

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES, THE DEPARTMENT
OF LAND CONSERVATION AND DEVELOPMENT OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM)
FOR COMPENSATION UNDER)
BALLOT MEASURE 37 (CHAPTER 1,)
OREGON LAWS 2005) OF)
Jean M. Jesse, CLAIMANT)

FINAL ORDER
CLAIM NO. M 120573

Claimant: Jean M. Jesse (the Claimant)

Property: Tax Lot 803, T.1S, R.2W, Section 35, W.M., Washington County

Claim: The demand for compensation and any supporting information received from the Claimant by the State of Oregon (the Claim).

Claimant submitted the Claim to the State of Oregon under Ballot Measure 37 (2004) (Oregon Laws 2005, Chapter 1) (hereafter, Measure 37). Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Jean M. Jesse's building of a single family dwelling on the 14.71-acre property: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33¹. These land use regulations will not apply to Jean M. Jesse's use of her property only to the extent necessary to allow her a use permitted at the time she acquired the property on December 12, 1968.

2. The action by the State of Oregon provides the state's authorization to Jean M. Jesse to use her property subject to the standards in effect on December 12, 1968.

¹ In the draft staff report sent out for review on September 16, 2005 it stated "The claimant desires compensation or the right to divide her 14.71-acre property into three, approximately five-acre parcels and to develop each parcel for residential use." The final report is revised to reflect comments from the claimant's agent. The agent said the claimant is only requesting compensation or waiver to build a single family dwelling on the 14.7 acre property.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under Section (3) of the Measure.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for her to obtain a decision under Measure 37, from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under Measure 37, from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under Measure 37, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under Measure 37, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:

Lane Shetterly, Director



George Naughton, Deputy Director
DLCD

Dated this 3^d day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 3rd day of October, 2005.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to the following judicial remedies:

1. **Judicial review under ORS 293.316:** Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. **Judicial review under ORS 183.484:** Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County and the Circuit Court in the county in which you reside.
3. **A cause of action under Oregon Laws 2005, chapter 1 (Measure 37 (2004)):** A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that “[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost.”

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

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

October 3, 2005

STATE CLAIM NUMBER: M120573

NAME OF CLAIMANT: Jean M. Jesse (Murphy)¹

MAILING ADDRESS: 3893 SW Hillsboro Highway
Hillsboro, Oregon 97123

PROPERTY IDENTIFICATION: Township 1S, Range 2W, Section 7
Tax Lot 803
Washington County

OTHER INTEREST IN THE PROPERTY: Jean M. Jesse Revocable Living Trust

OTHER CONTACT INFORMATION: Dorothy Cofield
4248 Galewood Street, Suite 18
Lake Oswego, Oregon 97035

DATE RECEIVED BY DAS: April 13, 2005

180-DAY DEADLINE: October 10, 2005

I. SUMMARY OF CLAIM

The claimant, Jean M. Jesse (Murphy), seeks compensation in the amount of \$600,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to build a single family dwelling on the 14.71 acre property². The property is located near 4000 SW Hillsboro Highway, in Washington County. (See claim.)

¹ On the claim form submitted to the State of Oregon, the claimant submitted her name as Jean M. Jesse (Murphy). On the copy of the Washington County claim form, the claimant signed her name as Jean M. Jesse-Murphy.

² In the draft staff report sent out for review on September 16, 2005 it stated "The claimant desires compensation or the right to divide her 14.71-acre property into three, approximately five-acre parcels and to develop each parcel for residential use." The final report is revised to reflect comments from the claimant's agent. The agent said the claimant is only requesting compensation or waiver to build a single family dwelling on the 14.7 acre property.

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 Jean M. Jesse's building of a single family dwelling: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow Jean M. Jesse a use of the property permitted at the time she acquired it in 1968. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 5, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments, evidence or information were received in response to the 10-day notice.

IV. TIMELINESS OF CLAIM

Requirement

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

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

Findings of Fact

This claim was submitted to DAS on April 13, 2005, for processing under OAR 125, division 145. The claim identifies applicable 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

The claimant, Jean M. Jesse, acquired the subject property on December 12, 1968, from her brother, James Furby, as reflected by a Warranty Deed included with the claim. The claim includes a Warranty Deed transferring ownership from Jean M. Jesse to the Jean M. Jesse Revocable Trust, a trust established by the claimant, on August 5, 1999. Transfer of the property to a revocable living trust is not a change in ownership for purposes of Measure 37. A copy of a Title Report dated April 12, 2005, and a Washington County real property tax statement for the 2004-2005 tax year indicate that Jean M. Jesse is the current owner of the subject property.³

Jean M. Jesse’s family has owned the property since at least 1963. Jean M. Jesse’s brother (James Furby) acquired the property from their parents on December 7, 1963, as reflected by a Warranty Deed included with the claim. No documentation establishing when the claimant’s parents acquired the property has been submitted.

Conclusions

The claimant, Jean M. Jesse, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of December 12, 1968. The claim establishes that the property has been owned by a “family member” as that term is defined by Section 11(A) of the Measure, since 1963.

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.

³ Also included with the claim, is a Warranty Deed consolidating tax lots 800 and 803 and adjusting a property line on August 5, 2002.

Findings of Fact

The claim states that the claimant cannot build “a single family dwelling on the 14.71 acre property”. Exhibit 9 of the claimant’s narrative lists ORS 215.284 and OAR 660-33-0130 and -0135 as state regulations that restrict the use of her property.

The claim is based on Washington County’s current Exclusive Farm Use (EFU) Zone and the applicable provisions of state law that require such zoning. The claimant’s property is zoned EFU as required by Statewide Planning Goal 3 in accord with OAR 660, division 33 and ORS 215 because the claimant’s property is “Agricultural Land” as defined by Goal 3.⁴ 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 215.213, 215.284, and OAR 660, division 33, as applied by Goal 3, establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

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 215.213.

OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993.

The claimant’s family owned the subject property in 1963. At that time, Statewide Planning Goal 3 and its implementing statutes and rules were not in effect. Provisions of ORS 215 were enacted in 1963 but did not directly limit the use of the subject property.⁵

Conclusions

The zoning requirements and dwelling standards established by Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33 were all enacted after Jean M. Jesse’s family acquired the subject property in 1963, and do not allow residential development of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired. In 1963, the property was subject to the requirements of the County’s F-1 zone, which were adopted pursuant to the provisions of ORS 215 then in effect.

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 use(s) that the claimant has identified. There may be other laws that currently apply to the claimant’s use of the property, and that may continue to apply to the claimant’s use of the property, that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific

⁴ The claimant’s property is “agricultural land” and is composed of high-value farmland” soils. (1982 Washington County Soil Survey.)

⁵ Washington County’s F-1 zoning applied to the subject property in 1963, and was adopted pursuant to ORS 215. The F-1 zone did not have a minimum lot size and allowed dwellings by right.

proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

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

Findings of Fact

The claim includes an estimate of \$600,000, as the reduction in the property’s fair market value as a result of current regulations. This amount is based on the claimant’s estimate of a market value of \$200,000 for buildable approximately five-acre lots, according to a real estate sales agreement included with the claim for an adjacent property owned by the claimant. The claim also includes a Title Report estimating the current real market value of the subject property to be approximately \$13,520. Based on information in the record, it is not clear how the \$600,000 reduction in fair market value was determined.

Conclusions

As explained in Section V.(1) of this report, the current owner is Jean M. Jesse, whose family acquired the property in 1963. Under Ballot Measure 37, Jean M. Jesse is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimant’s family acquired the property restrict residential development of the subject property. The claimant estimates the reduction in value due to the restrictions to be \$600,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

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 includes references to several state land use regulations that restrict the use of the property relative to what would have been allowed in 1963, when the property was acquired by Jean M. Jesse’s family. These provisions include Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33, which Washington County has

implemented through its EFU zone. With the exception of provisions of ORS 215 in effect in 1963, none of these laws appear to be exempt under Section 3(E) of Ballot Measure 37.

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that the general statutory, Goal and rule restrictions on residential development and use of farm land apply to the claimant's use of the property, and for the most part these laws are not exempt under Section 3(E) of Measure 37. Laws in effect when the claimant's family acquired the property in 1963 are exempt under Section 3(E) of the Measure and will continue to apply to the property.

There may be other laws that continue to apply to the claimant's use of the property that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under 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 claimant has identified. Similarly, this report only addresses the exemptions provided for under Section (3) of Measure 37 that are clearly applicable given the information provided to the department in the claim. The claimant should be aware that the less information she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her 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 claimant's ability to build a single family dwelling. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$600,000. However, because the claim does not provide an appraisal or other specific documentation establishing 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 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 certain land use regulations to allow Jean M. Jesse to use the subject property for a use permitted at the time she acquired the property on December 12, 1968. On that date, the property was subject to the same provisions of ORS 215 and the County's F-1 zone in effect when her brother acquired the property in 1963.

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 Jean M. Jesse's building of a single family dwelling on the 14.71-acre property: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33⁶. These land use regulations will not apply to Jean M. Jesse's use of her property only to the extent necessary to allow her a use permitted at the time she acquired the property on December 12, 1968.
2. The action by the State of Oregon provides the state's authorization to Jean M. Jesse to use her property subject to the standards in effect on December 12, 1968.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.
4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under Section (3) of the Measure.
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for her 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

⁶ In the draft staff report sent out for review on September 16, 2005 it stated "The claimant desires compensation or the right to divide her 14.71-acre property into three, approximately five-acre parcels and to develop each parcel for residential use." The final report is revised to reflect comments from the claimant's agent. The agent said the claimant is only requesting compensation or waiver to build a single family dwelling on the 14.7 acre property.

under Measure 37, from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 16, 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.