

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

June 10, 2005

STATE CLAIM NUMBER: M118967

NAME OF CLAIMANTS: Gregg and Patricia Hottmann

MAILING ADDRESS: 14625 NE Dopp Road
Newberg, Oregon 97132

IDENTIFICATION OF PROPERTY: Township 3S Range 3W, Section 7
Tax lot 3307-700, Hood River County

DATE RECEIVED BY DAS: December 14, 2004

180-DAY DEADLINE: June 12, 2005

I. CLAIM

Gregg and Patricia Hottmann, the claimants, seek compensation in the amount of \$500,000 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 claimants desire compensation or the right to develop one single family dwelling on their property. The property is located at T3S, R3W, Section 7, tax lot 3307-700 in Yamhill 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 certain state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, specifically, the requirements of OAR 660-033-0135(7) not apply to the subject property, to the extent necessary to allow the Hottmanns a use of the property permitted at the time they acquired it on July 30, 1993. (See Section VI. of this report for the complete recommendation.)

III. COMMENTS ON CLAIM

Comments Received

On February 15, 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 December 14, 2004 for processing under OAR 125, Division 145. The claim lists land use regulations, specifically OAR 660-033-135(6) and (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

Gregg and Patricia Hottmann acquired the subject property on July 30, 1993. (See portion of the land sale contract conveying the subject property to Gregg and Patricia Hottmann in the department’s claim file). A complete signed copy of the contract with a description of the property conveyed was not submitted. The claim includes a “Special Warranty Deed” conveying the legal title to the property in fulfillment of the contract, dated October 10, 2001. Although neither the contract for sale nor the deed include a legal description of the property, the legal description of the subject property was included in the copy of the claim provided to the department by Yamhill County (See Yamhill County Measure 37 Action Docket # M 37-06-04, Board Order 05-72 dated February 3, 2005 as part of the department’s claim file.)

Conclusions

The claimants, Gregg and Patricia Hottmann are “owners” of the subject property as of July 30, 1993, as that term is defined by Section 11 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 claim states that OAR 660-033-0135(6) and (7) “restrict a single family dwelling” on the subject property. (See letter from claimants dated December 14, 2004.) 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. OAR 660-033-0135(6) only applies to farm dwellings in counties that have adopted marginal lands under ORS 197.247 (1991 Edition) and does not apply to properties in Yamhill County.

OAR 660-033-0135(7) became effective on March 1, 1994 and interprets the statutory standard for a primary dwelling in an exclusive farm use zone under ORS 215.283(1)(f).

The claimants applied for a dwelling under OAR 660-033-0135(7) on March 2, 1994 and, upon learning that they could not qualify for the approval of a dwelling, withdrew their application on April 14, 1994. (See Yamhill County Measure 37 Action Docket # M 37-06-04, p. 2, Board Order 05-72 dated February 3, 2005 as part of the department's claim file.)

Under ORS 197.646 (Chapter 612, Section 7, Oregon Laws 1991), OAR 660-033-0135(7) was applicable to the claimant's property until the County amended its comprehensive plan and land use regulations to implement OAR 660-033-0135(7). Following the County's implementation of OAR 660-033-0135(7), the state rule was no longer directly applicable to county decisions made consistent with its ordinance. However, on February 3, 2005, the County determined to not apply that ordinance to the subject property as a result of a local claim brought by the claimants under Measure 37. Therefore, OAR 660-033-0135(7) is directly applicable to local actions affecting the claimant's use of their property. That rule restricts the claimants' ability to construct a dwelling on the subject property.

It is not clear, however, whether the claimants could have constructed a dwelling on the subject property under the standards in effect when they acquired it. The claimants acquired the subject property on July 30, 1993. The applicable statutory and administrative rule standards for the approval of a farm dwelling in effect on that date are found in ORS 215.283(1)(f) (1991 edition) and OAR 660, Division 5 (1986 edition, repealed August 7, 1993). Specifically, ORS 215.283(1)(f) 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). (See OAR 660, Division 5, 1986 edition.)¹

Conclusions

OAR 660-033-0135(7) clearly does not allow a single family dwelling to be approved on the subject property. It is possible that a dwelling could have been approved under the more general provisions of ORS 215.283(1)(f) and OAR 660, Division 5 in effect on July 30, 1993, when the claimants acquired the subject property.

¹ An indication of the correct application and interpretation of the applicable statutory and rule standards in Yamhill County on the date the claimants acquired the subject property can be found in the County's acknowledged Exclusive Farm Use Zone, which incorporated the applicable provisions of OAR 660, Division 5. (See Yamhill County Ordinance # 310: Sections 402.02 and 402.06.) The County ordinance permits a "principal or secondary dwelling customarily provided in conjunction with farm use." Relevant state statutes remain applicable after acknowledgment and interpretation of the local county code provisions must reflect any statutory requirements not embodied in the local law. (See *Kenagy v. Benton County*, 115 Or App 131 (1992).)

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 claimants, the fair market value of their property has been reduced by \$500,000 because they cannot qualify for the approval of a dwelling under OAR 660-033-0135(7). No information has been submitted to explain the basis for calculating the amount of this reduction. The claim notes that the “basis can be provided if deemed necessary and upon request. Basis will be comparisons of property & appraisals – realtor’s statements, etc.” The review of this claim by Yamhill County determined that “the property value would increase by approximately \$150,000” with the ability to add a dwelling.

Conclusions

As explained under Section V.(2) of this report, it is not clear whether the claimants would have qualified for the approval of a dwelling on their property under the standards in effect when they acquired the property in July 1993. However, OAR 660-033-0135(7) clearly does not allow a dwelling on the subject property, but it is possible that a dwelling could be approved under the more general provisions in effect when the property was acquired on July 30, 1993. Until a determination is made by Yamhill County applying the standards in effect on July 30, 1993, the specific amount of a reduction in the fair market value, if any, cannot be determined. 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 215.283(1)(f). It does not appear to be, either on its face or as applied to the subject property, exempt under Section 3 of Ballot Measure 37.

Conclusions

OAR 660-033-0135(7) does not appear to be exempt under Section 3 of Ballot Measure 37. There may be other specific laws that are exempt and 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 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 \$500,000. However, because the claim does not provide a specific explanation for how the specific restrictions reduce the fair market value of the property from what the claimants could have done under the regulations in place at the time they acquired the property in 1993, a specific amount of compensation cannot be determined. Nevertheless, 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.

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 claimants to use the subject property for a use permitted at the time they acquired the property on July 30, 1993.

Conclusions

Based on the record before the department, OAR 660-033-0135(7) applies to the subject property following the County's determination to not apply its implementing regulation to the subject property, and the Hottmanns have established that they are entitled to relief. Therefore, department staff recommends that, in lieu of payment of compensation, the requirements of OAR 660-033-0135(7) not apply to the subject property to the extent necessary to allow the Hottmanns a use of the property permitted at the time they acquired it.

Specifically, on July 30, 1993, the property was subject to ORS 215.283(1)(f) (1991 edition) and OAR 660-05-030 (1986 edition).² Therefore, to the extent it would otherwise apply, department staff recommends not applying OAR 660-033-0135(7) to the subject property so as to permit the Hottmanns to apply to Yamhill County for a single-family dwelling pursuant to ORS 215.283(1)(f) (1991 edition) and OAR 660, Division 5 (1986 Edition, repealed August 7, 1993) or under Sections 402.02 and 402.06 of the acknowledged Yamhill County EFU zone (Ordinance #310), both applicable to the property on July 30, 1993.

Any use of the property by the claimants remains subject to the following laws: (a) those laws not specified in this claim to the State of Oregon, dated December 14, 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 23, 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.

² A source of guidance as to what these standards would permit is set forth in Sections 402.02 and 402.06 of the acknowledged Yamhill County EFU zone (Ordinance #310).