

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 )  
Laurence and Linda Waldow, CLAIMANTS )

FINAL ORDER  
CLAIM NO. M 118319

Claimants: Laurence and Linda Waldow

Property: Tax Lot 4800, T.2S, R.2E, Section 34, W.M., Clackamas County

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

Claimants 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 Laurence and Linda Waldows' division and development of the property: the applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6, enacted after August 30, 1974.
2. The action by the State of Oregon provides the state's authorization to Laurence and Linda Waldow to use the property subject to the standards in effect on August 30, 1974. On that date, the property was subject to the interim planning goals set forth in ORS 215.515 (1973 edition) and provisions of Clackamas County's RA-1 zone.
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, this order does not authorize the use of the Property unless the Claimant first obtains that permit, license, or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a

permit as defined in ORS 215.412 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the Property imposed by private parties.

4. Any use of the Property by the Claimants under the terms of this order remains 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 DLCD; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under section (3) of Measure 37.

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

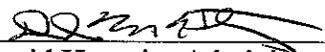
FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:

Lane Shetterly, Director

  
\_\_\_\_\_  
George Naughton, Deputy Director  
DLCD

Dated this 6<sup>th</sup> day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
\_\_\_\_\_  
David Hartwig, Administrator  
DAS, State Services Division

Dated this 6<sup>th</sup> 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 6, 2005

**STATE CLAIM NUMBER:** M118319

**NAMES OF CLAIMANTS:** Laurence and Linda Waldow

**MAILING ADDRESS:** 18052 S. Waldow Road  
Oregon City, OR 97045

**PROPERTY IDENTIFICATION:** Township 2S, Range 2E, Section 34,  
Tax lot 4800  
Clackamas County

**DATE RECEIVED BY DAS:** April 15, 2005

**180-DAY DEADLINE:** October 12, 2005

**I. SUMMARY OF CLAIM**

The claimants, Laurence and Linda Waldow, seek compensation in the amount of \$1,290,000, 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 27.82-acre property into approximately 1-acre lots and to develop a dwelling on each lot. The property is located at 10852 SE Waldow Road, near Oregon City, in Clackamas 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 Laurence and Linda Waldows' division of the property for residential development: Statewide Planning Goal 4 (Forest Lands) and Goal 14 (Urbanization), ORS 215.705-755 and 215.780, and applicable provisions of OAR 660, division 6. These laws will not apply to the claimants only to the extent necessary to allow the Waldows a use of the property permitted at the time they acquired it on August 30, 1974. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On April 27, 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 April 15, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's Timber District zone as the law that restricts the use of the property and is 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, Laurence and Linda Waldow, acquired the subject property on August 30, 1974, as reflected by a Bargain and Sale Deed included with the claim. A copy of a Title Report dated April 4, 2005, indicates that Laurence and Linda Waldow are the current owners of the subject property.

Family ownership for the subject property began on February 17, 1970, with acquisition by Waldow Farms, a co-partnership comprised of Herman and Pearl Waldow, the parents of claimant Laurence Waldow.

### **Conclusions**

The claimants, Laurence and Linda Waldow, are “owners” of the subject property as that term is defined by Section 11(C) of Ballot Measure 37, as of August 30, 1974. The Waldow Farms Partnership is a “family member” of the claimants as that term is defined in Section 11(A) of the Measure. Family ownership dates from February 12, 1970.

### **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 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 or a family member acquired the property.

### **Findings of Fact**

The claim indicates that “TBR zoning” does not allow the property to be subdivided into approximately 1-acre lots.

Current Clackamas County zoning for subject property is the TBR (Timber District) zone that precludes division of subject property to the extent that the claimants’ desire. The County’s TBR zone was adopted in 1994, to comply with Statewide Planning Goal 4 (Forest Lands) and OAR 660, division 6.

Statewide Planning Goal 4 (Forest Lands) and laws applicable to land zoned for forest use under ORS 215, including ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6 restrict the

division and residential development of the subject property. 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, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993, (Chapter 792, Or Laws 1993) and were adopted into OAR 660-006-0026 and 0027 on March 1, 1994. (See citations to rule history under OAR 660-015-0000(4).)

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 standards for dwellings in forest zones under Statewide Planning Goal 4.

Statewide Planning Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses, and became effective on January 25, 1975.

Clackamas County's RA-1 (Rural Agricultural Single Family Residential District) applied to the property at the time the claimants' family acquired the property in 1970, and allowed approximately 1-acre lots if public water was unavailable. The Statewide Planning Goals and implementing statutes and regulations were not in effect in 1970.

### **Conclusions**

The minimum lot size and dwelling standards established by Statewide Planning Goal 4 and OAR 660-006-0026 and 0027, and by provisions of ORS 215, were all adopted after the claimants' family acquired the property in 1970, and do not allow division of the property into parcels less than 80 acres in size or the approval of dwellings on one-acre parcels.

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 \$1,290,000, as the reduction in the property's fair market value as a result of restricting regulations. This estimate is based on a construction company's estimate of the market value of approximately 1-acre lots in the area, less the value of

the property and the home in its current configuration. The claim also includes an estimate of the current real market value of the subject property with improvements to be approximately \$600,000.

### **Conclusions**

As explained in Section V.(1) of this report, the current owners are Lawrence and Linda Waldow. Family members acquired the property on February 17, 1970. Under Ballot Measure 37, the claimants 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) of this report, laws adopted since 1970 restrict the claimants' ability to divide the property. The claim estimates the loss in property value due to the restrictions to be \$1,290,000.

Without an appraisal or other documentation, 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 Clackamas County's TBR zone and the related provisions of state law that have restricted the use of the subject property and reduced its fair market value, including Statewide Planning Goal 4 (Forest Lands) and relevant provisions of ORS 215, OAR 660, division 6. These laws were adopted after 1970, when the claimants' family acquired the property.

While not directly raised by the claimants, the department notes that ORS 215.730 and OAR 660, division 6 include standards for siting dwellings in forest zones. These 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**

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 for the most part these laws are not exempt under Section 3(E) of Measure 37.

Laws in effect when the claimants' family acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. In addition, the restrictions in ORS 215.730 and provisions of OAR 660, division 6 that establish fire protection standards for dwellings in forest zones are exempt under Section 3(B) of the Measure and will continue to apply to the subject 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 the 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 27.82-acre property into approximately 1-acre parcels, and the development of those parcels for residential purposes. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by \$1,290,000. However, because the claim does not provide an appraisal or other documentation, 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 Laurence and Linda Waldow to use the subject property for a use permitted at the time they acquired the property on August 30, 1974.

When Laurence and Linda Waldow acquired the property on August 30, 1974, the property was zoned RA-1 by Clackamas County. Under the RA-1 zone, single-family dwellings were permitted and there was a 1-acre minimum parcel size for the creation of new lots or parcels. However, the claimants 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)). No information has been provided establishing whether the 1-acre development cited 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 on August 30, 1974.

### **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 Laurence and Linda Waldows' division and development of the property: the applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6, enacted after August 30, 1974.
2. The action by the State of Oregon provides the state's authorization to Laurence and Linda Waldow to use the property subject to the standards in effect on August 30, 1974. On that date, the property was subject to the interim planning goals set forth in ORS 215.515 (1973 edition) and provisions of Clackamas County's RA-1 zone.
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 September 13, 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.