

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES, THE DEPARTMENT
OF LAND CONSERVATION AND DEVELOPMENT OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM)
FOR COMPENSATION UNDER)
BALLOT MEASURE 37 (CHAPTER 1,)
OREGON LAWS 2005) OF)
Arthur and Thelma Dorrance, CLAIMANTS)

FINAL ORDER
CLAIM NO. M 118343

Claimants: Arthur and Thelma Dorrance (the Claimants)

Property: Tax Lot 600, T.3S, R.2E, Section 31, W.M., Clackamas County

Claim: The demand for compensation and any supporting information received from the Claimant by the State of Oregon (the Claim).

Claimants submitted the Claim to the State of Oregon under Ballot Measure 37 (2004) (Oregon Laws 2005, Chapter 1) (hereafter, Measure 37). Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of paying just compensation under Measure 37, the State of Oregon will not apply the following laws to the Arthur and Thelma Dorrance's division of the Property into lots or parcels or to the establishment of a single-family dwelling on each lot or parcel: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, that restrict the division of the Property into lots or parcels or the establishment of a single-family dwelling on each lot or parcel, except for the provisions of each of these laws that were in effect when Arthur Dorrance acquired his interest in the Property on March 22, 1957; and will not apply to Thelma Dorrance's use of the property only to the extent necessary to allow her a use permitted at the time she acquired the property on February 18, 2005. The department acknowledges that the relief to which Thelma Dorrance is entitled under Measure 37, will not allow her to use the property as set forth in the claim.

2. The relief granted by this order does not authorize Arthur Dorrance to use the Property for a use that was not permitted when he acquired his interest in the Property. The use of

Property permitted in 1957 was governed by state laws that include, but are not limited to: the provisions of ORS chapter 92 that existed at that time.

The relief granted by this order does not authorize Thelma Dorrance to use the Property for a use that was not permitted when she acquired his interest in the Property. The use of Property permitted in 2005 was governed by state laws that include, but are not limited to: the provisions of ORS chapter 92, Statewide Land Use Planning Goal 3, and ORS chapter 215 that existed at that time.

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, this order does 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.

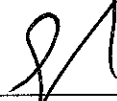
4. Any use of the Property by the Claimants under the terms of this order remains subject to the following laws: (a) those laws not specified in (1), above; (b) any laws enacted or enforced by a public entity other than DLCD; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under section (3) of Measure 37.

5. Without limiting the generality of the foregoing terms, in order for the Claimant to use the Property, it may be necessary for the Claimant 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.

This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under Measure 37, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under Measure 37, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:

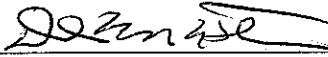
Lane Shetterly, Director



George Naughton, Deputy Director
DLCD

Dated this 12th day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



David Hartwig, Administrator
DAS, State Services Division

Dated this 12th day of October, 2005.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to the following judicial remedies:

1. Judicial review under ORS 293.316: Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County and the Circuit Court in the county in which you reside.
3. A cause of action under Oregon Laws 2005, chapter 1 (Measure 37 (2004)): A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that “[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost.”

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation**

October 12, 2005

STATE CLAIM NUMBER: M118343

NAME OF CLAIMANTS: Arthur and Thelma Dorrance

MAILING ADDRESS: 12063 South Carus Road
Oregon City, Oregon 97045

PROPERTY IDENTIFICATION: Township 3S, Range 2E, Section 31
Tax Lot 600
Clackamas County

DATE RECEIVED BY DAS: April 22, 2005

180-DAY DEADLINE: October 19, 2005

I. SUMMARY OF CLAIM

The claimants, Arthur and Thelma Dorrance, seek compensation in the amount of \$510,000 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 divide the 4.14-acre property into parcels of an unspecified size for additional residential development. The property is presently developed with five dwellings, and is located at 12063 South Carus Road, near Canby, in Clackamas 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 that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Arthur and Thelma Dorrance's division of the property for residential development: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215, and OAR 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow the Arthur Dorrance a use of the property

permitted at the time he acquired it in 1957, and to allow Thelma Dorrance a use of the property permitted at the time she acquired an interest in the property on February 18, 2005. The department acknowledges that the relief to which Thelma Dorrance is entitled under Measure 37, will not allow her to use the property in the manner set forth in this claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 12, 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, five 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 April 22, 2005, for processing under OAR 125, division 145. The claim identifies OAR 660-033-0100(1) and 660-033-0130(3)(a) as laws that restrict the use of the property and are 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 statutory and administrative rule history of the 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 claim alleges that the claimants acquired the property in 1957. The documentation submitted by the claimants confirms that claimant Arthur Dorrance acquired his interest in the subject property, by Deed, on March 22, 1957, and that claimant Thelma Dorrance acquired her interest in the subject property, by Deed, on February 18, 2005. The Clackamas County staff report indicates that Arthur and Thelma Dorrance are the current owners of the subject property.

Conclusions

Claimant, Arthur Dorrance, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of March 22, 1957. Claimant, Thelma Dorrance, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of February 18, 2005. Arthur Dorrance is a “family member” as to Thelma Dorrance as that term is defined by Subsection 11(A) of Measure 37.

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 claimants’ 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 cites OAR 660-033-0100(1) and OAR 660-033-0130(3)(a) as the land use regulations which restrict the subdivision of the property.

The claim is based, generally, on Clackamas County's current Exclusive Farm Use (EFU) Zone, and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Statewide Planning Goal 3 in accord with OAR 660, division 33, and ORS 215 because the claimants' 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 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 of less than 80 acres and establish standards for the approval of dwellings.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on 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 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 administrative rule history for OAR 660-033-0100, 660-033-0130 and 660-033-0135.)

Statewide Planning Goal 14 (Urbanization) would also likely apply to the division of the claimants' property into parcels of less than two acres in size. Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses. Goal 14 also became effective on January 25, 1975.

Claimant Arthur Dorrance acquired his interest in the subject property on March 22, 1957, prior to the establishment of the statewide planning goals and their implementing statutes and rules. At that time, the property was not zoned by Clackamas County.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted after Arthur Dorrance acquired ownership of the subject property in March 1957, and do not allow the further division of the property, thereby restricting his use of the property relative to the uses allowed when the property was acquired. In 1957, the property was not subject to any zoning.

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 claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and that may continue to apply to the claimants' 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 the claimants seek 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 land use regulation 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 informal estimate of \$510,000 as the reduction in the property's fair market value, as a result of restrictions imposed after acquisition of the property. This amount is based on the claimants' estimate of the market value of parcels in the area.

Conclusions

As explained in Section V.(1) of this report, Arthur and Thelma Dorrance are current owners of the property. Arthur Dorrance acquired the property on March 22, 1957. Under Ballot Measure 37, Arthur and Thelma Dorrance are due compensation for land use regulations 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 Arthur Dorrance acquired the property, restrict division of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$510,000.

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 enacted or 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 state land use regulations that restrict the use of the property relative to what would have been allowed in 1957, when claimant Arthur Dorrance acquired the property. Those laws include applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its EFU zone. None of those laws appear to be exempt under Section 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 does appear that the general statutory, goal and rule restrictions on residential development and use of farm land apply to Arthur and Thelma Dorrance's use of the property, and for the most part these laws are not exempt under Section 3(E) of Measure 37.

Laws in effect when the claimants acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' 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 the claimants seek 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 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. The 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 the law in order to allow the present owner to carry out a use of the property permitted at the time the current 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 set forth in this report, laws enforced by the Commission or the department restrict the division of the subject property into additional parcels, and the development of additional residential dwellings on the property. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$510,000. However, because the claim does not provide an appraisal or other documentation 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 record for this claim, the department acknowledges that it is more likely than not that the laws on which the claim is based likely 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 land use regulations to allow Arthur Dorrance to use the subject property for a use permitted at the time he acquired the property on March 22, 1957, and to allow Thelma Dorrance to use the subject property for a use permitted at the time she acquired her interest in the property on February 18, 2005.

Arthur Dorrance acquired the subject property before adoption of the statewide planning goals and their implementing statutes and rules. At that time, it was not zoned by the county. When Thelma Dorrance acquired interest in the subject property in 2005, it was subject to the County's EFU zone and the state laws currently in effect, as described in Section V. 2 above.

Conclusion

Based on the record, the department recommends 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 Arthur and Thelma Dorrance's division and development of the 4.14-acre property: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33. These land use regulations will not apply to Arthur Dorrance's use of the property only to the extent necessary to allow him a use permitted at the time he acquired the property on March 22, 1957; and will not apply to Thelma Dorrance's use of the property only to the extent necessary to allow her a use permitted as the time she acquired the property on February 18, 2005. The department acknowledges that the relief to which Thelma Dorrance is entitled under Measure 37 will not allow her to use the property as set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to Arthur Dorrance to use his property subject to the standards in effect on March 22, 1957; and to Thelma Dorrance to use the subject property subject to the standards in effect on February 18, 2005. On that date, the property was subject to provisions of Statewide Planning Goal 3, ORS 215, OAR 660, division 33, and the Clackamas County EFU zone currently in effect.

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 215.402 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 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 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 September 26, 2005. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' 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.