

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

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

September 12, 2005

STATE CLAIM NUMBER: M120238

NAMES OF CLAIMANTS: David and Sharon Jenkins

MAILING ADDRESS: 5610 Oregon Road
Parkdale, Oregon 97041

PROPERTY IDENTIFICATION: Township 1N, Range 10E, Section 15,
Tax Lot 1403

Township 1N, Range 10 E, Section 22B
Tax Lot 1112
Hood River County

DATE RECEIVED BY DAS: March 21, 2005

180-DAY DEADLINE: September 17, 2005

I. SUMMARY OF CLAIM

The claimants, David and Sharon Jenkins, seek compensation in the amount of \$350,000 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 two properties totaling 8.7 acres (in two lots) into 1/2-acre lots.¹ The properties are located near Parkdale, in Hood River 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 David and Sharon Jenkins' division of tax lots 1403 into 1/2-acre lots: Statewide Planning Goal 14 (Urbanization), and OAR 660-004-0040. These laws will not apply to the

¹ The claim initially included a third property: Township 1N, Range 10E, Section 15, tax lot 1401. The claim for that property was withdrawn by the claimants in a letter dated August 8, 2005.

claimants' use of tax lot 1403 only to the extent necessary to allow them a use of the property permitted at the time they acquired it in 1974.

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 David Jenkins' division of tax lot 1112 into 1/2-acre lots: OAR 660-004-0040. This law will not apply to the claimant's use of tax lot 1112 only to the extent necessary to him a use of the property permitted at the time he acquired it in 1977. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

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

The comments do not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law. (See comment letters in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

Ballot Measure 37, Section 5, requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of the Measure (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of the Measure (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on March 21, 2005, for processing under OAR 125, division 145. The claim indirectly identifies Goal 14 and OAR 660-04-000(4), 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 claimants, David and Sharon Jenkins, acquired tax lot 1403 on November 26, 1974, as reflected by a Warranty Deed included with the claim. David Jenkins acquired tax lot 1112 on January 26, 1977 as reflected by a Real Property Contract and Warranty Deed. A copy of a Title Report dated March 4, 2005, indicates that David and Sharon Jenkins are the current owners of tax lot 1403, and that David Jenkins is the current owner of tax lot 1112.

Family ownership of tax lot 1403 through David Jenkins’ parents is reported to begin in 1944, although no evidence for this has been submitted with the claim.

Conclusions

The claimants, David and Sharon Jenkins are “owners” of tax lot 1403, and David Jenkins is an “owner” of tax lot 1112, as that term is defined by Section 11(C) of Ballot Measure 37, as of November 26, 1974 and January 26, 1977, respectively.

Family ownership for these properties is reported to have begun in 1944.²

² No evidence has been provided to substantiate the family ownership date. Without documentation of an earlier family acquisition date, the department must assess the claim based on the dates the claimants acquired the properties.

2. The Laws that are the Basis for this Claim

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a law must restrict the claimant's use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

Findings of Fact

Mr. and Ms. Jenkins' claim to Hood River County states that claimants want to waive rules to "Allow me to divide the land into 1/2-acre parcels for sale purposes." Additional information submitted by the claimants indicates that "Ordinance 106" has restricted the property so that it cannot be subdivided into 1/2-acre lots.

The properties are currently zoned with a rural residential (RR 2.5) designation under the Hood River County Comprehensive Plan. The RR 2.5 zone requires a minimum of 2.5-acres for the creation of new lots or parcels. The subject properties are 4.01-acres and 2.92-acres respectively, and cannot be divided under the current RR-2.5 zone. The RR 2.5 zone is in accord with Statewide Planning Goal 14 (Urbanization), which became effective January 25, 1975, and generally required that land outside of urban growth boundaries be used for rural uses.

As a result of a 1986 Supreme Court decision³, in 2000, the Commission amended Statewide Planning Goal 14 (Urbanization) and adopted OAR 660-004-0040, which became effective on October 4, 2000. The rule provides that after October 4, 2000, a County minimum lot size requirement in rural residential zone may not allow a smaller minimum lot size without taking an exception to Goal 14 (OAR 660-004-0040(6)). This rule prevents the subject property from being divided without an exception to Goal 14.

According to the claim when the David and Sharon Jenkins acquired the property in 1974, and when David Jenkins acquired the property in 1977, respectively, the properties were zoned Farm Zone (A-2). An A-2 zone had a 10,000 square foot minimum lot size requirement for the creation of new lots or parcels without sanitary sewer. A single family dwelling was permitted outright. Although the zone was titled "Farm Zone", there is no evidence that this was an agricultural zone subject to ORS 215. The property was rezoned to RR 2.5 in 1980.

The claimants first acquired the tax lot 1403 property on November 26, 1974. The Jenkins acquired the property after the adoption of SB 100 (Chapter 80, Oregon Laws 1973, effective October 5, 1973), but before the adoption of the Statewide Planning Goals effective January 25, 1975. As such, ORS 197.175(1) and 197.280 (1973 edition) required, in addition to any local plan or zoning provisions, the application of interim land use goals set forth in ORS 215.515 (1973 edition) to the preparation, revision, adoption or implementation of any comprehensive plan prior to the effective date of the Statewide Planning Goals (see *Petersen v. Klamath Falls*, 279 Or 249 (1977)).

³ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or App 447 (1986).

No information has been provided showing that the 1/2-acre development requested by the claimants complies with the Interim Planning Goals set forth in ORS 215.515 (1973 edition) in effect at the time the claimants acquired the property in 1974. Those goals include the following: “...(e) to provide for an orderly and efficient transition from rural to urban land use, ... (h) to develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development, and ... (j) to ensure that the development of properties...is commensurate with the character and physical limitations of the land.” The department notes that the language of interim goal (e) is the same as the text of Goal 14. As a result, the Jenkins’ use of tax lot 1403 in 1974 was effectively subject to a showing of compliance with Goal 14. As noted below, it is unlikely that allowing a lot size as small as 1/2-acre on rural land is consistent with these goals.

David Jenkins acquired tax lot 1112 on January 26, 1977, when it was zoned Farm Zone (A-2), a rural residential zone adopted by Hood River County. However, the County’s A-2 zone that applied to the property at that time was not 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. The Commission acknowledged the Hood River County Comprehensive Plan and land use regulations as complying with the Statewide Planning Goals on December 14, 1984. Since the Commission had not acknowledged Hood River County’s comprehensive plan and land use regulations, including the A-2 zone, when the David Jenkins acquired the property on January 26, 1977, Statewide Planning Goal 14 applied directly to the use of property on the date of acquisition.⁴

In 2001, the Commission adopted OAR 660-004-0040, which prohibits counties (including Hood River County) from doing either of the following on rural residential areas outside of an urban growth boundary: (a) allowing the creation of any new lots or parcels smaller than two acres; or (b) reducing the County’s minimum lots size. Prior to the adoption of this rule, it is possible that the County may have been able to allow a lot size smaller than 2 ½ acres on the two subject properties in a manner that was consistent with Goal 14. Whether a reduced lot size would be consistent with Goal 14 will depend on the specific size and number of lots, as well as other factors such as the distance from the nearest urban growth boundary.

Conclusions

Goal 14 and OAR 660-004-0040, adopted since the David and Sharon Jenkins acquired tax lot 1403 in 1974, may restrict the use of tax lot 1403 relative to uses allowed when they acquired the property in 1974. OAR 660-004-0040, adopted since David Jenkins acquired tax lot 1112 in 1977, also may restrict the use of that property.

⁴ Statewide Planning Goal 14: Urbanization, was effective January 25, 1975 and required that local comprehensive plans identify and separate urbanizable land from rural land, in order to provide for an orderly and efficient transition from rural to urban land use. It is likely that the division of property into ½-acre lots would be considered an urban use and would therefore be prohibited by Goal 14. See, e.g. *Doob v. Josephine County*, 32 Or LUBA 364 (1997).

Although Goal 14 appears to be the same as interim goals that were in effect in 1974, OAR 660-004-0040 prevents Hood River County from allowing a smaller lot size for the two properties. Whether a smaller lot size would have been allowed under the interim statewide goals (for tax lot 1403) or under Goal 14 (for tax lot 1112) is not clear, but it is at least possible. As a result, Goal 14 and OAR 660-004-0040 restrict the use of tax lot 1403, and OAR 660-004-0040 restricts the use of tax lot 1112.

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 claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and that may continue to apply to the claimants' 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 claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any land use regulation described in Section V. (2) of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes an informal estimate of \$350,000 as the properties' estimated reduction fair market value. This estimate is based on the claimants' compilation of the market value of comparable 1/2-acre lots in the area, less the cost of development.

Conclusions

As explained in Section V. (1) of this report, the current owners are David and Sharon Jenkins who acquired the properties on November 26, 1974, and January 26, 1977 (David only). Under Ballot Measure 37, David and Sharon Jenkins are 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), land use regulations adopted since the properties were acquired restrict the claimants' ability to subdivide the properties.

Without an appraisal based on the value of 1/2-acre lots or other substantiating documentation, and without knowing the extent of development that would have been permitted with the claimants acquired the property, 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 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 amendments to Statewide Planning Goal 14 and OAR 660-004-0040, which set forth the requirements to create new lots or parcels in rural residential areas. Goal 14 was enacted in 1975, before David Jenkins acquired tax lot 1112 in 1977. OAR 660-004-0040 was enacted after the claimants acquired the properties in 1977, and restricts the use of the property in a manner that likely reduces its fair market value. No other laws identified in the claim are exempt, either on their face, or as applied to the subject property, under subsection 3(E) of Ballot Measure 37.

Conclusions

Goal 14 was enacted before David Jenkins acquired tax lot 1112, and is, as a result, exempt under subsection 3(E) of the Measure. Prior to 2000, Goal 14 was held to prohibit residential development outside UGBs at densities of one-to-five-acres per lot or parcel (*see DLCD v. Klamath County*, 38 Or LUBA 769 (2000)). Amendments to Goal 14 in 2000 authorized the Commission to adopt rules allowing single-family residential development on rural lands under specified circumstances (i.e., OAR 660-004-0040). Because the claimants' use of the subject properties will continue to be subject to the interim goals (tax lot 1403) and Goal 14 (tax lot 1112), it is unlikely that approval of this Measure 37 claim will permit him to use the properties at the density he desires (1/2-acre lots).

OAR 660-004-0040, adopted in 2000, is not exempt under subsection 3(E) of Ballot Measure 37. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure, or because they are laws that are not covered by the Measure to begin with.

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 claimants have identified. Similarly, this report only addresses the exemptions provided for under Section (3)(E) of Measure 37 that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the property.

VI. FORM OF RELIEF

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report laws enforced by the Commission or the department restrict the division of the subject properties into parcels or lots. The claimants state that they cannot create the desired 1/2-acre lots out of the subject properties under current law. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$350,000. The claimants have provided a list of comparable properties for the purpose of estimating loss in real market value. However, because the claim does not provide an appraisal, and because it is not clear what level of development would have been allowed when the claimants acquired the property, 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 properties to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Ballot Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow David and Sharon Jenkins to use tax lot 1403 for a use permitted at the time they acquired it in 1974 and to allow David Jenkins a use of tax lot 1112 permitted at the time he acquired in 1977. The department acknowledges that the relief recommended in this report likely will not allow the claimants to divide the subject properties into 1/2-acres parcels.

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 David and Sharon Jenkins' division of tax lot 1403 and the construction of a dwelling on each lot: applicable provisions of Statewide Planning Goal 14 and OAR 660-004-0040, to the extent necessary to allow the claimants a use permitted at the time they acquired the property. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to David Jenkins' division of tax lot 1112 and the construction of a dwelling on each lot: applicable provisions of OAR 660-004-0040, to the extent necessary to allow him a use permitted at the time he acquired the property.

2. The action by the State of Oregon will provide the state's authorization to the claimants to use their properties subject to the standards in effect on the dates they were acquired. On November 26, 1974, tax lot 1403 was subject to the applicable provisions of Statewide Interim Goals set forth in ORS 215.515 (1973 edition), and the Hood River County A-2 zoning in effect at that time; on January 26, 1977 tax lot 1112 was subject to the applicable provisions of Statewide Planning Goal 14 and the County's A-2 zoning in effect at that time. It is likely that both the interim goals and Goal 14 did not allow lot sizes as small as 1/2-acre.
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 claimants first obtain 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 claimants 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 claimants to use the property, it may be necessary for them 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 claimants 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 on this claim on August 23, 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.