

**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: M120241

NAMES OF CLAIMANTS: Scott T. Wadsworth¹ and
Anna M. Wadsworth²

MAILING ADDRESS: Post Office Box 1136
Aumsville, Oregon 97325

PROPERTY IDENTIFICATION: Township 8S, Range 1W, Section 30D
Tax Lots 600, 1200 and 1700³
Marion County

OTHER CONTACT INFORMATION: Edward P. Fitch, Attorney at law
Bryant Emerson & Fitch
888 W. Evergreen Avenue
Post Office Box 457
Redmond, Oregon 97756-0103

OTHER INTERESTS IN PROPERTY:

1. Portland General Electric Company (electrical and phone line easement);
2. Pacific Power and Light Company (utilities and right-of-way easements);
3. Northwest Natural Gas Company (pipeline easement);
4. 15-foot driveway easement;
5. Non-exclusive 30-foot wide right-of-way easement along the westerly right-of-way line of County Road 871 (Albus Road SE);

¹ Also known as Scott Tom Wadsworth.

² Also known as Annie Wadsworth and Anna Mary Wadsworth.

³ On March 28, 2005, Edward Fitch (the attorney for the claimants) wrote a letter to the Department of Administrative Services requesting to amend the claim to add tax lot 1200 of T8S, R1W, Section 30D. The letter also enclosed a preliminary title report for tax lot 1200. The state is not normally allowing claimants to amend their claims to add persons or property. However, in this case, the information was received in time so that notice required by DAS rule was not affected. As a result, the state is processing the claim for all three tax lots, although the department notes that the 180-day period under Measure 37 will not run for tax lot 1200 until seven days after the date for the other two tax lots.

6. Scott and Annie Wadsworth (access easement);
7. Oregon Department of Transportation (deed with limit on access to State Highway 22).

DATE RECEIVED BY DAS: March 21, 2005

180-DAY DEADLINE: September 17, 2005

I. SUMMARY OF CLAIM

The claimants, Scott T. Wadsworth and Anna M. Wadsworth, seek compensation in the amount of \$5,000,000 for 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 divide their 34 acres into approximately 6,000-square-foot lots (0.14 of an-acre) or parcels for residential use. The property includes three contiguous tax lots and is located in the 7500 block of Bishop Road SE, south of State Highway 22, in Marion County. (See the 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 this claim is valid as to tax lot 1200 and is not valid as to tax lots 1700 and 600. 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. and Ms. Wadsworths' division of tax lot 1200 for residential development: Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215, and OAR 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow Mr. and Ms. Wadsworth a use of tax lot 1200 allowed at the time they acquired it in 1974. The claim is not valid as to tax lots 1700 and 600 because neither the Commission nor the department has enforced laws that restrict the ability of the claimants to use the property relative to the uses allowed in 1992, and 1999 when the claimants acquired tax lot 1700 and 600, respectively. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On April 21, 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, three 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 criterion 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 criterion, 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 Statewide Planning Goals 3 and 14 and provisions of ORS 215 and OAR 660, division 33, 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

Tax Lot 600

The claimants, Scott Wadsworth and Anna Wadsworth, first acquired tax lot 600 (approximately 23-acres) by land sale contract on January 1, 1972. A lender foreclosed on this property in 1997 and the property was sold to another party. On March 8, 1999 the claimants purchased the property again.⁴ The claimants have submitted a preliminary title report, showing that they are current owners of tax lot 600, and the evidence in the department's file shows that the claimants acquired their interest in the property on March 8, 1999.

Tax Lot 1200

The claimants submitted a preliminary title report showing that they are current owners of tax lot 1200. Evidence in the department's file shows that the claimants acquired tax lot 1200 (approximately ten-acres) by land sale contract on June 25, 1974.

Tax Lot 1700

The claimants submitted a preliminary title report showing that they are current owners of tax lot 1700. The claimants' lawyer states that Mr. and Ms. Wadsworth acquired tax lot 1700 (approximately one-acre) by land sale contract in the late 1960s⁵. However, this transaction is not otherwise substantiated in the record, and department staff agrees with Marion County Planning staff's determination that the claimants appear to have lost any interest in tax lot 1700 sometime between 1971 and 1992, and then reacquired tax lot 1700 on May 12, 1992.⁶

According to Marion County Assessor records and Marion County Planning staff, Scott T. Wadsworth and Anna M. Wadsworth are the current owners of all three of the tax lots that are the subject of this claim. (See the department's claim file.)

Conclusions

The claimants, Scott Wadsworth and Anna Wadsworth, are "owners" of the three tax lots, as the term owner is defined by Section 11(C) of Ballot Measure 37. They became an owner of tax lot 600 on March 8, 1999. They became an owner of tax lot 1200 on June 25, 1974. They became an owner of tax lot 1700 on May 12, 1992.

⁴ According to a May 25, 2005, letter from Edward P. Fitch, Attorney at law to Marion County Planning staff (see copy in the department claim file). Marion County Planning staff substantiated the 1999 acquisition date in its April 21, 2005 memorandum to the Marion County Hearings Officer (see copy in department claim file).

⁵ See May 25, 2005, letter in the department claim file from Edward P. Fitch, Attorney at law to Marion County Planning staff.

⁶ There are a number of different Deeds for this property to and from the claimants between 1971 and 1992. The August 8, 2005 response by claimants' lawyers to department staff requests for information did not establish a different acquisition date for tax lot 1700.

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

The claim states that the state laws that restrict the claimants' use of the property are: "All Statewide and County regulations and ordinances restricting the ability of claimants to subdivide and develop property." The claimants have included a copy of their Measure 37 claim filed with Marion County, which indicates that the use of the property that they believe is restricted is to "subdivide and develop the property into lots of approximately 6,000 square feet in size."

The state claim appears to be based on the applicable provisions of state law that require Marion County's current Special Agriculture (SA) zoning and that prohibit the division and development of land zoned for exclusive farm use. The claimants' property is zoned Exclusive Farm Use (EFU) as required by Statewide Planning Goal 3 in accordance with OAR 660, division 33, and ORS 215 because the claimants' property is "Agricultural Land" as defined by Goal 3.⁷ Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660 division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels smaller than 80-acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2003 edition) established standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f).

⁷ The claimants' property is "Agricultural Land" because it consists of Class II, III and IV soils. See Soil Survey of Marion County Area, Oregon; USDA Soil Conservation Service, September 1972, sheet #54 and pp. 86, 88-89, 98, 103-104. Marion County has determined that the subject property is "high-value farmland" (see copy of April 21, 2005 memorandum from Marion County Planning to Marion County Hearings Officer in the department's claim file).

OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. Subsequent amendments to comply with HB 3326 (Chapter 704, Oregon Laws 2001, effective January 1, 2002) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

The claimants acquired tax lot 1200 on June 25, 1974, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973, effective October 5, 1973) but prior to adoption of the Statewide Planning Goals effective January 25, 1975. On June 25, 1974, tax lot 1200 was zoned Residential Agriculture (RA) by Marion County. It appears that this zone was not a qualified farm zone under ORS chapter 215 (1973 edition). As a result, the provisions of ORS chapter 215 that were in effect in 1974 did not apply to the use of the property at that time.

However, in 1974, ORS 197.175(1) and 197.280 (1973 edition) required, in addition to any local plan or zoning provisions, the application of the 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)). The goals included: “to conserve prime farm lands for the production of crops,” and “to provide for an orderly and efficient transition from rural to urban land use.” ORS 215.515 (1973 edition). No information has been provided showing that the 6,000-square-foot lot subdivision described by claimants as the use that state law restricts would have been permitted under the Interim Planning Goals in ORS 215.215 (1973 edition) in effect at the time that the claimants first acquired tax lot 1200 in 1974.

The claimants acquired tax lot 1700 on May 12, 1992. At that time, tax lot 1700 had the current Marion County zoning, Special Agriculture (SA). Establishment of farm or non-farm dwellings would have been governed by the SA zone and statutory provisions then in effect. Statutory provisions in effect at that time included the then applicable portions of ORS 215 (1989 edition) and Planning Goals 3 and 14 then in effect. In 1992, neither the Marion County zone, state statutes, nor Statewide Planning Goals allowed the division of the subject property into 6,000-square-foot lots or the development of dwellings on such lots.

The claimants acquired tax lot 600 on March 5, 1999. At that time, Marion County’s SA zone applied to tax lot 600 as did the current standards in ORS 215 and OAR 660, division 33, and Statewide Planning Goals 3 and 14 related to dividing property and establishing dwellings. Again, neither the Marion County zone nor the state land use regulations in 1999 allowed the division of the subject property into 6,000-square-foot lots or the development of dwellings on such lots.

Statewide Planning Goal 14 (Urbanization) became effective on January 25, 1975, and required that land outside of the Urban Growth Boundary (UGB) be used for rural uses. Prior to 2000, Goal 14 as implemented by the Commission generally prohibited new residential development on lots and parcels smaller than two acres in size outside the UGB.

Conclusions

Tax Lot 1200

Lot size and dwelling standards established by Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization) and provisions in ORS 215 and OAR 660, division 33, adopted after Scott T. and Anna M. Wadsworth acquired tax lot 1200 in 1974, do not allow the division of tax lot 1200 into 6,000-square-foot lots or parcels for residential development, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimants in 1974. In 1974, tax lot 1200 was subject to the Interim Statewide Planning Goals in ORS 215.215 (1973 edition), which may have prohibited the use the claimants describe in their claim. It is unclear whether the claimants' requested level of development complies with the standards in effect when Mr. and Ms. Wadsworth acquired their interest in tax lot 1200 on June 25, 1974. In contrast, under current law it is certain that the use described in the claim would not be allowed. As a result, the department concludes that current law restricts the use described in the claim.

Tax Lots 1700 and 600

Lot size and dwelling standards established by Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), and applicable provisions in ORS 215 and OAR 660, division 33, do not allow the division of the subject property into 6,000-square-foot lots or parcels for residential development. State standards restricting division of tax lots 1700 and 600 into lots of 6,000 square feet and restricting establishment of dwellings were adopted before Mr. and Ms. Wadsworth acquired tax lot 1700 in 1992, and tax lot 600 in 1999. Therefore, state laws do not restrict the use of the property relative to the uses allowed when Mr. and Ms. Wadsworth acquired tax lot 1700 in 1992, and tax lot 600 in 1999.

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 estimate of \$150,000 as the property's current fair market value with regulations⁸, and \$6,000,000 as the property's current fair market value in the absence of current regulations. The claimants take the difference between these two amounts, and subtract another \$850,000 for estimated development costs, to arrive at an estimated reduction in fair market value due to current regulations of \$5,000,000. The claim does not include an appraisal or other explanation to substantiate these amounts.

Conclusions

As explained in Section V. (1) of this report, the current owners are Scott T. and Anna M. Wadsworth, who acquired tax lot 1200 on June 25, 1974, tax lot 1700 on May 12, 1992, and tax lot 600 on March 5, 1999. As explained in Section V. (2) of this report, the applicable state laws were enacted after acquisition of tax lot 1200 and restrict the use of the property relative to the uses allowed when Mr. and Ms. Wadsworth acquired it in 1974. Applicable state laws related to dividing the subject property into 6,000-square-foot lots and establishment of dwellings were enacted before acquisition of tax lots 600 and 1700, and current laws do not restrict the use of these tax lots relative to the uses allowed when Mr. and Ms. Wadsworth acquired them in 1992 and 1999. As a result, the department concludes that there has been no reduction in the fair market value of tax lots 600 and 1700, and that there has been a reduction in the fair market value of tax lot 1200.

Under Ballot Measure 37, Scott T. and Anna M. Wadsworth are due compensation for land use regulations that restrict the use of the tax lot 1200 in a manner that reduces its fair market value. Without an appraisal based on the value of 6,000-square-foot lots or other explanation, 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 tax lot 1200 as a result of land use regulations enacted or 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.

⁸ Marion County Assessor records show an estimated real market value for the subject property as \$348,530: \$150,160 for tax lot 600, \$62,370 for tax lot 1200, and \$136,000 for tax lot 1700. (See department claim file).

Findings of Fact

The claim includes a general reference to any state land use regulations that restrict division and development of the property relative to what would have been allowed when Mr. and Ms. Wadsworth acquired the property. These provisions include Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), and applicable provisions of ORS 215 and OAR 660, division 33, which Marion County had implemented through its SA zone. These provisions were enacted after the claimants acquired tax lot 1200, but before they acquired tax lots 600 and 1700.

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimants' use of the property, and these laws are exempt as to tax lots 600 and 1700, and are not exempt as to tax lot 1200, under subsection 3(E) of Measure 37.

Other laws in effect when the claimants acquired the property are also exempt under subsection 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. There may be other laws that 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. And, in some cases, some of these laws may be exempt under subsections 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 claimants have 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 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 owners to carry out a use of the property permitted at the time the current owners 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 tax lot 1200 into parcels or lots and the use of the property for residential purposes. The claimants cannot create the desired 6,000-square-foot lots out of tax lot 1200, or develop those lots for residential use because laws enacted after the claimants acquired tax lot 1200 prohibit lot sizes that small. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$5,000,000. However, because the claim does not provide an appraisal or other 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 acknowledges that the laws on which the claim is based likely have reduced the fair market value of tax lot 1200 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 Mr. and Ms. Wadsworth to use tax lot 1200 for a use permitted at the time they acquired tax lot 1200 in 1974.

Based on the claimants' request to divide the subject property into 6,000-square-foot lots and to establish dwellings on each lot, current state standards restricting the division of the subject property and establishment of dwellings do not restrict the claimants' use of tax lots 600 and 1700 in a manner that reduces the fair market value that the property relative to how tax lot 1700 could have been used in 1992 and tax lot 600 could have been used in 1999. Tax lot 1700 is one acre, and could not have been divided under the laws in place in 1992. The laws related to division of Agricultural Land and establishment of dwellings have not been amended to allow additional divisions or uses since the claimants acquired tax lot 600 in 1999.

Conclusion

Based on the record, the department recommends that the claim be approved as to tax lot 1200 and not approved as to tax lots 1700 and 600, 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. and Ms. Wadsworth's requested division of tax lot 1200 into lots or parcels as small as 6,000 square feet and the development of a dwelling on each lot or parcel: applicable provisions of Statewide Planning Goals 3 and 14, ORS chapter 215, and OAR 660, division 33, enacted after June 25, 1974. These land use regulations will not apply to Mr. and Ms. Wadsworth's use of tax lot 1200 only to the extent necessary to allow the claimants a use permitted at the time they acquired tax lot 1200 on June 25, 1974.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property subject to the standards in effect on June 25, 1974 and any other laws that continue to apply to the property. On June 25, 1974, tax lot 1200 was subject to applicable provisions of ORS 215.215 (1973 edition) and the Interim Planning Goals.

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 Marion County or other jurisdiction 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 25, 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.