

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

June 23, 2005

STATE CLAIM NUMBER: M119116

NAME OF CLAIMANTS: Victor C. and Pamela J. Cobos

MAILING ADDRESS: 2741 Bunker Hill Road South
Salem, Oregon 97306

IDENTIFICATION OF PROPERTY: Township 8S, Range 3W, Section 32
Tax lots 100 and 200
Marion County

OTHER CONTACT INFO: Dennis Koho, Wallace W. Lien, P.C.
1775 32nd Place NE
Salem, Oregon 97303
(503) 585-0105

DATE RECEIVED BY DAS: December 30, 2004

180-DAY DEADLINE: June 28, 2005

I. CLAIM

Victor C. and Pamela J. Cobos, the claimants, seek compensation in the amount of \$6,745,290 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 subdivide the property 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 applicable state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, specifically Statewide Planning Goal 3 (Agricultural Lands) and OAR 660, Division 33, not apply to the subject property to the extent necessary to allow the claimants a use of the property permitted at the time they acquired the property that is the subject of the claim. As a result, Pamela Cobos' use of Parcel 2 of the property will be subject to those specified laws in effect in 1999 and Victor C. Cobos' use of Parcel 1 of the property will be

subject to those specified laws in effect in 2001. The department acknowledges that this will not allow the claimants to use their property in the manner set forth in their claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On February 17, 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 five (5) written comments received in response to the 10-day notice. Some comments expressed concerns about the date of ownership in relation to the date applicable land use laws were enacted and expressed concerns about steep slopes and landslide hazards on the subject property. Comments specific to the criteria in Ballot Measure 37 are addressed in the appropriate sections of this report. General comments regarding the possible impact of the proposed or intended development of claimants' property are not relevant to the evaluation and determination of claimants' Ballot Measure 37 claim and cannot be considered by the department. (See letters 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

The claim was submitted to DAS on December 10, 2004 for processing under OAR 125, Division 145. The claim identifies Statewide Planning Goal 3 and associated administrative rules 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 to “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 claim includes a bargain and sale deed conveying the subject property to the claimants’ grandparents, James and Beatrice Drury, on August 20, 1946.¹

Victor Cobos, Sr., and Joan L. Cobos inherited the property in 1992, upon the death of Mrs. Drury. Victor and Joan Cobos then conveyed their interest in the subject property to Pamela Cobos pursuant to a Statutory Bargain and Sale Deed on May 6, 1999.

On October 24, 2001, Pamela Cobos conveyed a portion of the subject property, described as Parcel 1 of Marion County Partition Plat no. 2001-82, to Victor C. Cobos and Victor Cobos, Sr., by Bargain and Sale Deed. Pamela Cobos retained title to that portion of the property described as Parcel 2. Victor Cobos, Sr. passed away on March 12, 2003.²

Additional information submitted with the claim indicates that Victor C. and Pamela J. Cobos continue to hold Parcel 1 and Parcel 2 of the property, respectively, as owners at the time of filing the subject claim for compensation. (See Subdivision Guarantee prepared by First American Title on December 9, 2004, included in the claim.)

Conclusions

The claimants’ grandparents, James and Beatrice Drury, who initially acquired the property on August 20, 1946, are “family members” and the claimants, Victor C. Cobos and Pamela J. Cobos, are “owners” as defined by Section 11 of Ballot Measure 37. Pamela J. Cobos acquired Parcel 2 (51.02 acres) on May 6, 1999. Victor C. Cobos acquired Parcel 1 (43.50 acres) on October 24, 2001.

¹ The claim includes death certificates for Beatrice Crawford Drury, for Victor Cobos, Sr. and for Joan L. Cobos, all of which demonstrate the relationship between Mr. and Mrs. Drury and the claimants.

² The claim includes a death certificate for Victor NMN Cobos, Sr., dated March 12, 2003. (See Oregon State DHS Certificate of Vital Record – Certificate of Death included in the claim materials.)

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 Goal 3 (OAR 660-015-0000(3)) restricts the use of the claimants' property. The property is zoned by Marion County as SA (Special Agriculture) in compliance with Statewide Planning Goal 3 (Agricultural Lands) and ORS 215.283. The County's zoning precludes dwellings and subdivisions, stating, "Subdivisions and planned developments, however, are not consistent with the purpose of this zone and are prohibited."

The claimants' family acquired the subject property in 1946. At that time, no state land use laws applied to the property. Current land use regulations, particularly Statewide Planning Goal 3 and the statutory and administrative rule standards for the approval of a farm or non-farm dwellings found in ORS 215 and OAR 660, Division 33, do not allow the subject property to be divided into parcels less than 80 acres and restrict the placement of dwellings on the subject property.

Conclusions

The minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands), and OAR 660-033, and statutory requirements in ORS 215 were enacted after the property was acquired by the claimants' family in 1946 and restrict the use of the property relative to the uses allowed when the property was acquired in 1946.

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 includes an estimate of the property's fair market value, in the absence of current regulations, at \$6,975,000. (See statement of "How Value was Reduced" included in the claim). An estimate of recent comparable sales provided by a realtor indicates that 3-acre; buildable lots are worth approximately \$225,000 each. (See letter from realtor, dated December 13, 2004, included in the claim.)

The claim also includes recent statements from the Marion County tax assessor estimating the real market value of the subject property with improvements to be approximately \$230,000.

The property's assessed value is estimated by the assessor under exclusive farm use zoning in order to relieve the owners' tax burden.

The claim does not identify what percentage of the site is buildable. Adjacent development patterns indicate that surrounding parcels are able to support the development of three-acre building sites. The claim states that the subject property contains steep slopes. Comments from neighboring property owners indicate that the subject property may not be buildable due to steep slopes and landslide areas. (See letter in the department's claim file.)

Conclusions

As explained in section V.(1) of this report, Pamela Cobos is the owner of Parcel 2, having acquired the property in 1999 and Victor Cobos is the owner of Parcel 1, having acquired the property in 2001. Family members, as defined in Ballot Measure 37, section 11, first acquired the property in 1946. Thus, under Ballot Measure 37, the claimants are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value.

Without an appraisal based on the value of proposed development, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, including information on comparable property sales and from the Marion County Tax Assessor's office, 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 identifies Statewide Planning Goal 3 (Agricultural Lands) and statutes and administrative rules relating to exclusive farm use zones as the basis of this claim. These regulations are not exempt under Section 3 of Measure 37, either on their face or as applied to the subject property.

The claim states that the subject property contains steep slopes. Comments from neighboring property owners also indicate that the subject property may not be buildable due to steep slopes and landslide areas. (See letters in the department's claim file.) In the event that topography and soil conditions would endanger public health and safety upon further development, any regulations enacted to protect the public health and safety would be exempt from claim under Measure 37.

Conclusions

Without a specific proposed use or a specific listing of all laws that are the basis for the claim, it is impossible 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 does appear that the general statutory, goal and rule restrictions on residential development and use of agricultural land apply to the owners' anticipated use of the property, and for the most part, these laws would not come under any of the exemptions in Measure 37.

To the extent that state land use laws, specifically Statewide Planning Goal 7, require restrictions on development of steep slopes in order to protect public health and safety, these regulations are exempt from a claim under Measure 37, Section 3, and shall remain in effect.³ 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.

VI. FORM OF RELIEF

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the department has enacted or 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 allowed 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 prohibits subdivision and residential development of the subject property. The laws enforced by the Commission or department reduce the fair market value of the subject property to some extent. The claim estimates this amount to be \$6,745,290, an amount based on a realtor's estimate and on the sale of adjacent parcels similar to those proposed by the claimants. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, an appraisal was not submitted and it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the current record for this claim, the department acknowledges that the laws on which the claim is based have more than likely reduced 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 allow Pamela J. Cobos and Victor C. Cobos to use the subject property for a use permitted at the time they acquired the properties on May 6, 1999 and on October 24, 2001, respectively.

³ Statewide Planning Goal 7 requires local governments to identify areas of natural hazards and to adopt ordinances to protect people and property from such hazards.

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 Pamela J. Cobos and Victor C. Cobos use of the subject properties: provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, Division 33, enforced by the Commission or the department since the claimants acquired the subject property.
2. The action by the State of Oregon provides the state's authorization to Pamela Cobos to use Parcel 2 subject to those standards in effect on May 6, 1999, when she acquired Parcel 2, and to Victor Cobos to use Parcel 1 subject to those standards in effect on October 24, 2001, when he acquired Parcel 1. Those standards include the provisions of ORS 215 and Goal 3 that were in effect on the dates they acquired their respective parcels. The department acknowledges this relief does not allow the claimants to use the property as requested in the claim.
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 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.
4. Any use of the property by the claimants remain subject to the following laws: (a) those laws not specified in the claim to the State of Oregon, dated December 20, 2004, or identified in this report; (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.
5. 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 June 7, 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.