

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

June 21, 2005

STATE CLAIM NUMBER: M119098

NAME OF CLAIMANTS: Lawrence K. and Helen A. Wallin

MAILING ADDRESS: P.O. Box 2502
Harbor, Oregon 97415

IDENTIFICATION OF PROPERTY: Township 41S, Range 13W, Section 31
Tax Lot 309, Curry County

OTHER INTEREST IN PROPERTY: Robert D. Street (Lien Holder)
P.O. Box 1869
Corvallis, Oregon 97339

DATE RECEIVED BY DAS: December 29, 2004

180-DAY DEADLINE: June 27, 2005

I. CLAIM

Lawrence K. Wallin and Helen A. Wallin, the claimants, seek compensation in the amount of \$1,000,000 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 for residential development. (See attached 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 not valid because neither the Land Conservation and Development Commission (the Commission) nor the department have enforced laws that restrict the claimants' use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants purchased the property in 1979. (See Section VI. of this report for the complete recommendation.)

III. COMMENTS ON THE CLAIM

Comments Received

On February 18, 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, three comments were received in response to the 10-day notice. One commenter was supportive of the Wallins' claim. The other commenters were opposed to further development in the area. (See comment letters in the department's claim file.) The comments received are not specific to the criteria required under Measure 37 for the department's review of this claim. Without funding to pay compensation, comments regarding the possible impact of the proposed or intended development of the claimants' property are not relevant to the evaluation and determination of the claimants' Ballot Measure 37 claim, and cannot be considered by the department.

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

The claim was submitted to DAS on December 29, 2004, for processing under OAR 125, Division 145. 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 to “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

Lawrence K. Wallin and Helen A. Wallin acquired the subject property, Tax Lot 309 (29.27 acres), as part of their purchase of a 40-acre parcel on June 25, 1979. The title report shows that the Wallins are the current owners of the subject property. (See Contract of Sale and title report in the department’s claim file).

Conclusions

The claimants, Lawrence K. Wallin and Helen A. Wallin have been current “owners” of the subject property under Measure 37, Section 11(C) since June 25, 1979.

2. The Laws that are the Basis for the 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 Fact

The claim states that Curry County’s Forest Grazing Zone (FG) “prohibits the break-up of land for multi-housing”, and requests a zone change to the RA – 1 zoning (residential, 1-acre lots) that they contend applied to the property at the time the Wallins acquired it in 1979. The FG zone implements Statewide Planning Goal 4 (Forest Lands) (OAR 660-015-0000(4)), and ORS 215.705 to 215.780 and OAR 660, Division 6. 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. ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Or Laws 1993), and were implemented by OAR 660-006-0026 and 0027 on March 1, 1994. (See citations to rule history under OAR 660-015-0000(4).) ORS 215.730(1)(b) establishes approval standards for dwellings on lands zoned for forest use to protect the public health and safety with regard to fire safety, water supply and development on steep slopes.

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 current state standards for dwellings in forest zones under Statewide Planning Goal 4. The current Curry County FG zone partition and dwelling approval standards are based on the standards contained in Statewide Planning Goal 4 and OAR 660, Division 6.

The claimant purchased the property in 1979 when it was zoned RA-1. The County re-zoned the property to Forest Grazing (FG) in 1980. However, neither the RA-1 zone that applied to the property until 1980, nor the FG zone that applied to the property thereafter, were acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged provisions of Curry County's local comprehensive plan and land use regulations, including the RA-1 zone and the FG zone that applied to the subject property, certain site-specific Goal provisions, including Statewide Planning Goal 4, applied directly to the property when the claimants acquired it in June 1979.¹ The relevant components of the Curry County plan that applied to the subject property, including the FG zoning, were not acknowledged by the Commission until 1984. Until the County's land use regulations were acknowledged by the Commission, the use of the property was subject to both the County's ordinances and the applicable statewide land use planning goals.

In summary, when the Wallins acquired the property in 1979, the opportunity to subdivide the property was limited to land divisions that were consistent with Statewide Planning Goal 4 (Forest Lands) (OAR 660-015-0000(4)). In general, Goal 4 required local land use regulations to "conserve forestlands for forest uses." Specifically, Goal 4 only allowed land divisions that would protect commercial forestlands for commercial forest uses. The Goal 4 standard for dwellings in forest zones was that such dwellings were required to be "necessary and accessory to a forest use."²

Conclusions

The Wallins' claim is based on the assumption that the County's RA -1 zone was the governing land use regulation when they acquired the property in 1979. However, because neither the County's RA-1 zone, nor the current FG zone, had been acknowledged by the Commission at the time the claimant acquired the property, the Goal 4 standards for land division and dwellings also applied to the property. The 1-acre minimum parcel size requirement of the County's unacknowledged RA-1 zone was not the controlling land use regulation.

Based on the Goal 4 standard for land divisions applicable to this property when the Wallins acquired the property in 1979, only those land divisions that "would protect commercial forestlands

¹ . (See *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (1977); *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978); *Jurgenson v. Union County*, 42 Or App 505 (1979); *Alexanderson v. Polk County*, 289 Or 427, rev. denied, 290 Or 137 (1980); and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly applied to such local land use decisions. (See *Byrd v. Stringer*, 295 Or 311 (1983)). However, the applicable statutes continue to apply and insofar as the local implementing provisions are materially the same as the rules, the local provisions must be interpreted consistent with the substance of the rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

² Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for forest lands as well as those that were not necessary and accessory to an enumerated forest use, *Lamb v. Lane County*, 7 Or LUBA 137 (1983). Dwellings in forestlands were required to be "necessary and accessory" to show that such dwellings comply with the Goal 4 requirement that local land use regulations must "conserve forest lands for forest uses *1000 Friends v. LCDC/Curry County*, 301 Or 447 (1986). A dwelling that may "enhance" forest uses is not "necessary and accessory" to a forest use to the extent required by Goal 4, *1000 Friends of Oregon v. LCDC/Lane County*, 305 Or 384 (1988).

for commercial forest uses would be allowed.” The Goal 4 standard for dwellings in forest zones in 1979 was that such dwellings were required to be “necessary and accessory” to a forest use. The claimants have not demonstrated that any land division or residential development would have been approved under the Goal 4 standards in place in 1979.

3. Affect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any law(s) 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

According to the claimant, the County’s FG zone results in a fair market value reduction of \$1,000,000. The claim states that the basis of evaluation for this reduction is “the amount that was paid vs. the amount that surrounding property is selling for.” The claim states that under the RA-1 zone that applied to the property at time of their original purchase in 1979, the Wallins would have been able to create an unspecified number of one-acre lots. The claim states “the sale of just 4 prime one-acre homesites would sell for \$300,000.00 each”. A tax report is included in the claim and shows an assessed real market value (improvements) of \$189,110, for the entire property. Subtracting the combined assessed value of \$189,110 from the total value resulting from four potential lots (\$1,200,000) is approximate to the amount of the claim. The claim also contains a map of the property subdivided into 25 one-acre lots, though no projected value was given for this type of land division or development. (See claim and letter from the claimants in the department’s claim file.)

The claimant has not provided information showing that the identified fair market value reduction of \$1,000,000 would actually result from the application of the RA-1 or FG zoning. As stated above, division of the property at the time the Wallins acquired it in 1979 was subject to Goal 4, and information has not been presented that shows that one-acre lot development, or any other land division or residential development, would have been authorized under the Goal 4 standard that applied at the time of purchase. Therefore, the claimant has not shown that a fair market value reduction results from the application of the current FG Zone or Goal 4 standards that applied to the property in 1979.

Further, since claimants acquired the subject property in 1979, the Urban Growth Boundary (UGB) for the City of Brookings has been expanded to include the subject property. Through the plan amendment process, the property could be developed to urban densities under the Brookings/Curry County joint management agreement that applies to the subject property. (See City of Brookings and Curry County UGB Joint Management Agreement, adopted January 22, 2001.) Now that the property is within the UGB, state land use laws applicable to the property require that it be made available for urban uses, enhancing rather than restricting the potential uses of the property, and hence its value.

Conclusions

The claimant has not provided information to show that state regulations result in a decrease in the fair market value of the subject property. Goal 4 (Forest Lands) standards for land uses, divisions

and dwellings were applicable to the property at the time of purchase. The applicable Goal 4 requirements continued to be the standard by which the County was required to make land use decisions until the Commission adopted the Goal 4 administrative rule in 1982, and subsequently acknowledged the relevant portions of the Curry County Comprehensive Plan in 1984.

In addition, the Harbor Heights area, including the subject property, has been incorporated into the City of Brookings UGB. Development of the area will now be carried out under the provisions set forth in the Joint Management Agreement between the City of Brookings and Curry County. That agreement and provisions of state law provide the property owner with the right to subdivide the property and develop it to urban densities, resulting in a substantial increase in the value of the property since it was acquired in 1979.

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

Goal 4 (Forest Lands) and the statutes that implement the Goal that were in place prior to 1979 when the claimants acquired the property are exempt under Section 3 of Measure 37. Other applicable state regulations cited in the claim do not appear to be exempt under Section 3 of Ballot Measure 37.

While not directly raised by the claimants, the department notes that ORS 215.730 and OAR 660, Division 6, adopted after the claimants acquired the property in 1979 include standards for siting dwellings in forest zones. Those 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...” The department finds that siting standards for dwellings in forest zones in ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, Division 6) are exempt under subsection (3) of Measure 37.

Conclusions

The versions of Goal 4, and implementing statutes in place before June 25, 1979 when the Wallins first acquired the property, are exempt from this claim. Other applicable regulations cited in the claim do not appear either on their face or as applied to the subject property to be exempt under Section 3 of Ballot Measure 37.

The siting requirements of ORS 215.730, Goal 4 and its implementing rules related to dwelling siting standards based on health and safety are exempt and will also continue to apply. There may be other specific laws that continue to apply under one or more of the exemptions in Measure 37, because they were not identified in the claim, or because they are laws that are not covered by Measure 37 to begin with.

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 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 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 conclusions set forth in this report, neither the Commission nor the department have enforced laws that restrict the claimants' use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants acquired the property in 1979. Development of the property when it was acquired by the claimants was subject to the standards of Statewide Planning Goal 4 and was limited to land divisions that protect commercial forestlands and dwellings that were "necessary and accessory to a forest use." Furthermore, since the claimants acquired the property the City of Brookings' UBG has been expanded to include the subject property and the claimants have development rights that did not exist when they acquired the property in 1979.

Conclusions

Based on the record before the department, the claimants, Lawrence and Helen Wallin, have not established that they are entitled to relief under Section 1 of Measure 37. Therefore, this claim is denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on June 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.