

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

August 4, 2005

STATE CLAIM NUMBER: M119745

NAME OF CLAIMANTS: Rose Mary Powell and
Daniel E. Fish

MAILING ADDRESS: 6010 Hughes Road
Medford, Oregon 97504

4149 Northwest 178th Place
Portland, Oregon 97229

IDENTIFICATION OF PROPERTY: Township 38S, Range 1W, Section 13
Tax Lot 200
Jackson County

OTHER CONTACT INFORMATION: Mark S. Bartholomew
Hornecker, Cowling, Hassen & Haskell LLP
717 Murphy Road
Medford, Oregon 97504

DATE RECEIVED BY DAS: February 14, 2005

180-DAY DEADLINE: August 13, 2005

I. CLAIM

The claimants, Rose Mary Powell and Daniel E. Fish, seek compensation in the amount of \$3,645,000 for a 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 partition their approximately 42.5-acre property into twenty-one (21) parcels of approximately two-acres each, and to develop each parcel with one single-family dwelling. The property is located at 6010 Hughes Road, near Phoenix and Talent, in Jackson 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 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 claimants to allow them to divide their property into 21, 2-acre parcels and develop each parcel for residential use: the provisions of Statewide Planning Goals 3 and 14, ORS 215.263, 215.284 and 215.780, and applicable provisions of OAR 660, division 33, in effect when each claimant acquired an interest in the property. These laws will not apply to the claimants to the extent necessary to allow Rose Mary Powell a use of the property permitted when she acquired it in November 9, 1961, and to allow Daniel E. Fish a use of the property permitted at the time he acquired an interest in the property on December 21, 2004. The department acknowledges that the relief recommended will not allow Daniel Fish to use the property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On March 2, 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, two written comments, evidence or information were received in response to the 10-day notice. The comments do 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

This claim was submitted to DAS on February 14, 2005 for processing under OAR 125, division 145. The claim identifies Jackson County's Exclusive Farm Use (EFU) zoning and state 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 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 to an “owner” 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

Rose Mary Powell acquired the subject property on November 9, 1961.¹ Daniel Fish is a grandson of Rose Mary Powell. On December 21, 2004, Rose Mary Powell conveyed the property to herself and Daniel Fish. (See November 9, 1961 and December 21, 2004, deeds in department claim file.)

Jackson County records confirm that Rose Mary Powell and Daniel Fish are current owners of the subject property.

Conclusions

The claimants, Rose Mary Powell and Daniel E. Fish, are “owners” of the subject property as that term is defined in Section 11 (C) of Ballot Measure 37. Rose Mary Powell acquired the subject property on November 9, 1961. Daniel Fish acquired an interest in the subject property on December 21, 2004. Rose Mary Powell is a “family member” as to Daniel Fish, as that term is defined in Section 11 (A) 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 claimants or a family member acquired the property.

¹ The warranty deed by which Rose Mary Powell acquired the property was not recorded until 1968.

Findings of Fact

The claim states:

“When applicant acquired the property in 1961, there was no zoning applicable to the property.” . . . “Applicants wish to subdivide their property into saleable lots of two-acres each for future home sites. However, numerous regulations enacted after the applicant’s acquisition, including ORS 215.780, strictly forbid such development, with no recourse.”

The claim is based on Jackson County’s current EFU Zone and the applicable provisions of state laws that require such zoning. The claimants’ property is zoned EFU as required by Goal 3 in accord with OAR 660, division 33 and ORS 215 because the claimants’ property is “Agricultural Land” as defined by Goal 3.² Goal 3 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 established an 80-acre minimum size for the creation of new lots or parcels 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.)

Statewide Planning Goal 14, became effective on January 25, 1975, and requires land outside of urban growth boundaries to be used for rural uses.

According to claim statements and to a Jackson County staff report issued in response to a Measure 37 claim the claimants filed with the county, there were no zoning regulations on the subject property when Ms. Powell acquired the property in 1961. (See Jackson County staff report dated March 15, 2005 and County Board Order dated April 6, 2005, included in the department claim file.)

² The claimants’ property is “Agricultural Land” because it contains NRCS (Natural Resources Conservation Service) Soils. The property contains predominantly Darow Silty Clay Loam, 5-20% slopes.

Conclusions

Lot size and dwelling standards established by Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, adopted since Rose Mary Powell acquired the property in 1961, do not allow the division of the property into parcels less than 80-acres in size or allow the approval of dwellings as may have been possible in 1961. The County's EFU zone is based on the standards required by Goal 3, ORS 215 and OAR 660, division 33. Land use laws adopted since 1961 restrict the use of the property from what could have been done when Ms. Powell acquired the property.

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 use(s) that the claimants have identified. There may be other laws that currently apply to the claimant's use of the property, and that 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 a claimant seeks a building permit 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 claim states that the fair market value of the subject property has been reduced by \$3,645,000 as a result of land use laws enacted after Rose Mary Powell acquired the property in 1961. The claim includes a Comparable Market Analysis (CMA) from a local Real Estate Broker. (See the department's claim file.) The CMA is not a formal appraisal but does provide a list of similar properties as references for the claimants' estimates of value. The CMA provides information regarding the value of the property based on what is allowed under current land use regulations as compared with the assumed value if developed into twenty-one (21), 2-acre residential parcels.

There is no certified appraisal to substantiate the claimed property values either before or with state land use regulations.

Conclusions

As explained in section V. (1) of this report, claimant Rose Mary Powell acquired the subject property on November 9, 1961, and is a family member of claimant Daniel Fish, who acquired an interest in the property on December 21, 2004. Thus, under Ballot Measure 37, Ms. Powell and Mr. Fish are 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, laws adopted since Ms. Powell acquired the property restrict the division

and development of the subject property. The claim asserts the reduction in value due to the restrictions to be \$3,645,000. However, without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand 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 on Jackson County's EFU zone and the related provisions of state law that have restricted use of the property and reduced its fair market value including Statewide Planning Goals 3, (Agricultural Lands) and 14 (Urbanization), and applicable provisions of ORS 215 and OAR 660, division 33. All of these specified state land use regulations were enacted after Rose Mary Powell acquired the property in 1961, and restrict the use of the property in a manner that likely reduces its fair market value. None of these specified laws appear to be exempt under subsection 3(E) of Ballot Measure 37.

Conclusions

It appears that the general statutory, goal and rule restrictions on the division, residential development and use of agricultural land apply to the claimants' use of the property, and these laws do not appear to come under the exemption in subsection 3(E) of Measure 37. There may be other laws that continue to apply to the claimants' use of the property because they were not 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 an owner of property seeks a building or development permit to carry out a specific use, it may become evident that 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 use(s) that the claimants have identified. Similarly, this 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. Claimants should be aware that the less information they provide to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their 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 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 division of the subject property into twenty-one (21) 2-acre parcels, and development of each with a single-family dwelling. The claim asserts these restrictions reduce the fair market value of the subject property by \$3,645,000. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, no appraisal or other documentation was submitted and 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 Rose Mary Powell to use the subject property for a use permitted at the time she acquired the property on November 9, 1961, and to allow Daniel E. Fish to use the subject property for a use permitted at the time he acquired the property on December 21, 2004.

All current state land use regulations addressed in this report were in place at the time that Daniel Fish acquired an interest in the property on December 21, 2004

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 Rose Mary Powell's or Daniel Fish's division of the subject property or to the establishment of a single-family dwelling on each lot or parcel created: applicable provisions of Statewide Planning Goals 3 and 14, ORS 215.263, 215.284 and 215.284 and OAR 660, division 33. For Daniel Fish, only provisions of the foregoing laws that were not in effect when he acquired his interest in the property on December 21, 2004 will not apply to his use of the property.
2. These land use laws will not apply to Rose Mary Powell's use of the property only to the extent necessary to allow her a use permitted at the time she acquired the property on November 9, 1961; and will not apply to Daniel Fish's use of the property only to the extent necessary to allow him a use permitted at the time he acquired the property on December 21, 2004.. The department acknowledges that the relief recommended in this report will not allow Daniel Fish to use the property in the manner set forth in the claim.

3. The action by the State of Oregon provides the state's authorization to Rose Mary Powell to a use of the property subject to the standards in effect on November 9, 1961 and to Daniel Fish to a use of the property subject to the laws in effect on, December 21, 2004. On that date, the property was subject to the laws currently in effect, as described in Section V. 2.

4. 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 claimants first obtain 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.

5. Any use of the property by the claimants 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.

6. Without limiting the generality of the foregoing terms and conditions, in order for the claimants 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 claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on July 15, 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.