

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. M 118371  
BALLOT MEASURE 37 (CHAPTER 1 )  
OREGON LAWS 2005) OF )  
SHARON DAILY MCCULLOCH-GILSON, )  
CLAIMANT )

Claimant: Sharon Daily McCulloch-Gilson (the Claimant)

Property: Tax Lot 1300, T.1S, R.2W, Section 21, W.M., Washington 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 compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to allow Sharon McCulloch-Gilson to divide the property into 12, one-acre parcels and to develop a dwelling on 11 of those parcels: 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 Sharon McCulloch-Gilson only to the extent necessary to allow her a use of the subject property permitted at the time she acquired an interest in the property on January 7, 1971.
2. The action by the State of Oregon provides the state's authorization to Sharon McCulloch-Gilson to use the property subject to the standards in effect on January 7, 1971. Depending on the local zoning of the property at that time, provisions of ORS 215 then in effect may have applied to the property.
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

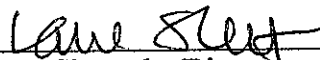
form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in 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 the claimant to obtain a decision under Measure 37 from a city and/or county and/or metropolitan service district that enforce 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:

  
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Lane Shetterly, Director  
DLCD

Dated this 19<sup>th</sup> day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
\_\_\_\_\_  
Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 19<sup>th</sup> 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, and effective, 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 19, 2005

**STATE CLAIM NUMBER:** M118371

**NAME OF CLAIMANT:** Sharon Daily McCulloch-Gilson<sup>1</sup>

**MAILING ADDRESS:** 6065 SW River Road  
Hillsboro, Oregon 97123

**IDENTIFICATION OF PROPERTY:** Township 1S, Range 2W, Section 21  
Tax Lot 1300  
Washington County

**OTHER INTEREST IN PROPERTY** Paul H. Gilson  
6065 SW River Road.  
Hillsboro, Oregon 97123

**DATE RECEIVED BY DAS:** April 28, 2005

**180-DAY DEADLINE:** October 25, 2005

**I. CLAIM**

The claimant, Sharon Daily McCulloch-Gilson, seeks compensation in the amount of \$2,700,000 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 divide the 12.9-acre property into approximately 12 parcels and to build 11 additional dwellings. The 12.9-acre property is located at 6065 SW River Road in Washington 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 as to Sharon McCulloch-Gilson. 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 allow Sharon McCulloch-Gilson's division of the

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<sup>1</sup> Paul H. Gilson is listed on the claim form as a person with an interest in the property, but he is not identified as a claimant. The record does not document his ownership interest.

property into 12 parcels, and her development of a dwelling on 11 of those parcels: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), Goal 14 (Urbanization), ORS 215 and OAR 660, division 33. These laws will not apply to Sharon McCulloch-Gilson only to the extent necessary to allow her a use of the subject property permitted at the time she acquired the property on January 7, 1971. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On March 2, 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, no comments were received.

### **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 28, 2005, for processing under OAR 125, division 145. The claim identifies as the basis for the claim: ORS 215.780, OAR 660-33-0100, minimum parcel size for dwellings; ORS 215.213, OAR 660-33-0135, minimum income for dwellings; OAR 660-33-040, minimum lot size for dwellings; ORS 215.213 and 215.263, ORS 215.780 and 215.283, OAR 660-33-120, -130 and -135, land divisions, farm and non-farm dwellings that restrict the use of the property. 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 was submitted within two years of December 2, 2004 the effective date of Measure 37, based on land use regulations enacted 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, Sharon McCulloch-Gilson acquired an interest in the subject property on January 7, 1971. (See deed in department claim file.) According to Washington County, Sharon and Paul Gilson are listed as the current owners of the subject property.

### **Conclusions**

The claimant, Sharon McCulloch-Gilson, is an “owner” of the subject property as that term is defined, as of January 7, 1971.

### **2. The Laws that Are the Basis for the Claim**

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 Fact**

The claim states:

“In 1971 my property could have been lawfully developed with *at least* 12 buildable lots created by partitions of lots into lots directly abutting the County roadway (including flag lots) at a minimal cost for the division of lots and the availability for building permits.”

The claim is based generally on Washington County's current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU 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 EFU pursuant to ORS 215.

Current land use regulations, particularly Goal 3 and ORS 215.213, 215.263, 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 in a marginal lands county under ORS 215.213. ORS 215.213 became effective on October 5, 1973 (SB 101, Chapter 503, Oregon Laws 1973). OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993.

Statewide Planning Goal 14 would apply to the division of the claimant's 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 became effective on January 25, 1975.

Sharon McCulloch-Gilson acquired the subject property on January 22, 1971, prior to the establishment of the Statewide Planning Goals and their implementing statutes and administrative rules. It is unclear whether the property was zoned by the county at that time. If the property was in a qualified farm zone under ORS 215, enacted in 1963, the applicable provisions of that statute would have applied to the property.

### **Conclusions**

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) applicable to land zoned EFU in amendments to ORS 215 and OAR 660, division 33, were all enacted after Sharon McCulloch-Gilson acquired ownership of the subject property on January 12, 1971. Those laws do not allow the division and development of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by Sharon McCulloch-Gilson in 1971.

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 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 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 estimates the reduction in fair market value due to land use restrictions as \$2,700,000. The \$2,700,000 estimate is not substantiated. However, according to the claim, dividing the 12.9-acre parcel into approximately one-acre parcels for housing increases the value of the property resulting in a reduction due to currently allowed farm uses.

#### **Conclusions**

As explained in Section V.(1) of this report, Sharon McCulloch-Gilson is a current owner, who acquired the property on January 12, 1971. Thus, under Ballot Measure 37, Sharon McCulloch-Gilson 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), current law restricts the division and development of the subject property. The claim estimates the reduction in the property's fair market value due to restrictions is \$2,700,000.

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 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 on state land use regulations that restrict the use of the property relative to what would have been allowed in 1971 when the claimant acquire the property. These regulations include Statewide Planning Goals 3, Goal 14 ORS 215 and OAR 660, division 33. With the exempt of applicable provisions of ORS 215, which may have applied to the property at the time, none of these laws appear to be exempt under Section 3(E) of Measure 37, 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. If the property was in a qualified farm zone in 1971, the applicable provisions of ORS 215 then in effect would be exempt and continue to apply to the property.

Other laws in effect when Sharon McCulloch-Gilson 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 what 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, 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. 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 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 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, 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 conclusion set forth in this report, laws enacted or enforced by the Commission or the department restrict the claimant's ability to create the desired one-acre parcels out of the subject 12.9-acre property and to develop 11 dwellings on those parcels. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by \$2,700,000. 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 one or more land use regulations to allow Sharon McCulloch-Gilson to use the subject property for a use allowed at the time she acquired the property on January 7, 1971.

## **Conclusions**

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. 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 allow Sharon McCulloch-Gilson to divide the property into 12, one-acre parcels and to develop a dwelling on 11 of those parcels: 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 Sharon McCulloch-Gilson only to the extent necessary to allow her a use of the subject property permitted at the time she acquired an interest in the property on January 7, 1971.
2. The action by the State of Oregon provides the state's authorization to Sharon McCulloch-Gilson to use the property subject to the standards in effect on January 7, 1971. Depending on the local zoning of the property at that time, provisions of ORS 215 then in effect may have applied to the property.
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 the claimant to obtain a decision under Measure 37 from a city and/or county and/or metropolitan service district that enforce 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 October 4, 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.