

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

IN THE MATTER OF THE CLAIM) FINAL ORDER
FOR COMPENSATION UNDER) CLAIM NO. M 118329
BALLOT MEASURE 37 (CHAPTER)
1, OREGON LAWS 2005) OF)
Rebecca Badger, CLAIMANT)

Claimant: Rebecca Badger (the Claimant)

Property: Tax Lots 100, 200 and 204, T.17S, R.13E, Section 18, W.M., Deschutes 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 Rebecca Badger's division of the subject property: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33 enacted after August 7, 2000. These land use regulations will not apply to Rebecca Badger's use of her property only to the extent necessary to allow her a use permitted at the time she acquired interest in the property on August 7, 2000.
2. The action by the State of Oregon provides the state's authorization to the claimant to use her property subject to the standards in effect on August 7, 2000. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, Division 33 then in effect. The department acknowledges that the relief to which Rebecca Badger is entitled under Measure 37 will not allow her a use of the subject property set forth in the claim
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.

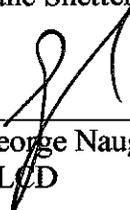
4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to Measure 37 including, 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 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:

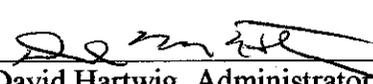
Lane Shetterly, Director



George Naughton, Deputy Director
DLCD

Dated this 7th day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



David Hartwig, Administrator
DAS, State Services Division

Dated this 7th 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 7, 2005

STATE CLAIM NUMBER: M118329

NAME OF CLAIMANT: Rebecca Badger

MAILING ADDRESS: Post Office Box 182
Scio, Oregon 97347

PROPERTY IDENTIFICATION: Township 17S, Range 13E, Section 18
Tax Lots 100, 200 and 204
Deschutes County

OTHER CONTACT INFORMATION: Michael C. Robinson
Perkins Coie
1120 NW Couch Street
Portland, Oregon 97209-4128

OTHER INTEREST IN PROPERTY: Kathryn Megan Lee Trust
David Badger
Post Office Box 182
Scio, Oregon 97347

DATE RECEIVED BY DAS: April 18, 2005

180-DAY DEADLINE: October 16, 2005

I. SUMMARY OF CLAIM

The claimant, Ms. Rebecca Badger, seeks compensation in the amount of \$800,000 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 divide the 60-acre property. The property is located west of the Bend airport on the Powell Butte Highway north of Butler Market Road in Deschutes 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 Rebecca Badger's division of the property: the 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 Rebecca Badger a use of the property permitted at the time she acquired it on August 7, 2000. The department acknowledges that the relief to which the claimant is entitled under Measure 37, will not allow the claimant a use of the subject property set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 6, 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, one written comment was received in response to the 10-day notice.

The comment does 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 letter 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 18, 2005, for processing under OAR 125, division 145. The claim identifies Statewide Planning Goal 3 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

The claimant’s mother, Irene Smead, acquired the subject property (along with an additional 100 acres not included as part of this claim) on July 27, 1971, by a Warranty Deed.

On June 11, 1993, Irene Smead created a revocable living trust. The trust appointed Irene Smead as trustee and the claimant, Rebecca Badger, as successor trustee in the event of the death of Irene Smead or if for any reason she would be unable to serve as trustee. On July 15, 1993, a Quitclaim Deed transferred the property from Irene Smead to the Irene Smead Trust. Thereafter, Irene Smead became incapacitated and a court order appointing the claimant as successor to the Irene Smead Trust was entered on August 7, 2000. The claimant, Rebecca Badger, acquired interest in the subject property on August 7, 2000, when her appointment as successor to the Irene Smead Trust became effective¹.

Conclusions

The claimant, Rebecca Badger, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. Rebecca Badger acquired an interest in the subject property on August 7, 2000. The claimant’s family acquired the subject property on July 27, 1971.

¹ As trustee to the Irene Smead Trust, on December 17, 2004, the claimant transferred an undivided 1/3 interest in the subject property to herself, 1/3 interest to the Trustee of the Kathryn Megan Lee Trust, and the remaining 1/3 interest to her husband, David Badger, and to herself. The Kathryn Megan Lee Trust and David Badger are not claimants for purposes of this Measure 37 claim.

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

After each regulation cited, the claim provides the following statements of how current regulations restrict the use of the property:

Statewide Planning Goal 3: "Limits uses allowed on land zoned for farm use."

ORS 215.213 and OAR 660-033-0120: "Limits uses allowed on EFU land."

ORS 215.780 and OAR 660-033-0100: "Creates 80-acre minimum lot size on EFU land."

The claim is based, generally, on Deschutes 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 3.² 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, do not allow the subject property to be divided into parcels less 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) establishes 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).

² The claimant's property is "agricultural land" because it contains predominately NRCS (Natural Resources Conservation Service) Class VI Soils (non-irrigated) and Class III (irrigated). The property is located on Soils Sheet #86. Soil Map Unit 36A is found on page 63 and Table 5, Land Capability Classes (Soil Survey of Upper Deschutes River Area, Oregon, including part of Deschutes, Jefferson and Klamath Counties, 2002).

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, and 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 claimant's family acquired the subject property on July 27, 1971, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. Depending on the local zoning of the property in 1971, applicable provisions of ORS 215, enacted in 1963, may have applied to the property when the claimant's family acquired it.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33 were all enacted after the claimant's family acquired ownership of the subject property in July of 1971, and do not allow the division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimant's family in 1971.

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. 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 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 \$800,000 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 the fair market value of property being \$1,400,000, if divided, less the value of the property as three 20-acre parcels being \$600,000. The claim includes a letter from a real estate agent, who concurs with the reduction in the fair market value cited by the claimant.³

³ The real estate agent based the value of the property after reviewing the plat map for "The Edge and Airport Commons" prepared by Pinnacle Engineering. However, a copy of this plat map was not included in the claim. For purposes of this claim, the department assumes the plat map cited here to be the subdivision that the claimant has alleged is not allowed under current zoning.

Conclusions

As explained in Section V.(1) of this report, the claimant's family acquired the subject property on July 27, 1971. Under Ballot Measure 37, Rebecca Badger 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 acquired the property restrict division of the subject property. The claimant estimates the reduction in value due to the restrictions to be \$800,000.

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 is based on state land use regulations that restrict the use of the property relative to what would have been allowed in 1971, when the claimant's family acquired interest in the property. These provisions include Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33, which Deschutes County has implemented through its EFU zone. With the exception of provisions of ORS 215 in effect on July 27, 1971, none of these laws appear to be exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimant's family acquired the property.

Conclusions

Although a tentative subdivision plat proposal was included in the claim, 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. Provisions of ORS 215 in effect when the claimant's family acquired the property in 1971, are exempt under Section 3(E) of the Measure and, if applicable, will continue to apply to the property.

Other laws in effect when the claimant's family acquired the property also are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimant's use of 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 division of the 60-acre subject property. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by \$800,000. However, because the claim does not provide an appraisal or other specific documentation 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 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 Rebecca Badger to use the subject property for a use permitted at the time she acquired interest in the subject property on August 7, 2000.

When the claimant acquired the property on August 7, 2004, it was subject to the land use laws currently in effect, as described above in Section V.(2) of this report.

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 Rebecca Badger's division of the subject property: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33 enacted after August 7, 2000. These land use regulations will not apply to Rebecca Badger's use of her property only to the extent necessary to allow her a use permitted at the time she acquired interest in the property on August 7, 2000.
2. The action by the State of Oregon provides the state's authorization to the claimant to use her property subject to the standards in effect on August 7, 2000. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33 then in effect. The department acknowledges that the relief to which Rebecca Badger is entitled under Measure 37 will not allow her a use of the subject property set forth in the claim
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.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 19, 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.