

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 118335
BALLOT MEASURE 37 (CHAPTER 1,)
OREGON LAWS 2005) OF)
Martin and Rowena Gass, CLAIMANTS)

Claimants: Martin and Rowena Gass (the Claimants)

Property: Tax Lot 500, T.4S, R.5W, Section 2, W.M., Yamhill 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 Martin Gass' division or residential development of the .26-acre portion of the subject property; or to Martin and Rowena Gass' division and residential development of the 15-acre and 33.62-acre portions of the subject property: applicable provisions of Statewide Planning Goal 4 ORS 215.780 and OAR 660-006-0050 and -055. These land use regulations will not apply to Martin Gass' use of .26-acre portion of the property only to the extent necessary to allow him a use permitted at the time he acquired that portion of the property on December 22, 1960; and will not apply to Martin and Rowena Gass' use of the 15-acre and 33.62-acre portions of the subject property only to the extent necessary to allow them a use permitted at the time they acquired those portions of the property on April 7, 1961 and January 4, 1967, respectively.
2. The action by the State of Oregon provides the state's authorization to Martin Gass to use the .26-acre portion of the property, subject to the standards in effect on December 22, 1960; and to Martin and Rowena Gass to use the 15-acre and 33.62 acre portions of the property, subject to the standards in effect on April 7, 1961, and January 4, 1967, respectively.

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.

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.

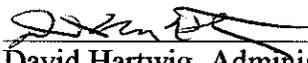
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:

Lane Shetterly, Director


George Naughton, Deputy Director
DLCD

Dated this 12th day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:


David Hartwig, Administrator
DAS, State Services Division

Dated this 12th 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 11, 2005

STATE CLAIM NUMBER: M118335

NAMES OF CLAIMANTS: Martin and Rowena Gass

MAILING ADDRESS: 14660 NW Berry Creek Road
McMinnville, Oregon 97128

PROPERTY IDENTIFICATION: Township 4S, Range 5W, Section 2
Tax Lot 500
Yamhill County

DATE RECEIVED BY DAS: April 20, 2005

180-DAY DEADLINE: October 17, 2005

I. SUMMARY OF CLAIM

The claimants, Martin and Rowena Gass, seek compensation in the amount of \$300,000 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 divide the 48.88-acre property into four parcels and to develop a dwelling on each parcel. The property is located at 14660 NW Berry Creek Road, northwest of McMinnville, in Yamhill 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 Martin Gass' division and development of the .26-acre parcel, and to Martin and Rowena Gass' division and development of the 15-acre and 33.62-acre portions of the property: applicable provisions of Statewide Planning Goal 4 (Forest Lands), OAR 660-006-050 and -055 and ORS 215.780 enacted after date of acquisition. These laws will

not apply to the claimants only to the extent necessary to allow Martin Gass a use of a .26-acre portion of the property permitted at the time he acquired that portion of the property in 1960; and to allow Martin and Rowena Gass a use of a 15-acre and 33.62-acre portions of the property permitted at the time they acquired those portions of the property in 1961 and 1967, respectively. (See the complete recommendation in Section VI. of this report).

III. COMMENTS ON THE CLAIM

Comments Received

On May 11, 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, evidence or information was received in response to the 10-day notice.

The comment is relevant to whether the restriction of the claimants' use of the property reduces the fair market value of the property. The comment submitted raise general questions about the alleged reduction in property value but did not provide details specific to this claim under Measure 37. This comment has been considered by the department in preparing this report. (See the 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 20, 2005, for processing under OAR 125, division 145. The claim is based on Statewide Planning Goal 4 (Forest Lands) and provisions required under OAR 660-006-0050 and -055 and ORS 215.780. 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, Martin and Rowena Gass, acquired the subject property on the following dates: Martin Gass acquired a .26-acre portion on December 22, 1960; Martin and Rowena Gass acquired a 15-acre portion on April 7, 1961; and then acquired a 33.62-acre portion on January 4, 1967. The claimants’ dates of acquisition are reflected by one Quitclaim Deed and two Warranty Deeds included with the claim. Information provided by the Yamhill County Assessor’s office indicates that Martin and Rowena Gass are the current owners of the subject property.

Conclusions

The claimant, Martin Gass is an “owner” of a .26-acre portion of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. He acquired that portion of the property on December 22, 1960. Martin and Rowena Gass are “owners” of the 15-acre and 33.62-acre portions of the subject property. They acquired the 15-acre portion on April 7, 1961, and the 33.62-acre portion on January 4, 1967, respectively. Based on the record, Rowena Gass is not an owner of the .26-acre portion of the property.

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 states that Yamhill County's AF-40 zone "prohibited building on the property." The claim also states, regarding the County's gross income test, that it is "not possible to generate this much income on this property." Information submitted with the claim and a telephone conversation with the claimants confirm that Martin and Rowena Gass seek to divide the total 48.88-acre property into four dwelling sites of three parcels each containing approximately 15 acres and one parcel containing approximately .26 acres.

The claim is based, generally, on Yamhill County's Agriculture Forestry (AF-40) zoning and the applicable provisions of state law that require such zoning. The AF-40 zone is a mixed agricultural and forest land zone adopted to comply with Statewide Goal 4 (Forest Lands) and the implementing provisions of OAR 660-006-0050 and OAR 660-006-0055 (effective February 5, 1990) and subsequently amended on March 1, 1994, to comply with the provisions of HB 3661 (Chapter 792, Oregon Laws 1993).¹

Under OAR 660-006-0050, all the uses permitted under Statewide Planning Goals 3 and 4 are allowed except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993. No information was provided to the department regarding the predominant use of the property on January 1, 1993. Depending on the predominant use on January 1, 1993, the property is subject to either the requirements for dwellings applicable under exclusive farm use zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Statewide Goal 4 and OAR 660, division 006. This includes the dwelling standards asserted by the claimants as restricting the use of the property. However, no analysis of whether any of the tax lots can be approved for a dwelling under the applicable farm or forest provisions has been provided.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones, which implement the 80-acre minimum lot size specified in ORS 215.780. Under OAR 660-006-0055, the claimants' property cannot be divided into parcels smaller than 80 acres as may have been possible under the county zones applied in 1960, 1961 and 1967. However, no analysis of whether any of the tax lots can be divided for non-farm dwellings under ORS 215.263(4)(b) has been provided.

The claimants acquired the subject property prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. No Yamhill County zoning applied to the subject property in 1960, 1961, or 1967 respectively.

¹ The subject property includes a combination of Jory clay loam 12 to 20 percent slopes (JrD, capability subclass IIIe-2), Yamhill silt loam 20 to 30 percent slopes (YaE, capability subclass IVe-2), Hazleair silty clay loam 2 to 7 percent slopes (HcB, capability subclass IIIe-3), Willakenzie silty clay loam 7 to 20 percent slopes (WkD, capability subclass IVe-1) and Olyic silt loam 30 to 60 percent slopes (OLF, capability subclass VIe-3) (1985 Soil Survey of Yamhill County Oregon).

Conclusions

The current provisions applicable to lands zoned AF-40 under OAR 660-006-0050 and- 0055 relating to land divisions and dwelling standards adopted since the claimants acquired the property in 1960, 1961 and 1967, restrict the use of the property relative to uses allowed when claimants acquired the property. Under these current provisions, the claimants are restricted from further dividing or developing their property as they could have when they acquired it.

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 \$300,000 as the property's reduction in fair market value due to restrictions imposed by current regulations. This amount is based on the claimants' estimate of the market value of four rural lots in the area, less the current real market value, as estimated by the Yamhill County Assessor.

Conclusions

As explained in section V.(1) of this report, the current owners are Martin and Rowena Gass who acquired the property on December 22, 1960, April 7, 1961, and January 4, 1967, respectively. Under Ballot Measure 37, Martin and Rowena Gass 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 the claimants acquired the property restrict division and development of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$300,000.

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 includes a general reference to any state land use regulations that restrict the use of the property relative to what would have been allowed in 1960, 1961, and 1967, when the property was acquired by Martin and Rowena Gass. These provisions include Statewide Planning Goals 3 and 4, ORS 215.780 and provisions of OAR 660, division 6 related to agriculture/forest zones, which Yamhill County has implemented through its AF-40 zone. None of these laws appear to be exempt under Section 3(E) of Ballot Measure 37.

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...” To the extent they may be applicable under OAR 660-006-0050, the department finds that siting standards for dwellings in forest zones under ORS 215.730 and in Goal 4 and its implementing rules, OAR 660 division 6, are exempt under Section (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 mixed farm/forest 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 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 siting standards for dwellings in forest zones under ORS 215.730 and in Goal 4 and its implementing rules, OAR 660 division 6, are exempt under Section (3)(B) of Measure 37. 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 the owners 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 present 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 claimants' ability to divide of the subject property into four parcels (one .26-acre parcel and three 15-acre parcels) and develop the new parcels for residential use. The claim asserts that laws enforced by the Commission or department reduce the fair market value of the subject property by \$300,000. 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 Martin Gass to use the .26-acre portion of the property for a use permitted at the time he acquired it on December 22, 1960; and to allow Martin and Rowena Gass to use the 15-acre and 33.62-acre portions of the subject property for a use permitted at the time they acquired their interests in those portions of the property on April 7, 1961 and January 4, 1967.

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 Martin Gass' division or residential development of the .26-acre portion of the subject property; or to Martin and Rowena Gass' division and residential development of the 15-acre and 33.62-acre portions of the subject property: applicable provisions of Statewide Planning Goal 4 ORS 215.780 and OAR 660-006-0050 and -055. These land use regulations will not apply to Martin Gass' use of .26-acre portion of the property only to the extent necessary to allow him a use permitted at the time he acquired that portion of the property on December 22, 1960; and will not apply to Martin and Rowena Gass' use of the 15-acre and 33.62-acre portions of the subject property only to the extent necessary to allow them a use permitted at the time they acquired those portions of the property on April 7, 1961 and January 4, 1967, respectively.
2. The action by the State of Oregon provides the state's authorization to Martin Gass to use the .26-acre portion of the property, subject to the standards in effect on December 22, 1960; and to Martin and Rowena Gass to use the 15-acre and 33.62 acre portions of the property, subject to the standards in effect on April 7, 1961, and January 4, 1967, respectively.
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 23, 2005. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.