

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

July 28, 2005

STATE CLAIM NUMBER: M119632

NAME OF CLAIMANT: Donna Ott

MAILING ADDRESS: 12345 Southwest Spring Hill Road
Gaston, Oregon 97119

IDENTIFICATION OF PROPERTY: Township 1S, Range 3W, Section 31
Tax Lot 1700
Washington County

OTHER INTEREST IN PROPERTY: Robert Ott

DATE RECEIVED BY DAS: January 31, 2005

180-DAY DEADLINE: July 30, 2005

I. CLAIM

The claimant, Donna Ott, seeks compensation in the amount of \$75,000 for 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 build a home on a 0.92-acre property. The property is located in Washington County, Oregon. (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 just 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 build a single family dwelling: Statewide Planning Goal 3, and applicable provisions of ORS 215, OAR 660, division 33, enforced after December 30, 1974. These laws will not apply to the claimant only to the extent necessary to allow her a use of the subject property permitted at the time she acquired the property on December 30, 1974. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On February 24, 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, 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 February 7, 2005, for processing under OAR 125, division 145. The claim identifies applicable provisions of ORS 215 and OAR 660, division 33, 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 claims has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulation 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 of 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, Donna Ott, acquired the subject property from her mother, Mary M. Lazott (also known as Mary M. Dames) on December 30, 1974. Mary M. Dames acquired the property on May 27, 1926. On January 17, 1978, the claimant conveyed the property to herself and her son, Robert Ott (grantees) “not as tenants in common but with the right of survivorship...” (See Deeds in claim file.) Based on the current records, Robert Ott is not a claimant for purposes of this Measure 37 claim.

Conclusions

The claimant, Donna Ott, is an “owner” of the subject property, as that term is defined in Section 11(C) of Ballot Measure 37, as of December 30, 1974. Mary M. Lazott (also known as Mary M. Dames) is a family member as that term is defined by Section 11 (A) of Ballot Measure 37 and acquired her interest in the property on May 27, 1926.

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 does not specifically identify a use of the subject property that is restricted by current land use regulations. However, the claim includes a copy of a comparable claim submitted by the claimant to Washington County which states: “Owners would like building permit for 2 bedroom house.” The claim form identifies state laws that restrict the division and approval of a dwelling on the subject property including ORS 215.780 and OAR 660-033-0100, 0135 and OAR 660-04-040. Based on this information, the department is assessing the claim to based on the claimants’ desire to develop the subject property with one single-family dwelling. Although the claimant identifies state laws that restrict the division of the property, the claimants’ desired use does not include any division of the 0.92 acre parcel. Therefore, this report evaluates only the restrictions imposed by standards that apply to establishment of a single-family dwelling.

The claim is based, in part, on the Washington County’s Agriculture and Forest District (AF-20) Zone and the applicable provisions of state law that require such zoning. According to Washington County, the AF-20 zone is a qualified Exclusive Farm Use (EFU) zone under ORS 215. Because Washington County adopted marginal lands provisions prior to January 1, 1993, agricultural land is subject to the EFU provisions under ORS 215.213 instead of the provisions of ORS 215.283 and 215.284 (See ORS 215.316). The claimant’s property is zoned AF-20 (EFU) as required by Goal 3 in accord with OAR 660, division 33, because the claimant’s property is “agricultural land” as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required agricultural land defined by the Goal to be zoned EFU. Land that is zoned EFU also is subject to restrictions based on certain provisions of ORS 215. Current land

use regulations, particularly ORS 215.213, 215.263, 215.780, along with Goal 3 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 farm or non farm dwellings.

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 215.213¹. OAR 660-033-0130(4) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993, and was amended to comply with ORS 215.213(3) to (8) and 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.)

OAR 660-04-040 pertains to the division of land in rural residential zones and is not applicable to the subject property.

The claimant's family acquired the property on May 27, 1926, when it was not zoned by Washington County.

Conclusions

Dwelling standards established by Statewide Planning Goal 3, amendments to ORS 215, and OAR 660, division 33, adopted since the claimant's family first acquired the property in 1926, do not allow the approval of a dwelling on the property as may have been possible in 1926. The County's EFU zone is based on the standards required by Goal 3, ORS 215 and OAR 660, division 33.

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 claim states that the fair market value of the subject property has been reduced by \$75,000 as a result of land use laws enacted after it was acquired in 1926. The claim states that the reduction in value is based on information "comparable to building lots in county." Also provided is the County's approval for a septic tank for the property in 1981, and a statement that a Portland General Electric line is at the corner of the lot.

The claimant has not provided any detailed information regarding the value of the property based on what is allowed under current land use regulations as compared with the assumed value if

¹ The subject property is composed of "high-value farmland" soils (see Soil Survey of Washington County, July 1982, sheet #42.

developed with a single-family dwelling. There is no certified appraisal to substantiate the claimed reduction in value as a result of state land use regulations.

Conclusions

As explained in section V. (1) of this report, Donna Ott is an owner of the subject property under section (11) of Measure 37. The claimant's family acquired the property on May 27, 1926. Thus, under Ballot Measure 37, the claimant is due compensation for land use laws 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, Statewide Planning Goal 3, "Agricultural Lands," ORS 215, and OAR 660, division 33, restrict the use of the subject property so that the claimant cannot establish a dwelling on the 0.92-acre parcel as was allowed when it was acquired in 1926. These restrictions reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$75,000. However, without an appraisal or a more detailed analysis of the information submitted, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, including the comparative market analysis, 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 on Washington County's AF-20 (EFU) zone and the related provisions of State Law that have restricted use of the property and reduced its fair market value. These are Statewide Planning Goal 3, "Agricultural Lands," ORS 215 and OAR 660, division 33. All of these regulations were enacted after the claimant's family acquired the property in 1926. None of the laws identified in the claim appear to be exempt under Section 3(E) of Ballot Measure 37.

Conclusions

It appears that the general statutory, goal and rule restrictions on the residential development and use of agricultural land apply to the claimants' use of the property, and for the most part these laws would 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, 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 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 in this report, laws enforced by the Commission or the department, prohibit the approval of a dwelling on the subject property. Specifically, Statewide Planning Goal 3, "Agricultural Lands," ORS 215, and OAR 660, division 33, restrict use of the subject 0.92-acre property so that a dwelling cannot be established on it. These restrictions reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$75,000. Without an appraisal, it is not possible to substantiate the specific dollar amount the claimants demand 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 claimants to use the subject property for a use permitted at the time Donna Ott acquired the property on December 30, 1974.

The claimant, Donna Ott acquired the property on December 30, 1974, when it was zoned AF-10 by Washington County. Under the AF-10 zone, single-family dwellings were permitted with a ten-acre minimum parcel size for the creation of new lots or parcels. The claimant acquired the property after the adoption of SB 100 (chapter 80, Oregon Laws 1973, effective October 5, 1973) but before the adoption of the Statewide Planning Goals effective January 25, 1975. As such, ORS 197.175(1) and 197.280 (1973 edition) required, in addition to any local plan or zoning provisions, the application of interim land use goals set forth in ORS 215.515 (1973 edition) to the preparation, revision, adoption or implementation of any comprehensive plan prior to the effective date of the Statewide Planning Goals (see *Petersen v. Klamath Falls*, 279 Or 249 (1977)).

No information has been provided showing that the approval of a single-family residence complies with the interim planning goals set forth in ORS 215.515 (1973 edition) in effect at the time the claimant first acquired the property in 1974.

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 the claimant's establishment of a single-family dwelling on the subject property: those provisions of ORS 215 as applied by Statewide Planning Goal 3 and OAR 660, division 33, enacted after December 30, 1974, that relate to the establishment of dwellings.

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 December 30, 1974. On that date, the property was subject to the interim planning goals set forth in ORS 215.515 (1973 edition).
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 215.412 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 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 them 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 in this order relieves the claimants 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 July 6, 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.