

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

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

September 15, 2005

STATE CLAIM NUMBER: M120341

NAME OF CLAIMANT: Jacqueline Fisher

MAILING ADDRESS: 885 E. Ellendale
Dallas, Oregon 97338

IDENTIFICATION OF PROPERTY: Township 8S, Range 5W, Sections 1 and 2
Tax Lot 301
Polk County

OTHER CONTACT INFORMATION: Mark Irick
Shetterly, Irick, Shetterly & Ozias
Post Office Box 105
Dallas, Oregon 97338

DATE RECEIVED BY DAS: March 25, 2005

180-DAY DEADLINE: September 21, 2005

I. CLAIM

The claimant, Jacqueline Fisher, seeks compensation in the amount of \$422,250 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 divide and develop the 59.88-acre subject property into two, approximately 30-acre parcels with a dwelling on each parcel. The property is located adjacent to 10670 Orrs Corner Road, near Rickreall, in Polk 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 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 subject property into two, approximately 30-acre parcels and to establish a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33, enacted after April 5, 1971. These laws will not apply to the claimant only to the extent necessary to allow Ms. Fisher a use of the subject property permitted at the time she acquired it on April 5, 1971. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

Comments Received

On April 7, 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, one written comment was received in response to the 10-day notice.

The comment does not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law. (See comment letter 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

The claim was submitted to DAS on March 25, 2005, for processing under OAR 125, division 145. The claim identifies Statewide Planning Goal 3 and numerous Oregon Revised Statutes 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

The claimant, Jacqueline Fisher (formerly known as Jacqueline Gwinn), was awarded ownership of the subject property through a divorce decree that became effective on April 5, 1971.¹

Conclusions

The claimant, Jacqueline Fisher, is an “owner” of the subject property as that term is defined in Section 11(C) of Ballot Measure 37, as of April 5, 1971.

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 lists numerous provisions of ORS 215, as well as ORS 197.250, as restricting the claimant’s ability to divide the subject parcel into two, approximately 30-acre parcels, and to develop a home on each parcel.

The claim is generally based on Polk 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

¹ The property awarded Ms. Fisher (then Ms. Gwinn) was divided into a total of two (2) new parcels and the western ten acres were sold to another party on January 31, 1973. The claimant retained the other 59.88-acre parcel, which is the property that is the subject of this claim.

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.

ORS 215.780 establishes an 80-acre minimum size for the creation of new parcels or lots 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.)

ORS 197.250 requires counties and cities to obtain acknowledgement of their comprehensive plans by the Commission. That statute does not in itself restrict the use of the subject property.

The claimant, Jacqueline Fisher, acquired the subject property prior to the establishment of the statewide planning goals or the implementing regulations and statutes. Some provisions of ORS 215 were in effect at the time the claimant acquired the property on April 5, 1971, and may have applied to the property, depending on the local zoning in effect at the time.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3, ORS 215, and OAR 660-033 adopted since Ms. Fisher acquired the property do not allow the division of the property into parcels less than 80-acres in size or the approval of dwellings. The County's EFU zone is based on the standards required by Goal 3, ORS 215 and OAR 660, division 33. Depending on the local zoning in effect when Ms. Fisher acquired the property, the property may have been subject to provisions of ORS 215 in effect at that time. Nonetheless, land use laws adopted since April 5, 1971, restrict the use of the property from what could have been done when the property was acquired by the claimant.

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 the claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and 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 the 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.

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 claimant asserts that the fair market value of the subject property has been reduced by \$422,250 as a result of land use laws enacted after Ms. Fisher acquired the property. No appraisal or explanation for this estimate has been provided with the claim.

Conclusions

As explained in Section V.(1) of this report, Jacqueline Fisher is the current owner who acquired the subject property on April 5, 1971. Under Ballot Measure 37, Ms. Fisher is due compensation for land use regulations 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 claimant estimates the reduction in value due to the restrictions to be \$422,250.

Without an appraisal or other documentation, 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 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 in part on laws related to Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33, that reduce the fair market value of the subject property. These state land use regulations are not exempt under Section 3(E) of Measure 37 to the extent they were enacted after the claimant acquired the property on April 5, 1971. Depending on the local zoning in effect in 1971, some provisions of ORS 215 may have applied to the property when the claimant acquired it. If applicable those provisions of ORS 215 are exempt under Section 3(E), which exempts laws in effect on the date the claimant acquired the property.

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property or whether those laws may fall under one or more of the exemptions under Measure 37. It appears that the general statutory, goal and rule restrictions on the division, residential development and use of Agricultural Land apply to the claimant's use of the property, and for the most part these laws are not exempt under Section 3(E). If applicable to the subject property, the provisions of ORS 215 in effect in 1971 are exempt under Section 3(E).

Other laws in effect when the claimant acquired her interest in the property are also exempt under Section 3(E) of Measure 37, and will continue to apply to the claimant's use of the 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 the claimant seeks a building or development permit to carry out a specific use, it may become evident what 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, the 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 she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her 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 by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusion in this report, laws enforced by the Commission or the department prohibit the division of the subject property into two, approximately 30-acre, parcels and development of a dwelling on each parcel. The claim asserts that these restrictions reduce the fair market value of the subject property by \$422,250. Because no appraisal or other documentation was submitted to substantiate the reduction in value, 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 the claimant to use the subject property for a use permitted at the time she acquired the property on April 5, 1971.

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 Jacqueline Fisher's division of the subject property into two, approximately 30-acre, lots or to the establishment of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660 division 33. These land use regulations will not apply to Jacqueline Fisher's use of the property only to the extent necessary to allow her a use permitted at the time she acquired the property on April 5, 1971.
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 April 5, 1971, including applicable provisions of ORS 215 then in effect.
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 215.402 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, Jacqueline Fisher, 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 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 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 August 26, 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.