the property relative to uses permitted when 5 Way LLC acquired the property. (See Section V.(2) of this report.)

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 includes a reference to ORS 197, 215 and OAR 660, division 33, which Baker County has implemented through its EFU zone. All of these laws were in effect when the claimant acquired the property. These laws are exempt under Section 3(E) of Ballot Measure 37, which exempts laws enacted prior to the date the claimant acquired the property.

Conclusions

The general statutory, goal and rule restrictions on subdividing property for residential or recreational development and use of farm land apply to the claimant's use of the property.

Statewide Planning Goal 3, ORS 215 and OAR 660, division 33, were in effect when the claimant acquired the property in 2004, are exempt under Section 3 (E) of the Measure and will continue to apply to 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. 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.

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 in order to allow the present owner to carry out a use of the property permitted at the time the current 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.

Conclusion

Based on the findings and conclusions set forth in this report, the claimant is not entitled to relief under Ballot Measure 37. Department staff recommends that this claim be denied because neither the Commission nor the Department have enforced laws that were enacted after the claimant acquired the property on January 1, 2004, that restrict the claimant's use of the subject private real property.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 23, 2005. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' 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.