

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 118384
BALLOT MEASURE 37 (CHAPTER 1,)
OREGON LAWS 2005) OF)
Jim Lingelbach, CLAIMANT)

Claimant: Jim Lingelbach (the Claimant)

Property: Tax lot 1800, Township 3S, Range 4E, Section 27, Clackamas County (the Property)

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 under Measure 37, the State of Oregon will not apply the following laws to Mr. Lingelbach's division or development of the 20.55-acre property: applicable provisions of Statewide Planning Goal 4, ORS 215 and OAR 660, division 6, enacted after November 10, 1992. These land use regulations will not apply to Mr. Lingelbach's use of the property only to the extent necessary to allow him a use permitted at the time he acquired the property on November 10, 1992. The department acknowledges that the relief to which the claimant is entitled under Measure 37 will not allow him to use the property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property subject to the standards in effect on November 10, 1992. On that date, the property was subject to applicable provisions of Statewide Planning Goal 4, ORS 215, and OAR 660, division 6, and Clackamas County's TTD 20-acre minimum lot size zone then in effect.

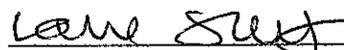
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first 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 him 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.

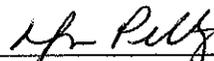
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 21st day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 21st 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 21, 2005

STATE CLAIM NUMBER: M118384
NAME OF CLAIMANT: Jim Lingelbach
MAILING ADDRESS: 33222 SE Moss Hill Road
Estacada, OR 97023
PROPERTY IDENTIFICATION: Township 3S, Range 4E, Section 27
Tax lot 1800
Clackamas County
DATE RECEIVED BY DAS: May 3, 2005
180-DAY DEADLINE: October 30, 2005

I. SUMMARY OF CLAIM

The claimant, Jim Lingelbach, seeks compensation in the amount of \$1,500,000 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 approximately 20.55-acre property into 36 half-acre lots with a dwelling on each lot. The property is located at 33222 SE Moss Hill Rd, near Estacada 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 Mr. Lingelbach's division of the property for residential development: Goal 4 (Forest Lands) applicable provisions of ORS 215 and applicable provisions of OAR 660, division 6, enacted after November 10, 1992. These laws will not apply to the claimant only to the extent necessary to allow Mr. Lingelbach a use of the property permitted at the time he acquired it in 1992. The department acknowledges that the relief provided to the claimant by Measure 37 will not allow him to use the property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 25, 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 written comments, evidence or information were received in response to the 10-day notice.

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 May 3, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's Farm/Forest 80-acre minimum lot size (August 1994) and 20-acre minimum lots size (June 1969) as laws that restrict the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulations adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

Ballot Measure 37 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in the Measure. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimant, Jim Lingelbach, acquired the subject property on November 10, 1992, as reflected by a Deed of Personal Representative included with the claim. The claimant acquired the property from the estate of a family relative, Elizabeth Sue Lingelbach, who had acquired the property from Frank J. and Elsie Lingelbach.¹

The claim states that the property has been in the family since 1943. However, the earliest evidence of family ownership is a copy of a Deed included with the claim, dated May 31, 1944, conveying the property from Valentine T. Lingelbach to Frank J. and Elsie Lingelbach. Without evidence of an earlier acquisition date, this report will use 1944 as the date that the claimant’s family acquired the property.

A copy of a 2004-2005 year tax assessment from Clackamas County indicates that Jim Lingelbach is the current owner of the subject property.

Conclusions

Based on information included in the claim, the claimant, Jim Lingelbach, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of November 10, 1992.

Based on information included in the claim, the claimant’s “family members,” as that term is defined by Section 11(A) of Measure 37, acquired the property on May 31, 1944.

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.

¹ The claim did not include information on the date of Elizabeth Sue Lingelbach’s death. Rather, the claim relies on the date of the Deed of Personal Representative as the date the claimant acquired the property.

Findings of Fact

The claim cites "603 of Timber District" for creating an 80-acre minimum for a house and "Section 403 of Zoning" for "allowing only one dwelling for 20 acres" as the regulations restricting the owner's use of the property. The Clackamas County Transitional Timber District Twenty (TTD-80) currently applies to the property and is a forest zone. The zoning standards are based on the standards contained in Statewide Planning Goal 4 and OAR 660 division 6.²

Goal 4, (Forest Lands) and laws applicable to land zoned for forest use under ORS 215, including ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6, restrict the right of an owner to divide the property for the purpose of sale and residential use. Goal 4 became effective on January 25, 1975, and required forest land as defined by the Goal to be zoned for forest use. (See citations to statutory and rule history under OAR 660-015-0000(4).) The forest land administrative rule (OAR 660, division 6,) became effective September 1, 1982 and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Or Laws 1993) and were adopted into OAR 660-006-0026 and 0027 on March 1, 1994. (See citations to rule history under OAR 660-015-0000(4)).

Together, ORS 215.705 to 215.755 and 215.780, and OAR 660-006-0026 and 0027 establish an 80-acre minimum lot size for the creation of a new parcel in a forest zone and also establish the standards for dwellings in forest zones under Statewide Planning Goal 4. Statewide Planning Goal 14 would likely 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.

The claimant's family acquired the property in 1944, prior to the adoption of the state land use planning goals and their implementing statutes and rules. No Clackamas County zoning applied to the subject property at that time.

Conclusions

The current minimum lot size and dwelling standards established by Statewide Planning Goal 4 and OAR 660-006-0026 and 0027, and the provisions of ORS 215 were adopted after Jim Lingelbach's family acquired an interest in the subject property in 1944 and do not allow the division of the property that is zoned TTD-80 into parcels less than 80 acres in size or the approval of dwellings on half-acre parcels.

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. 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

² The Land Conservation and Development Commission acknowledged Clackamas County's comprehensive plan and land use regulations to be in compliance with the Statewide Planning Goal 4 by order dated December 31, 1981. (See the department's October 23, 1981 Staff Report, pages 26 thru 28).

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 asserts that the reduction in the property’s fair market value due to current regulations is \$1,500,000. The claim includes a title report and comparative cost analyses to justify this amount, based on 36 half-acre lots at \$50,000 each minus the appraised value of the property under today’s regulations.

Conclusions

As explained in Section V.(1) of this report, the current owner is Jim Lingelbach, whose family acquired the property in 1944. Under Ballot Measure 37, Jim Lingelbach 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’s family acquired the property restrict division and development of dwellings on the subject property. The claimant estimates the reduction in value due to the restrictions to be \$1,500,000.

Without an appraisal or other documentation, it is not possible to substantiate a specific dollar amount that 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 since the claimant’s family acquired the property.

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, including Statewide Planning Goal 4 (Forest Lands) and applicable provisions of ORS 215 and OAR 660, division 6, which Clackamas County has implemented through its Timber District. None of these laws were in effect when the claimant’s family acquired the property in 1944 and thus are not exempt under Section 3(E) of Measure 37, which exempts laws in effect when the claimant’s family acquired the property.

The department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. Section 3(B) of Measure 37 specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes...” To the extent they may be applicable under OAR 660-006-0050, the department finds that siting standards for dwellings in forest zones under ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6,) are exempt under Section (3)(B) of 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 forest 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 because they were adopted after the claimant’s family acquired the property in 1944.

Laws in effect when the claimant’s family acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimant’s use of the property. In addition, the standards for siting a dwelling in a forest zone are exempt under Section 3(B) of the Measure and will continue to apply to 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 he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his use of the property.

VI. FORM OF RELIEF

Section 1 of Measure 37 provides for payment of compensation to the owners 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 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 conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimant's ability to create the desired half-acre parcels out of the subject property, or develop those parcels for residential use. The claim asserts that laws enforced by the Commission or department reduce the fair market value of the subject property by \$1,500,000. Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount that 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.

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 Jim Lingelbach to use the subject property for a use permitted at the time he acquired the property on November 10, 1992.

The claimant acquired the subject property on November 10, 1992, prior to the establishment of an 80-acre minimum lot size and the establishment of current standards for the placement of dwellings on lands designated for forest use. When the claimant acquired the property, it was zoned Transitional Timber District, 20-acre minimum parcel size (TTD-20). Under this zone in effect when he acquired the property, he may have been allowed a dwelling on his 20.55-acre parcel.³ However, under the TTD-20 zone, he could not have divided the property into the desired half-acre lots, as requested in the claim.

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 Mr. Lingelbach's division or development of the 20.55-acre property: applicable provisions of Statewide Planning Goal 4, ORS 215 and OAR 660, division 6, enacted after November 10, 1992. These land use regulations will not apply to Mr. Lingelbach's use of the property only to the extent necessary to allow him a use permitted at the time he acquired the property on November 10, 1992. The department acknowledges that the relief to which the

³ The Transitional Timber District was adopted to comply with Statewide Goal 4, Forest Lands in 1981 (see LCDC Continuance Order dated December 31, 1981, Goal 4 Section pp. 26-28). A staff report prepared by Clackamas County indicates that the TTD-20 zoning would have permitted the creation of 20-acre parcels. The County report also indicates that the test for establishing a dwelling in the TTD-20 zone at that time was to "demonstrate through a management plan that a farm or forest use would be occurring on the property." (See the department's claim file for a copy of the County staff report.)

claimant is entitled under Measure 37 will not allow him to use the property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to the claimant to use his property subject to the standards in effect on November 10, 1992. On that date, the property was subject to applicable provisions of Statewide Planning Goal 4, ORS 215, and OAR 660, division 6, and Clackamas County's TTD 20-acre minimum lot size zone 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 him 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 October 6, 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.