

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

May 27, 2005

STATE CLAIM NUMBER: M118917

NAME OF CLAIMANTS: Dorothy English
Christie Verhoef
Douglas Sellers

MAILING ADDRESS: 13100 NW McNamee Road
Portland, OR 97231

IDENTIFICATION OF PROPERTY: 13100 NW McNamee Road
Township 2N, Range1W, Section
32A, Tax lot 1200, Multnomah
County

**OTHER CONTACT INFORMATION
FOR CLAIMANT:** Donald Joe Willis and
Jill Gelineau
Schwabe, Williamson & Wyatt, PC
Attorneys at Law
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OTHER INTEREST IN PROPERTY: 40-foot right-of-way near western
boundary to accommodate
McNamee Road.

DATE RECEIVED BY DAS: December 6, 2004

180-DAY DEADLINE: June 4, 2005

I. CLAIM

The claimants, Dorothy English, Christie Verhoef and Douglas Sellers, seek compensation in the amount of \$1,150,000 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 subdivide the property to

accommodate eight dwellings. The property is located at 13100 NW McNamee Road in Multnomah County.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of certain state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Ms. English's use of the subject property to the extent necessary to allow her a use of the property permitted at the time she acquired an interest in the property that is the subject of this claim; and to Ms. Verhoef's and Mr. Seller's use of the subject property to the extent necessary to allow them a use of the property permitted at the time they acquired an interest in it. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On April 26, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS), provided written notice to owners of surrounding properties. According to DAS, there were no written comments, evidence or information received in response to the 10-day notice.

IV. TIMELINESS OF CLAIM

Requirement

Ballot Measure 37, subsection (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

Donald Joe Willis and Jill Gelineau (Schwabe, Williamson and Wyatt, PC) filed a written claim for compensation on behalf of Dorothy English, Christie Verhoef and Douglas

Sellers with DAS on December 6, 2004. Individual claim letters also were submitted to the State Attorney General, the State Department of Forestry and the State Department of Land Conservation and Development.

Exhibit A to the claim identifies certain land use regulations as restricting the claimants' use of the property and reducing its fair market value. According to the claim, claimants intend to use the property by partitioning it into parcels and developing a single family home on each parcel. The land use regulations that are identified in the claim include certain provisions of OAR chapter 660, certain Statewide Planning Goals, and certain statutes codified in ORS chapters 92, 215 and 227. This draft report addresses only those land use regulations that are administered in some manner by the department. 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, subsection (11)(C) defines "owner" as "the present owner of the property, or any interest therein."

Findings of Fact

A letter prepared by Donald Joe Willis, attorney for the claimants, indicates that Dorothy English is a current owner of the subject property described as 13100 NW McNamee Road in Multnomah County (tax lot 1200). The letter states that Ms. English and her husband purchased the property on November 4, 1953. A title report prepared at the request of the department demonstrates that Nykee C. English and Dorothy P. English purchased the property pursuant to a contract signed November 4, 1953 and recorded November 10, 1953. (See Chain of Title Report prepared by Stewart Title on March 21, 2005 and included in the claim file.)

A letter from Multnomah County indicates that Ms. English remains an owner of the subject parcel as of the filing of the claim, stating that, "Mrs. English meets the ownership requirements of Ballot Measure 37" (see letter from Multnomah County Attorney dated January 10, 2005). The Chain of Title Report referenced above also confirms that Dorothy English remains an owner of the subject property.

The claim states that, “In 1999, Mrs. English executed a quitclaim deed to her daughter, Christie Verhoef, and her grandson, Douglas Sellers, with the intent to transfer an interest in the property to them upon Mrs. English’s death”. The quitclaim deed signed by Dorothy English grants an ownership interest to Christie Verhoef and Douglas Sellers, “not as tenants in common, but with right of survivorship.” (See Chain of Title Report prepared by Stewart Title on March 21, 2005.)

Conclusions

Dorothy P. English is an “owner” of an interest in the property located at 13100 NW McNamee Road in Multnomah County (2N-1W-32A, 01200), as that term is defined by subsection (11)(C) of Ballot Measure 37. In addition, Christie Verhoef and Douglas Sellers acquired an ownership interest in the subject property on October 31, 1999. Therefore, Ms. Verhoef and Mr. Sellers are also “owners” of an interest in the subject property as that term is defined in Measure 37, as of October 31, 1999, and are eligible to file a claim for compensation under the Measure.

2. The Laws That Are the Basis for the Claim

In order to establish a valid claim, subsection (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 lists a large number of specific land use regulations as potentially restricting the use of the subject property for the uses contemplated by Ms. English as stated in the claim. The following is the department’s analysis of whether the listed land use regulations administered by the department or the Commission apply to the use of the property contemplated by the claimants in their claim.

OAR 660-001-0000 contains procedural rules that govern rulemaking by the Commission. It does not restrict the claimants’ use of their property.

OAR 660-002-0005 is a statement of what other rules delegating authority from the Commission to the Director of the Department do. It does not restrict the claimants’ use of their property.

OAR 660-004-0000 is a statement of purpose for the Commission’s rules interpreting Statewide Land Use Planning Goal 2. It does not restrict the claimants’ use of their property.

OAR 660-006-0000 is a statement of purpose for the Commission’s Statewide Land Use Planning Goal 4. It does not restrict the claimants’ use of their property.

OAR 660-007-0000 is a statement of purpose for the Commission's rules relating to needed housing in the Portland metropolitan area. It does not restrict the claimants' use of their property.

OAR 660-008-0000 is a statement of purpose for the Commission's rules interpreting Statewide Land Use Planning Goal 10. It does not restrict the claimants' use of their property.

OAR 660-011-0000 is a statement of purpose for the Commission's rules interpreting Statewide Land Use Planning Goal 11. It does not restrict the claimants' use of their property.

OAR 660-012-0000 is a statement of purpose for the Commission's rules interpreting Statewide Land Use Planning Goal 12. It does not restrict the claimants' use of their property.

OAR 660-015-0000(1), (2), (4)-(7), and (10)-(14) (the enumerated Statewide Land Use Planning Goals) may apply to the partitioning of the property into eight legal parcels and the development of a single family home on each parcel, as described in more detail below.

OAR 660-015-0005, the Willamette Greenway Goal, does not apply to the property.

ORS 92.012 requires partitions to be done in accordance with ORS 92.010 to 92.190. ORS 92.016(2) prohibits the sale of a parcel prior to approval of a tentative plan for the partition. ORS 92.025 prohibits the sale of a parcel until the final plat of the partition has been recorded. ORS 92.040 to 92.046 authorize cities and counties to adopt ordinances containing standards for the partitioning of property. ORS 92.050 and 92.100 set technical requirements for partition plats. All of these statutes may restrict the division of the claimants' property into legal parcels.

ORS 215.283 governs uses allowed on lands zoned for exclusive farm use and, as a result, does not apply to the claimants' property. ORS 215.284 governs the establishment of a non-farm dwelling in areas zoned for exclusive farm use, and as a result does not apply to the claimants' property. ORS 215.700 is a statement of legislative purpose regarding 1993 Oregon Laws chapter 792, which does not restrict the use of claimants' property. ORS 215.705, 215.720, 215.730, 215.740, 215.750, 215.755 and 215.78 may apply to the partitioning of claimants' property and the establishment of a single family home on each of the legal parcels that claimants desire to create, as described in more detail below.

The subject property is forest land, and has been designated as CFU-2 under Multnomah County's comprehensive plan and zoning and pursuant to Goal 4 (Forest Lands). Lands that meet the definition of forest lands are subject to the requirements of Statewide Planning Goal 4, its implementing regulations, and certain provisions of ORS 215.

Statewide Planning Goal 4 and certain statutes (including ORS 215.755 and 215.780) apply to lands that are designated as forest lands under Goal 4. These land use regulations governing the use of forest lands establish a minimum parcel size of 80 acres and limit the parcel to one dwelling. Goal 4 and these land use regulations generally make no provision for further divisions of forest lands or for the placement of additional dwellings on a parcel.

ORS 92.012, 92.016 and 92.025 generally prohibit the sale of property unless it is a lawfully-created lot or parcel. ORS 92.042 provides that cities have jurisdiction over the subdivision and partition of property within 6 miles of a city's boundary under certain circumstances. The City of Portland boundary is currently within one-quarter mile of the subject property. The other listed provisions of ORS 92 generally establish requirements for local governments, or for the form of recordation of plats, and do not restrict an owner's use of real property.

Statewide Planning Goal 4, and ORS 215.705-755 and 215.780 restrict either the partitioning of the subject property or the development of parcels for single-family residential use. Based on the record before the department, none of the other Statewide Planning Goals listed by the claimants appear to apply to the division of the property into legal parcels, or to the development of a single family home on each parcel, with the possible exception of Goal 14 depending on the parcel sizes that Ms. English desires to divide the property into. All of these land use regulations were enacted subsequent to Ms. English's acquisition of an interest in the property in 1953, but prior to the date that Christie Verhoef and Douglas Sellers acquired their interest on October 31, 1999.

Conclusions

Based on the record before it, the department concludes that it is more likely than not that ORS 92.012, 92.016, 92.025 and 92.042 restrict the use of the claimants' property. In addition, the department concludes that it is more likely than not that the minimum lot sizes and dwelling standards established by Statewide Planning Goals 4 and 14, and ORS 215.705 to 215.755 and 215.780 restrict the uses of the property identified in the claim. With the exception of certain provisions of ORS chapter 92, all of these laws were adopted after Dorothy English acquired the property (but before Christie Verhoef and Douglas Sellers acquired their interest in the property in 1999). The identified land use regulations do not allow the division of the property into parcels less than 80 acres in size or the approval of dwellings on parcels less than 80 acres in size, and therefore restrict the use of the property.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, subsection (1) of Ballot Measure 37 also 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 a reduction in value of \$1,150,000 due to restrictive land use regulations and states that an independent MAI appraisal has been performed for the purposes of determining reduction in value. No documentation of estimated values or reductions is included in the claim. Exhibits supplied by Multnomah County include a “limited and preliminary appraisal” of the fair market value of the subject property (see appraisal from Robert Gill & Associates, prepared November 29, 2004), which concludes that the reduction in fair market value as a result of current land use regulations is \$1,150,000. The department has no evidence that the enforcement of the state land use regulations listed in Section V.(2) of this report has not reduced the fair market value of the subject property. As a result, the department believes that it is more likely than not that the land use regulations listed in Section V.(2) of this report have reduced the fair market value of the property.

Conclusions

Based on the record before the department, the department concludes that it is more likely than not that ORS 92.012, 92.016, 92.025, and 92.042, as well as Statewide Planning Goals 4 and 14 and ORS 215.705 to 215.755 and 215.780 have had the effect of reducing the fair market value of the subject property.

Without a copy of the appraisal based on the value of the subdivision of the property into eight lots, 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 enforced by the Commission or the department.

4. Exemptions under Subsection (3) of Measure 37

Ballot Measure 37 does not apply to certain laws. In addition, under subsection (3) of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The claim lists numerous specific laws as potentially restricting the use of the subject property. This report addresses only those laws that the department is responsible in some manner for enforcing. The department has determined that ORS 92.012, 92.016, 92.025, and 92.042, as well as Statewide Planning Goal 4 and ORS 215.705-755 and 215.780 are land use regulations that restrict the use the claimants state they intend to carry out. These provisions establish requirements for the creation and conveyance of parcels of forest land, and for the development of dwellings on forest lands.

Statewide Planning Goals 4 and 14, and ORS 215.705-755 and 215.780 were enacted after 1953, but before 1999 when Ms. Verhoef and Mr. Sellers acquired their interests in the property.

Those provisions of ORS chapter 92 that existed on November 10, 1953 when Ms. English acquired the property are exempt under subsection (3) of Measure 37. In addition, under subsections (8) and (10) of Measure 37, the department may only authorize Ms. English a use of the property permitted at the time she acquired it. As a result, any use of the property by Ms. English will be subject to the restrictions imposed by provisions of ORS chapter 92 that were in effect on November 10, 1953 regardless of whether those restrictions or provisions are still in effect.

ORS 215.730 includes standards for siting dwellings in forest zones. This provision includes fire protection standards for the dwellings and for surrounding forest lands. Subsection (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...” The department finds that siting standards for dwellings in forest zones in ORS 215.730 and in Goal 4 are exempt under subsection (3) of Measure 37.

Conclusions

Based on the information currently in its record, the department has made a determination that certain of the specified land use regulations do not provide a basis for relief due to the fact that they are exempt under subsection (3) of Measure 37. With regard to Ms. English's use of the property, those current provisions of ORS 92.012, 92.016, 92.025, 92.040, 92.042, 92.044 92.046 that were in effect on November 10, 1953 are exempt, as is ORS 215.730 (along with the dwelling siting standards based on health and safety in Goal 4). With regard to Ms. Verhoef's and Mr. Sellers' use of the property, virtually all of the identified laws were enacted after they acquired their interest in the property and, as a result, only those amendments to the identified laws enacted after 1999 are the basis for a Measure 37 claim by them.

VI. FORM OF RELIEF

Subsection (1) of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or department has enforced an existing 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 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, the department concludes that it is more likely than not that ORS 92.012, 92.016, 92.025 and 92.042 restrict the use of the claimants' property and reduce its fair market value. In addition, the department concludes that it is more likely than not that the minimum lot sizes and dwelling standards established by Statewide Planning Goals 4 and 14, and ORS 215.705 to 215.755 and 215.780 restrict the identified uses of the property and reduce its fair market value to some extent. The claim asserts this amount to be \$1,150,000. However, because the claim does not provide a specific explanation 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 has determined that it is more likely than not that the laws listed above 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 the claimants to use the subject property for a use allowed at the time they acquired the property.

Based on the findings and conclusions set forth in section V. of this report, the department concludes that it is more likely than not than ORS 92.012, 92.016, 92.025 and 92.042 restrict the use of the claimants' property. In addition, the department concludes that it is more likely than not that the minimum lot sizes and dwelling standards established by Statewide Planning Goals 4 and 14, and ORS 215.705 to 215.755 and 215.780 restrict the identified uses of the property by Ms. English and reduce its fair market value. Except for ORS 215.730 and the Goal 4 provisions relating to siting standards for dwellings to protect public health and safety are a valid basis for the claim.

In lieu of payment of compensation, subsections (8) and (10) of Ballot Measure 37 authorize the department to modify, remove or not apply land use regulations in order to allow Ms. English to use the subject property for a use permitted at the time she acquired the property on November 6, 1953.

In lieu of payment of compensation, subsections (8) and (10) of Ballot Measure 37 authorizes the department to modify, remove or not apply land use regulations in order to allow Christie Verhoef and Douglas Sellers to use the subject property for a use permitted at the time they acquired their interest in it. Ms. Verhoef and Mr. Sellers acquired their interest as owners of the property in 1999.

Conclusions

Based on the record currently before the department, the department recommends that the Claim be approved, 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. English's partition of the property into eight legal parcels, and the construction of a single family home on each parcel: ORS 92.012, 92.016, 92.025 and 92.042, the minimum lot sizes and dwelling standards established by Statewide Planning Goals 4 and 14, and ORS 215.705 to 215.755 and 215.780, except ORS 215.730 and those provisions of Goal 4 relating to siting standards for dwellings for the protection of public health and safety, and except for those provisions of the listed statutes in ORS chapter 92 that were in effect when Ms. English acquired the property in 1953.

2. In lieu of compensation under Measure 37, the State of Oregon will not apply those provisions of the following laws to Ms. Verhoef's and Mr. Seller's partition of the property into eight legal parcels, and the construction of a single family home on each parcel: ORS 92.012, 92.016, 92.025 and 92.042, the minimum lot sizes and dwelling standards established by Statewide Planning Goals 4 and 14, and ORS 215.705 to 215.755 and 215.780, except ORS 215.730 and those provisions of Goal 4 relating to siting standards for dwellings for the protection of public health and safety, and except for those provisions of the listed Statewide Planning Goals and statutes that were in effect when Ms. Verhoef and Mr. Sellers acquired their interest in the property in 1999.

3. Ms. English may use the Property based on the order only for a use permitted at the time she acquired her interest in the Property. The use of the Property permitted in 1953 was governed by laws that include, but are not limited to, the provisions of ORS chapter 92 that existed at that time. Ms. Verhoef and Mr. Sellers may use the Property based on the order only for a use permitted at the time they acquired their interest in the Property.

4. 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.

5. Any use of the Property by the Claimants under the terms of the order remains subject to the following laws: (a) those laws not specified in (1) and (2), 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.

6. Without limiting the generality of the foregoing terms and conditions, in order for the Claimants 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 Claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report and recommendation on this claim on May 10, 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. (See the department's claim file.). Comments received have been taken into account by the department in the issuance of this final report.