

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

June 3, 2005

STATE CLAIM NUMBER: M118919

NAME OF CLAIMANT: Mildred Fergusson

MAILING ADDRESS: 3095 SW Lukas Road
Hillsboro, OR 97123

IDENTIFICATION OF PROPERTY: 3095 SW Lukas Road
Township 1S, Range 3W,
Section 25DC
Tax Lot 1600, Washington County

DATE RECEIVED BY DAS: December 8, 2004

180-DAY DEADLINE: June 6, 2005

I. CLAIM

Mildred Fergusson, the claimant, seeks compensation in the amount of \$1,000,000 for the reduction in fair market value of her subject property 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 the property into four approximately 2-acre parcels, with dwellings. The property is located at 30985 SW Lukas Road, in Washington County, OR near the City of Hillsboro. (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 certain applicable state laws enforced by the Land Conservation and Development Commission (the Commission) or by the department, specifically Statewide Planning Goal 14 (Urbanization), OAR 660-004-0040 and Goal 2 (Land Use Planning, specifying the standards for exceptions to statewide goals and how they are to be processed), not apply to the subject property to the extent necessary to allow Ms. Fergusson a use of the property permitted at the time she acquired the property that is the subject of this claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 9, 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

The claim was submitted to DAS on December 8, 2004 for processing under OAR 125, Division 145. The claim includes a list of 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

The claimant, Mildred Fergusson, and her husband acquired the subject property from Walter and Susie Fergusson, by warranty deed on October 30, 1944. (See claim). The deed reflects a parcel of 10.67 acres. However, the Washington County tax assessor’s map attached to the claim identifies the subject property as being 7.8 acres. Department staff contacted Washington County staff (Conway) who checked this claim against records in the County Assessor’s office, and states that a chain of title for the subject 7.8-acre parcel can be established for Ms. Fergusson back to Oct. 30, 1944 (phone conversation on March 25, 2005).

Conclusions

The claimant, Mildred Fergusson is an “owner” of the subject property identified as tax lot 1S325DC01600, in Washington County as that term is defined in Section 11(C) 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 claimant, Mildred Fergusson, in a December 2, 2004 letter to the Washington County Planning Department, states that her goal for her property is “to have four divided lots for permanent, single family dwellings. Current agriculture and forestry rights will remain unchanged.” This letter was included as part of the claim submitted to DAS dated December 8, 2005.

The claim identifies three different provisions of Washington County zoning that restrict her ability to divide her property:

Date	Zoning	Requirements
1959	F-1	1-acre minimum lot size.
1973	AF-2	2-acre minimum lot size
1974	AF-5	5-acre minimum lot size.

The claim also lists OAR 660-004-0040 (Interpretation of Statewide Planning Goal 2 Exception Process) and Goal 14 (Urbanization) as restricting the use of the claimant’s property. Current Washington County zoning applying to the subject property is Agricultural and Forestry (AF-5), a designation described in the County’s Comprehensive Plan, vol. 3 “Rural/Natural Resource Elements.” Rural lands designations, including AF-5, have been created by the County’s taking an exception to Statewide Planning Goal 3 (Agricultural Land) and Goal 4 (Forest Land), as required by the Statewide Planning Goal 2. AF-5 requires a minimum lot size of 5 acres. OAR 660, Division 4, Interpretation of Goal 2 Exception Process, Section 0040 (effective October 4, 2000), applies Goal 14 (Urbanization), to rural residential areas, and in section 5 (a) and (b) limits parcel size for new parcels to a minimum of 2 acres.

Conclusions

The minimum lot size requirements established by the current rural residential zoning and OAR 660-004-0040, which require Ms. Fergusson to take an exception to Statewide Planning Goal 14 in order to create four lots from her current 7.8 acre parcel, were adopted after the claimant acquired the subject property in 1944 and restrict the use of the property relative to the uses allowed when the property was acquired in 1944.

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

Ms. Fergusson’s claim included a one-paragraph explanation of how she determined the value of her property:

“At the time the property was purchased, 1944, there was no zoning restriction. The property could be divided any way possible. The going rate for an acre lot in the area is approximately \$100,000. If the property was divided into 10 separate lots, as it could in 1944, the property would be valued at \$1,000,000 or more. Because of zoning restrictions, that value is lost.”

The \$1,000,000 figure appears to assume an approximately 10-acre parcel, whereas the tax assessor's map she provided establishes that the subject property is approximately 7.8 acres. That estimated value also does not appear to net out the current value of the property with current zoning and other restrictions. No appraisal or other verification of the claim amount has been submitted with the Fergusson claim.

Conclusions

As explained in section V.(1) of this report, the current owner is Mildred Fergusson who acquired the property in 1944. Thus, under Ballot Measure 37, Mildred Fergusson is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Ms. Fergusson estimates the loss in value at \$1,000,000.

Without an appraisal based on the value of four, approximately 2-acre lots or verification of Ms. Fergusson's estimate of the property's value when subdivided, 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 list of state and county land use regulations, and states that they were enacted subsequent to acquisition of the property in 1944, and restrict the use relative to what would have been allowed in 1944 when the claimant acquired the property. As the claim specifies, these provisions include the Washington County AF-5 zone, as required by statewide Goal 14 (Urbanization) and OAR 660-04-0040.

Maps included in the claim show that roughly one-third of the subject property is in a mapped floodplain. To the extent that there are restrictions on the use of the property in the floodplain and these restrictions implement Statewide Planning Goal 7 (Natural Hazards), such restrictions are exempt under Ballot Measure 37, Section 3(B) which exempts laws "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations." Goal 7 requires local land use plans to identify natural hazards and to "protect people and property from natural hazards."

Conclusions

Without a specific proposed use 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 does appear that the general statutory, goal and rule restrictions on dividing the subject property apply to the owner's anticipated use of the property, and for the most part, these laws would not come under any of the exemptions in Measure 37. Restrictions adopted by local governments to comply with Statewide Planning Goal 7, such as local floodplain ordinances to protect health and safety will continue to apply. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure, because they were not raised in this claim, 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 department has enacted or 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 set forth in this report, laws enforced by the Commission or the department restrict the subdivision of, and approval of dwellings on, the subject property, specifically the requirements for an exception to Statewide Planning Goal 14 found in OAR 660-004-0040 and the Goal 2 language relating to the exception process. Thus the claimant cannot create the desired four lots on her 7.8-acre property in Washington County. The laws enforced by the Commission or department reduce the fair market value of the 7.8-acre property to some extent. The claim asserts this amount to be \$1,000,000. However because the claim does not provide a specific explanation for how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. 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 one or more land use regulations to allow Ms. Fergusson to use the subject property for a use permitted at the time she acquired the property on October 30, 1944.

Conclusions

Based on the record currently before the department, Ms. Fergusson has established that she is entitled to relief. Therefore department staff recommends that, in lieu of compensation, and except for local government restrictions adopted to comply with the health and safety requirements of Statewide Planning Goal 7, the requirements of applicable state laws enforced by the Commission or the department, specifically the exception for Statewide Planning Goal 14 found in OAR 660-004-0040 and the Goal 2 language relating to the exception process, not apply to the subject property to the extent necessary to allow Ms. Fergusson a use of the property permitted at the time she acquired the property that is the subject of this claim.

Any use of the property by the claimant remains subject to the following laws:

(a) those laws not specified in this claim to the State of Oregon, dated December 8, 2004, or identified in this report; (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.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on May 11, 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.