

**BALLOT MEASURE 37 (Chapter 1, Oregon Laws 2005)
CLAIM FOR COMPENSATION**

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

**Final Staff Report and Recommendation
June 13, 2005**

STATE CLAIM NUMBER: M118980

NAME OF CLAIMANTS: Janet E. Phillips

MAILING ADDRESS: 42047 Pocahontas Road
Baker City, Oregon 97814

OTHER INTEREST IN PROPERTY: Daniel S. Phillips, Owner

IDENTIFICATION OF PROPERTY: 42047 Pocahontas Road
Township 9S, Range 39E, Section 4
Tax lot 100, Baker County

DATE RECEIVED BY DAS: December 16, 2004

180-DAY DEADLINE: June 14, 2005

I. CLAIM

Janet E. Phillips, the claimant, seeks compensation in the amount of \$2,500 per acre 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.¹ The claimant desires compensation or the right to divide 80 acres into smaller parcels for residential development. (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, Statewide Planning Goal 3 (Agricultural Lands), ORS 215.263, ORS 215.780, OAR 660-033-100 and the standards for the approval of farm and non farm dwellings under OAR 660, Division 33 not apply to the

¹ It is assumed for purposes of reviewing this claim that the reduction in fair market value is intended to be on a per acre basis. The reduction in value for 80 acres at \$2,500/acre would be \$200,000.

subject property to the extent necessary to allow Ms. Phillips a use of the property permitted at the time she acquired it. As a result, Ms. Phillips' use of the property will be subject to those specified laws in effect on March 30, 1984. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On February 11, 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, one written comment was received in response to the 10-day notice. The comment was not specific to the Ballot Measure 37 criteria. Without funding to pay compensation, comments regarding the possible impact of the proposed or intended development of the claimant's property are not relevant to the evaluation and determination of the claimant's Ballot Measure 37 claim.

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 for processing under OAR 125, Division 145 on December 16, 2004. The claim describes land use regulations that restrict the use of the property as the basis for this 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. Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claim includes a warranty deed transferring the property from Nettie Lee Fuller to Daniel S. Phillips and Janet E. Phillips on March 30, 1984. The claim does not demonstrate a relationship between Ms. Fuller and Daniel or Janet Phillips.

The claim does not include evidence of current ownership. A conversation with Baker County Planning staff indicates that Ms. Phillips is the current owner of the property described in the claim. During the conversation, county staff indicated that Ms. Phillips is in the process of selling the subject property to a neighboring property owner.²

Although the 1984 deed is in the name of both Daniel and Janet Phillips, Mr. Phillips did not sign the claim form and the claim has been filed only in the name of Janet Phillips.

Conclusions

The department concludes that Janet E. Phillips is an owner of an interest in the subject property as that term is defined in Section 11 of Ballot Measure 37. In the event that the subject property is transferred to a subsequent owner(s), Ms. Phillips may no longer be an “owner” for Measure 37 review purposes.

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 states that:

ORS 215.700-705 “makes it so that I can’t sell off any acreage as buildable” and that OAR 660-033-0135(1)(A) “designates that a parcel be 160 acres before you can build.”

² Statement based on phone conversations between department staff and Baker County planning staff on March 30, April 5 and 11, and May 2, 2005. Phone calls, voice mails and a letter to the claimant on March 30, April 5 and May 2, 2005 remain unanswered.

According to Baker County, the subject property is zoned for exclusive farm use (EFU) as required by Goal 3 (Agricultural Lands) in accord with OAR 660, Division 33, and ORS 215. Goal 3 became effective on January 25, 1975 and required that agricultural lands, as defined by the Goal, be zoned exclusive farm use pursuant to ORS 215 (see OAR 660-015-0000(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 80 acres, 160 acres if designated rangeland, or for the subject tract or the proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 establishes an 80/160-acre minimum size for the creation of new lots or parcels in EFU zones, effective November 4, 1993 (Chapter 792, Oregon Laws 1993) as applied by OAR 660-06-0100. 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(1)(a) (applicable to farm dwellings on non-high-value farmland) became effective on March 1, 1994, and implements the statutory standard for a primary dwelling in an exclusive farm use 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. (See citations of administrative rule history for OAR 660-033-0130 and 0135.)

ORS 215.700 and ORS 215.705 establish criteria for approval and siting of “lot-of-record” dwellings on land designated for farm or forest use. The criteria apply to the establishment of one single-family dwelling and do not apply to the division of land or to the establishment of multiple dwellings. The subject property contains one existing single-family dwelling and is not eligible for additional dwellings under ORS 215.705(1)(b).

The claimant acquired the subject property on March 30, 1984 when it was zoned exclusive farm use (EFU) by the County under ORS 215. However, the County’s EFU zone that applied to the property at that time had not been acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251. Prior to the claimant’s acquisition of the subject property, the Commission reviewed the Baker County Comprehensive Plan and land use regulations, including the EFU zone twice, a third time just after the property was acquired and later acknowledged that the plan and land use regulations complied with the statewide goals on April 24, 1986.³ Because the Commission had not

³ See the Commission’s Continuance Order dated May 4, 1982, Continuance Order 83-CONT-163 dated September 9, 1983, Continuance Order 84-CONT-172 dated August 7, 1984 and Acknowledgement Order 86-ACK-038 dated May 16, 1986. Baker County amended its zoning and subdivision code including its EFU zone (Ordinance No. 83-3) dated March 9, 1984. This zoning code was reviewed by the Commission on July 20, 1984 and determined that it did not comply with Goal 3. The zone's 40-acre minimum lot size did not comply with the Goal 3 standard for the approval of farm parcels for non irrigated lands and the

acknowledged Baker County’s comprehensive plan and land use regulations, including the EFU zone in effect when the property was acquired by Ms. Phillips on March 30, 1984, site-specific Goal provisions, including Statewide Planning Goal 3, applied directly to property on the date of acquisition.⁴ Until the County’s land use regulations were acknowledged by the Commission, the use of the subject property was subject to both the County’s ordinances and the applicable statewide planning goals.

In 1984, the state standards for a land division involving property where the local zoning was not acknowledged, required that the resulting parcels be “appropriate for the continuation of the existing commercial agricultural enterprise in the area” under ORS 215.263 as applied by Goal 3.⁵ The applicable statutory and administrative rule standards for the approval of a farm or non-farm dwelling in effect on that date are found in ORS 215.283(1)(f) and ORS 215.283(3) (1983 edition) and OAR 660, Division 5 (1982 Edition, repealed August 7, 1993).

ORS 215.283(1)(f) (1983 edition) provided standards for a “dwelling customarily provided in conjunction with farm use.”⁶ OAR 660-05-025 further required that such a dwelling be located on a parcel large enough to satisfy the Goal 3 minimum lot size standard, that is, “appropriate for the continuation of the existing commercial agricultural

code did not apply the Goal 3 minimum lots size standard to the approval of farm dwellings on existing parcels.

⁴ See *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), and *Alexanderson v. Polk County*, 289 Or 427, rev. denied, 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1, (1985). After the County’s plan and land use regulations were acknowledged by the Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decision *Byrd v. Stringer*, 295 Or 311 (1983). However, the applicable statutes continue to apply and insofar as the local implementing provisions are materially the same as the rules, the local provisions must be interpreted consistent with the substance of the rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

⁵ The Goal 3 standard for the review of land divisions or the establishment of a minimum lot size states:

“Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area.”

On August 20, 1977, the Commission distributed a policy paper explaining the meaning of the Goal 3 minimum lots size standard (see “Common Questions about Goal 3; Agricultural Lands” (August 30, 1977, as revised and added to July 12, 1979). Further interpretation of the Goal 3 minimum lot size standard can be found in *Meeker v. Clatsop County*, 36 Or App 699 (1978); *Jurgenson v. Union County*, 42 Or App 505 (1979); *Alexanderson v. Polk County*, 289 Or 427, rev. denied, 290 Or 137 (1980); and *Thede v. Polk County*, 3 Or LUBA 336 (81).

In 1982, the policy paper and court decisions were incorporated into an administrative rule to guide the interpretation and application of the Goal 3 minimum lot size standard (see OAR 660, Division 5, specifically rules 015 and 020 effective July 21, 1982).

⁶ See *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) affirmed without opinion 70 Or App 179 (1984) and *Newcomer v. Clackamas County*, 92 Or App 174, modified 94 Or App 33 (1988). Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use (*Matteo v. Polk County*, 14 Or LUBA 67, 73 (1985)).

enterprise within the area” as explained in OAR 660-05-015 (See OAR 660, Division 5, 1982 edition). Non- farm dwellings were subject to ORS 215.283(3) (1983 edition).

No information has been provided showing that the development desired by the claimant complies with either the minimum lot size standard for farm parcels under Goal 3 and ORS 215.263 (1983 edition), the standards for new non-farm parcels under ORS 215.263 (1983 edition) or the approval standards for dwellings under ORS 215.283(1)(f) (1983 edition), in effect at the time Ms. Phillips acquired the property in 1984.

Conclusions

The current minimum lot size and dwelling standards established by ORS 215.263, 215.284, 215.700 to 705 and 215.780 as applied by Statewide Planning Goal 3 and OAR 660, Division 33, restrict the division of the property into parcels less than 80/160 acres in size and restrict the residential use of the property relative to what was permitted in 1984. The state land use regulations specified in the claim restrict the use of the property from the uses allowed when Ms. Phillips acquired the property on March 30, 1984.

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(s) 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 does not include a formal estimate of current fair market value. The claim also does not include a formal estimate of the value of the property under a land use proposed by the claimant but does assert a reduction in value of \$2,500. It is presumed for purposes of the review of this claim that the \$2,500 amount is the reduction in value per acre of the claimant’s 80-acre property because the claim compares the per acre value of the subject property when purchased with the per acre value of adjacent properties today. Based on this assumption, the estimated reduction in fair market value of the subject property is about \$200,000. The Baker County Assessor lists the real market value of the land portion of the subject property as \$162,690.

The claim does not include an appraisal or other analysis to support the claimant’s estimate. It can be assumed however, that the fair market value of the property is reduced to some extent by land use regulations enacted subsequent to Ms. Phillips’s acquisition of the property.

Conclusions

As explained in section V.(1) of this report, the current owner is Janet E. Phillips, who acquired the property on March 30, 1984. Thus, under Ballot Measure 37, Janet Phillips

is due compensation for land use regulations enacted after that date that restrict the use of the subject property in a manner that reduces its fair market value. The claim identifies a reduction in fair market value of \$2,500. The department assumes that this is a per acre reduction and for purposes of reviewing this claim, assumes that the reduction in fair market value of the 80-acre property is about \$200,000.

Without an appraisal based on the value of the 80-acre property or other explanation, 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 laws 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 identifies ORS 215.700-705 and OAR 660-033-0135(1)(a) as restricting the use of the subject property relative to what would have been allowed in 1984 when the property was acquired. The provisions in Baker County's EFU zone implement OAR 660, Division 33, and related provisions of state statutes and Goal 3 (Agricultural Lands). Some versions of these laws were enacted after Ms. Phillips acquired the property in 1984. However, ORS 215.283(1)(f) was enacted prior to 1984, as was much of Goal 3. Current state laws that restrict the use of the property that were enacted prior to March 30, 1984 are exempt under section (3)(E) of Measure 37.

Conclusions

Without a complete listing of laws that are the basis for the claim, and without a specific proposal for the division and use of the subject property, it is not possible for the department to identify all the laws that 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 for residential use do not come under any of the exemptions in Measure 37. 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 Commission or 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 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 has by rule 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 division of the subject property and the use of the property for residential purposes. The claimant cannot create the desired lots or develop those lots for residential use. 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 current record for this claim, the department acknowledges that the laws on which the claim is based likely have reduce the fair market value of the property to some extent.

No funds have been appropriated for the payment of claims. In lieu of payment of compensation, Measure 37 authorizes the department to modify, remove or not apply all or parts of one or more land use regulations to the extent necessary to allow Ms. Phillips to use the subject property for a use permitted at the time she acquired the property on March 30, 1984.

At the time the claimant acquired the property on March 30, 1984, the Goal 3 “commercial” standard (i.e., “appropriate for the continuation of the existing commercial agricultural enterprise in the area”) applied directly to the subject property for the creation of new farm parcels or for new dwellings on pre-existing parcels (OAR 660-05-020 and 025, effective July 21, 1982). These state laws, along with the county’s ordinances that were in effect at that time, determine what division of the property was permitted at the time Ms. Phillips acquired the subject property.

The applicable statutory standards for the approval of farm or non-farm dwellings on March 30, 1984 are set forth in ORS 215.283(1)(f) and 215.283(3) (1983 edition) and OAR 660, Division 5 (effective July 21, 1982, amended May 7, 1986, and repealed August 7, 1993). These laws determine what residential development was permitted at the time Ms. Phillips acquired the property.⁷

Conclusion

Based on the record before the department, Janet E. Phillips has established that she is entitled to relief. Therefore, department staff recommends not applying land use

⁷ Guidance for application and interpretation of Statewide Planning Goal 3 (effective January 25, 1975) can be found at OAR 660, Division 5 (effective July 21, 1982) for the approval of a farm parcel or the approval of a farm dwelling on an existing lot or parcel.

regulations enforced by the Commission or department to the extent necessary to allow the claimant a use of the property permitted at the time she acquired it on March 30, 1984. As a result, the claimant's use of the property will be subject to those specified laws that were in effect on that date.

The claimant acquired the subject property on March 30, 1984, when the approval of a land division and dwellings on the property were subject to Statewide Planning Goal 3 "Agricultural Lands (OAR 660-015-0000(3)), OAR 660, Division 5 (effective July 21, 1982, amended May 7, 1986, and repealed August 7, 1993) and the provisions for farm and non-farm dwellings under ORS 215.283(1)(f), 215.283(3) (1983 edition). Therefore, the claimant is authorized to apply to Baker County for approval of a use permitted in accordance with these standards.

Any use of the property by the claimant remains subject to the following laws: (a) those state laws not specifically waived by the Final Order on this claim; (b) any laws enacted or enforced by a public entity other than the Commission or department; and (c) those laws not subject to Measure 37 including without limitation, those laws exempt 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 24, 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.