

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

August 9, 2005

STATE CLAIM NUMBER: M119799

NAME OF CLAIMANT: Margaret Bollinger

MAILING ADDRESS: 31751 Northeast Wilsonville Road
Newberg, Oregon 97132

IDENTIFICATION OF PROPERTY: Township 3S, Range 2W, Section 27
Tax Lot 200,
Yamhill County

OTHER CONTACT INFORMATION: Lora Clemens
5531 Southwest Multnomah
Portland, Oregon 97219

DATE RECEIVED BY DAS: February 16, 2005

180-DAY DEADLINE: August 15, 2005

I. CLAIM

The claimant, Margaret Bollinger, seeks compensation in the amount of \$1,000,000 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 claimant desires compensation or the right to subdivide the 42.89-acre subject property into five-acre parcels, with a dwelling on each parcel created. The property is located at 31751 Northeast Wilsonville Road near Newberg, 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, 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 claimant to allow her to divide the subject property into five acre parcels and to develop each parcel with a dwelling: Statewide Planning Goal 3 and applicable provisions of ORS 215.263, 215.284, 215.780 and OAR 660, division 33, enacted after July 2, 1965. These

laws will not apply to the claimant only to the extent necessary to Ms. Bollinger a use of the subject property permitted at the time she acquired the property on July 2, 1965. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On February 24, 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, there were two written comments received by DAS in response to the 10-day notice. Surrounding property owners expressed concerns about the potential for negative impacts on an existing rock mining operation (increased density could make mining operations difficult), traffic, potential runoff, safety problems related to school buses and children. 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 statute. 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 letters in the department's claim files.)

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 16, 2005 for processing under OAR 125, division 145. The claim identifies Yamhill County's Ordinance #83 and state laws requiring \$80,000 in gross farm revenue for establishment of a farm dwelling, 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, Margaret Bollinger, and her late husband Sherman Bollinger, acquired the subject property on July 2, 1965. (See copy of Warranty Deed in department claim file.) A copy of the 2004-05 Real Property Tax Statement from Yamhill County lists the claimant as the current owner of the subject property

Conclusions

The claimant, Margaret Bollinger, is an “owner” of the subject property as that term is defined under Section 11 (C) of Ballot Measure 37 as of July 2, 1965.

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: Yamhill County “Zoning ordinance #83 and all subsequent amendments and ordinances ... restricts building unless \$80,000 of annual farm income can be produced,” which precludes the claimant from dividing and developing the subject property.

The claim is based on Yamhill County’s current EF-20 zone and the applicable provisions of state law that require such zoning. The EF-20 zoning is required by Goal 3 in accord with OAR 660, division 33, and ORS 215, because the claimant’s property is “Agricultural Land” as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned 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 of 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. Specifically, ORS 215.780(1) establishes an 80-acre minimum lot size for the creation of new parcels or lots in an Exclusive Farm Use (EFU) zone and became effective on November 4, 1993. ORS 215.263 establishes standards for the creation of new parcels for non farm uses and dwellings 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.)

The claimant acquired the subject property in 1965, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. According to the county, the property was first zoned in 1968, when it was zoned Agriculture. Provisions of ORS 215 were adopted in 1963, but did not apply to the subject property until it was zoned by the county in 1968, after the claimant acquired the property.

Conclusion

Lot size and dwelling standards established by amendments to Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, adopted since the claimant acquired the property in 1965, 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 1965. The County's EF-20 zone is based on the standards required by Goal 3, ORS 215 and OAR 660, division 33. Land use laws adopted since 1965 restrict the use of the property from what could have been done when the property was acquired by the claimant on July 2, 1965.

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 uses the claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and 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 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 \$1,000,000 as a result of land use laws enacted after the claimant acquired the property in 1965.

The claimant provided 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 5-acre residential lots. The alleged reduction amount was apparently based on the value of five-acre lots, each valued at approximately \$150,000. Ms. Bollinger estimates the existing market value of the parcel is approximately \$200,000 with current zoning and other restrictions. The claimant’s estimated \$1,000,000 figure does not appear to net out the current value of the subject property. (The Yamhill County Tax Assessor indicates the Real Market Value (RMV) of the subject property to be \$315,095.) No other documentation of estimated values or reductions is included in the claim. There is no certified appraisal to substantiate the claimed values either before or with state land use regulations.

Conclusions

As explained in section V. (1) of this report, the current owner of the subject property is Margaret Bollinger, who acquired the subject property on July 2, 1965. Thus, under Ballot Measure 37, Margaret Bollinger is due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value. The claim states that the reduction in value is \$1,000,000.

However, without an appraisal or other documentation, 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 is based in part on laws related to Statewide Planning Goal 3 (Agricultural Lands), applicable provisions of ORS 215 and OAR 660, division 33, that reduce the fair market value of the property. These specified state land use regulations were enacted after the claimant acquired

the property in 1965, and do 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

Without a specific development proposal for the property, 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 appears that the general statutory, goal and rule restrictions on residential development and use of Agricultural Land apply to the claimant's use of the property, and for the most part these laws do not appear to 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.

Laws in effect with the claimant acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimant's use of the property. There may be other laws that 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 or development permit to carry out a specific use, it may become evident what 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 that the claimant has identified. Similarly, the 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 have provided 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 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, that 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 prohibit the division of the subject property into 5-acre lots or parcels with

dwellings on each lot or parcel created. The claim asserts these restrictions reduce the fair market value of the property by \$1,000,000. No appraisal or other documentation was submitted to substantiate the reduction in value, and based on information submitted, it is not possible to substantiate the specific dollar amount the claimant demands 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 compensation, Ballot Measure 37 authorizes the department to modify, remove or not apply all or parts of certain state land use regulations to allow Ms. Bollinger to use the subject property for a use permitted at the time she acquired the property in 1965.

Conclusion

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 Ms. Bollinger's division of her property into five- parcels and establishment of dwelling on each parcel: applicable provisions of Statewide Planning Goal 3, ORS 215.263, 215.780 and 215.284, and OAR 660, division 33, enacted after July 2, 1965. These land use regulations will not apply to Ms. Bollinger's use of her property only to the extent necessary to allow the claimant to a use permitted at the time she acquired the property.
2. The action by the State of Oregon provides the state's authorization to the claimant to use her property subject to the standards in effect on July 2, 1965.
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 claimant 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 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.