

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

IN THE MATTER OF THE CLAIM) FINAL ORDER
FOR COMPENSATION UNDER) CLAIM NO. M118358
BALLOT MEASURE 37 (CHAPTER 1,)
OREGON LAWS 2005) OF)
Patricia Miller-Russell, CLAIMANT)

Claimant: Patricia Miller-Russell (the Claimant)

Property: Tax Lot 201, T.23S, R.4W, Section 5, Douglas County

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

Claimant 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 Ms. Miller-Russell's division of the 104 acre property into three new parcels, exceeding ten acres in size, with one single-family dwelling on each vacant parcel created, in conjunction with farm use: applicable provisions of Statewide Planning Goal 3(Agricultural Lands), ORS 215, and applicable provisions of OAR chapter 660, division 33 enacted after January 10, 1973. These land use regulations will not apply to Ms. Miller-Russell's use of the property only to the extent necessary to allow the claimant a use at the time he acquired the property on January 10, 1973.
2. The relief granted by this order does not authorize Ms. Miller-Russell to use the Property for a use that was not permitted when she acquired this interest in the Property. The use of Property permitted in 1973 was governed by state law that includes, but is not limited to: the provisions in 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 Claimant 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 the Measure.

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 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 Deputy 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.

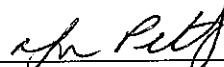
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 18th day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 17th 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."

FOR INFORMATION ONLY

The Marion County Circuit Court has issued an opinion declaring that 2004 Oregon Ballot Measure 37 (2005 Or Laws chapter 1) is invalid. As of the date of this order, the court has not entered a judgment that gives legal effect to the court's opinion. Once a judgment is entered by the court, any rights granted by this order may be void or voidable.

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

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

October 18, 2005

STATE CLAIM NUMBER: M118358

NAME OF CLAIMANT: Patricia Miller-Russell

MAILING ADDRESS: 4998 Elkhead Road
Yoncalla, Oregon 97499

PROPERTY IDENTIFICATION: Township 23 S, Range 4W, Section 5
Tax Lot 201
Douglas County

DATE RECEIVED BY DAS: April 26, 2005

180-DAY DEADLINE: October 23, 2005

I. SUMMARY OF CLAIM

The claimant, Patricia Miller-Russell, seeks compensation in the amount of \$505,000 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 claimant desires compensation or the right to create three new parcels, exceeding ten acres in size, with one single-family dwelling on each vacant parcel created, in conjunction with farm use. The property is approximately 104 acres, located at 4998 Elkhead Road, near Yoncalla, in Douglas 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 Patricia Miller-Russell's division of the property into three parcels, or to her establishment of a single-family dwelling on each vacant parcel created: the applicable provisions of Statewide Planning Goal 3 (Agricultural Lands); ORS 215; and OAR 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow Patricia Miller-Russell a use of the property permitted at the time she acquired it on January 30, 1973. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 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, three written comments, evidence or information were received in response to the 10-day notice.

Two of the comments provided 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. One of these comments expressed specific concern about the additional impacts on water resources in the area, but provided no documentation to substantiate the concern.

One comment addressed whether the claimant is an owner; when the claimant became the present owner of the property; and whether Douglas County's code implementing a state law restricts the claimant's use of the property. The comments have been considered by the department in preparing this report. (See comment 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

This claim was submitted to DAS on April 26, 2005, for processing under OAR 125, division 145. The claim identifies restrictions on minimum parcel sizes 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, Patricia Miller-Russell, acquired the subject property on January 10, 1973, as reflected by a recorded memorandum of land sale contract and county recording documents. Douglas County provided the department with verification that County Deed Reference Number 73-1382, in the County deed records shows that the property has been in the claimant’s continuous ownership since January 1973.

Conclusions

The claimant, Patricia Miller-Russell, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of January 10, 1973.

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 when the property was acquired, the Scotts Valley area was zoned AGT, there were no minimum parcel sizes, and claimant could have created “three parcels over 10 acres with homes.”

The claim is based, generally, on Douglas County’s current Exclusive Farm Use - Cropland (FC-F3) zone, and the applicable provisions of state law that require such zoning. The FC-F3 zone is a farm use zone that requires a minimum parcel size of 80 acres and establishes standards applicable to establishment of new dwellings. The claimant’s property is zoned for farm use as required by Statewide Planning 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 Exclusive Farm Use (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 parcels 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).

Although the claim indicates that the dwellings would be in conjunction with farm use, 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 on January 10, 1973, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. The County's Agriculture, Grazing and Timber (AGT) zoning applied to the subject property in 1973. The AGT zone did not have a minimum parcel size, allowed dwellings for "owners, operators, and/or help required to carry out . . . agriculture, grazing and/or timber raising" (Douglas County Zoning and Land Use Ordinance revised 1969 and 1972), and was adopted pursuant to the provisions of ORS 215, enacted in 1963.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted after Patricia Miller-Russell acquired ownership of the subject property in January 10, 1973, and do not allow the division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by Patricia Miller-Russell in 1973. In 1973, the property was subject to the requirements of Douglas County's AGT zone, which were adopted pursuant to the provisions of ORS 215 then in effect.

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. 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 the 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 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 \$1,130,000 as the property's fair market value, in the absence of current regulations. This amount is based on the claimant's estimate of the property's current market value of \$625,000 plus additional dwelling units. The estimated reduction in value, due to current regulations, is \$505,000.

The estimate is based on a comparative market analysis, included with the claim, estimating the current real market value of the subject property with improvements and property sales in the surrounding area, including properties with farmhand homes.

Conclusions

As explained in Section V.(1) of this report, Patricia Miller-Russell acquired the property on January 10, 1973. Under Ballot Measure 37, Ms. Miller-Russell is 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 the claimant acquired the property restrict division of the subject property. The claimant estimates the reduction in value due to the restrictions to be \$505,000.

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 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 land use laws that restrict the use of the property relative to what would have been allowed in 1973, when the property Patricia Miller-Russell acquired the property on January 10, 1973. These provisions include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Douglas County has implemented through its EFU zone. With the exception of provisions of ORS 215 in effect in 1973, none of these laws appear to be exempt under Section 3(E) of Ballot Measure 37. Provisions of what is now ORS 215, adopted before January 10, 1973 are exempt under Section 3(E) of the Measure, which exempts laws in effect when the claimant acquired the property.

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 the claimant's use of the property, and for the most part these laws are not exempt under Section 3(E) of Measure 37. Provisions of ORS 215 in effect when the claimant acquired the property in 1973, are exempt under Section 3(E) of the Measure and will continue to apply to the property.

Other laws in effect when the claimant acquired the property are also 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 the 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. And, in some cases, some of these laws may be exempt under Sections 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 uses that the claimant has 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 claimant should be aware that the less information she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her 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 claimant's ability to create the desired three new parcels, exceeding ten-acres in size, with one single-family dwelling on each vacant parcel created. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$505,000. However, because the claim does not provide an appraisal or other specific 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 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 Patricia Miller-Russell to use the subject property for a use permitted at the time she acquired the property on January 10, 1973.

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 Patricia Miller-Russell's division of the approximately 104-acre property into three new parcels, exceeding ten-acres in size, or to her establishment of a single-family dwelling on each vacant parcel created: applicable provisions of Statewide Planning Goal 3; ORS 215; and OAR 660, division 33 that were enacted after January 10, 1973. These land use regulations will not apply to Patricia Miller-Russell's use of her property only to the extent necessary to allow her a use permitted at the time she acquired the property on January 10, 1973.
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 January 10, 1973. On that date, the property was subject to applicable provisions of ORS 215 then 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 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 215.402 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 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 her 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 September 29, 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.