

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 118344
BALLOT MEASURE 37 (CHAPTER 1,)	
OREGON LAWS 2005) OF)	
WILLIAM H. WAHL, CLAIMANT)	
JANNIE V. WAHL, CLAIMANT)	

Claimant(s): William H. and Jannie V. Wahl (the Claimants)

Property: Tax Lots 1000, 1400, T.12S, R.5W, Section 1A, W.M., Linn 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 William and Jannie Wahl's division of tax lots 1000 and 1400 into three parcels for residential development: the applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to William and Jannie Wahl's use of the property only to the extent necessary to allow them a use of the property permitted when they acquired it on September 8, 1969.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on September 8, 1969.

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 12, 2005

STATE CLAIM NUMBER: M118344

NAME OF CLAIMANTS: William H. and Jannie V. Wahl

MAILING ADDRESS: Post Office Box 1182
Corvallis, Oregon 97339

IDENTIFICATION OF PROPERTY: Township 12S, Range 5W, Section 1A
Tax Lots 1000 and 1400
Linn County

DATE RECEIVED BY DAS: April 22, 2005

180-DAY DEADLINE: October 19, 2005

I. CLAIM

The claimants, William and Jannie Wahl, seek compensation in the amount of \$177,800 for a reduction in fair market value of property as a result of certain land use regulations that are alleged to restrict their use of the property. The claimants desire compensation or the right to partition their property, consisting of two tax parcels containing approximately 7.65 acres, into three parcels for residential development. The property is located at 33765 Peoria Road, Corvallis, in Linn 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 this claim is valid. Department staff recommends, in lieu of compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimants to allow them to divide the subject property into three

parcels and to develop a residential dwelling on each parcel created: the applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33. These laws will not apply to the claimants' use of the subject property only to the extent necessary to allow them a use of the property that was permitted at the time they acquired it on September 8, 1969. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On May 12, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, three comments were received. 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 22, 2005, for processing under OAR 125, division 145. The claim identifies Linn County's Exclusive Farm Use (EFU) Zoning and Rural Residential 1-Acre (RR-1) zoning and state 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 regulation 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 of 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

According to the claim, William and Jannie Wahl, acquired the property on September 8, 1969. On June 26, 2002, William and Jannie Wahl transferred the property to the Wahl Revocable Living Trust, a trust established by the claimants. On April 20, 2004, an undivided one-half interest each in the property was transferred to the Jannie Wahl Revocable Trust and to the William Wahl Revocable Trust. The transfer of the property to the revocable trusts does not constitute a change in ownership for purposes of Measure 37. (See claim.)

Conclusions

The claimants, William and Jannie Wahl, are “owners” of the subject property as that term is defined in Section 11 of Ballot Measure 37, as of September 8, 1969.

2. The Laws that are the Basis for the 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 land use laws “changed zoning from RR1 to EFU zoning.”

The Wahl property is split-zoned Exclusive Farm Use (EFU) and Rural Residential (RR-1) one-acre minimum lot size. The property consists of approximately 7.65 acres. Tax lot 1000 is 6.5 acres, with 5.5-acres zoned EFU and one-acre zoned RR-1. Tax lot 1400 is one-acre zoned

RR-1, and is developed with a single-family dwelling and barn. William and Jannie Wahl desire to partition the two existing tax lots into three parcels. The one-acre parcel zoned RR-1, on which the existing dwelling and barn are located, would be increased to approximately two acres, and two, approximately 2.75-acre home sites would be created on the split-zoned tax lot.

The claim is based, generally, on Linn County's current EFU zone and the applicable provisions of state law that require such zoning. The claimants' property is partially zoned EFU as required by Statewide Planning Goal 3, in accord with OAR 660, division 33, and ORS 215 because the claimants' property is "Agricultural Land" as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660, division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80 acres and establish standards for allowing the existing or any proposed parcel's 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).

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 RR-1 zoned portion of the property requires a one-acre minimum lot size for the creation of new parcels, and implements Statewide Planning Goal 14 (Urbanization), also adopted on January 25, 1975. Goal 14 generally requires that land outside urban growth boundaries be used for rural uses. As a result of a 1986 Oregon Supreme Court decision¹, in 2000, the Commission amended Goal 14 (Urbanization) and adopted OAR 660-004-0040, which became effective on October 4, 2000. The rule provides that after October 4, 2000, a county minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without taking an exception to Goal 14 (OAR 660-004-0040(6)). Because claimants proposed use of the property does not request to reduce the lot size of that portion of the property zoned RR-1, Goal 14 and OAR 660-004-0040 do not restrict the claimant's use of that portion of the property.

The claimants acquired the property in 1969, prior to the adoption of the Statewide Planning Goals and their implementing statutes and rules. The property was not zoned by Linn County at that time.

¹ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or App 447 (1986).

Conclusions

The zoning requirements, minimum lot size and dwelling standards for development in EFU zones were enacted after the claimants acquired the subject property in 1969, and do not allow the division of the property as requested by the claimants, thereby restricting the use of the property relative to the uses allowed when they acquired the property. When the claimants acquired the subject property in 1969, the Statewide Planning Goals and their implementing statutes and regulations were not 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 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 laws 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 states that there has been a reduction in the fair market value of the property of \$177,800 due to current regulations and includes a realtor's estimate of the market value of the developed lots. (See claim). The claim also includes current tax statements for the subject property reflecting the property's current assessed value.

The Linn County decision on the Measure 37 claim filed with the County states: "The claimant has submitted an estimated value opinion that the lost value is \$177,800. The current land value for the two tax lots according to the Assessor records is \$108,600. The Assessor estimates that the value of the property, if divided into three parcels, would be approximately \$251,830."

Conclusions

As explained in Section V.(1) of this report, the current owners are William and Jannie Wahl, who acquired the property on September 8, 1969. Under Ballot Measure 37, William and Jannie Wahl 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), laws adopted since 1969 restrict the claimants' ability to divide the property. The claimants state that the reduction in value due to the restrictions is \$177,800.

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 laws 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 laws that restrict the use of the property relative to what would have been allowed in 1969, when the claimants acquired the property. These laws include Goal 3, ORS 215 and OAR 660, division 33. These laws all came into effect after the claimants acquired the property in 1969, and therefore are not exempt under Section 3(E) of Measure 37, which exempts laws in effect when the claimants acquired the property.

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 rural 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 acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the property that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under Section (3) of Measure 37 that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the property.

VI. FORM OF RELIEF

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or 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 to allow the present owner to carry out a use of the property allowed at the time the current owner acquired the property. The Commission has by rule 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 record before the department, laws enforced by the Commission or the department restrict the division of the property into three parcels for residential development. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$177,800. 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.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow William and Jannie Wahl to use the subject property for a use permitted at the time they acquired the property on September 8, 1969.

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 William and Jannie Wahl's division of tax lots 1000 and 1400 into three parcels for residential development: the applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to William and Jannie Wahl's use of the property only to the extent necessary to allow them a use of the property permitted when they acquired it on September 8, 1969.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on September 8, 1969.

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 27, 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.