

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 118351
BALLOT MEASURE 37 (CHAPTER 1)
OREGON LAWS 2005) OF)
Eugene Braukman, CLAIMANT)
Nancy Braukman, CLAIMANT)
Farren Kohler, CLAIMANT)
Lois Verboort-Kohler, CLAIMANT)

Claimants: Eugene Braukman, Nancy Braukman, Farren Kohler, and Lois Verboort-Kohler
(the Claimants)

Property: Tax Lot 100, T.2N, R.3W, Section 19, W.M., Washington County

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

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

ORDER

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

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following
laws to the claimants' division and development of the 116.5-acre property: applicable
provisions of Statewide Planning Goal 3, Goal 14, ORS 215, and OAR 660, division 33, enacted
after the claimants each acquired their interest in the property. These land use regulations will
not apply to Eugene Braukman's and Farren Kohler's use of their property only to the extent
necessary to allow those claimants a use permitted at the time they acquired the property on
April 6, 1971; and will not apply to Lois Verboort-Kohler's and Nancy Braukman's use of the
property only to the extent necessary to allow those claimants a use permitted at the time they
acquired the property on February 25, 1994, and September 13, 2001, respectively.
2. The action by the State of Oregon provides the state's authorization to Eugene Braukman and
Farren Kohler to use the property subject to the standards in effect on April 6, 1971. On that

date, the property was subject to applicable provisions of ORS 215 then in effect. It also provides the state's authorization to Lois Verboort-Kohler and Nancy Braukman to use the property subject to the standards in effect on February 25, 1994 and September 13, 2001. On those dates, the property was subject to the current laws in effect, as described in Section V. 2. of this report. The department acknowledges the relief to which Lois Verboort-Kohler and Nancy Braukman are entitled to under Measure 37 does not allow them to use the property in a manner 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 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.

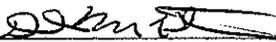
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:

Lane Shetterly, Director


George Naughton, Deputy Director
DLCD

Dated this 14th day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:


David Hartwig, Administrator
DAS, State Services Division

Dated this 14th 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 14, 2005

STATE CLAIM NUMBER: M118351

NAMES OF CLAIMANTS: Eugene Braukman
Nancy Braukman
Farren Kohler
Lois Verboort-Kohler

MAILING ADDRESSES: Eugene and Nancy Braukman
5880 NW 363rd Place
Cornelius, Oregon 97113

Farren Kohler
Lois Verboort-Kohler
39512 NW Verboort Rd.
Forest Grove, Oregon 97116

OTHER INTERESTS IN PROPERTY: AAT Communications Corp.
Woodridge Place
517 Route 1 South, Suite 5000
Iselin, New Jersey 08830

PROPERTY IDENTIFICATION: Township 2N, Range 3W, Section 19
Tax Lot 100
Washington County

OTHER CONTACT INFORMATION: William Cox, Attorney at Law
0244 SW California Street
Portland, Oregon 97219

DATE RECEIVED BY DAS: April 25, 2005

180-DAY DEADLINE: October 22, 2005

I. SUMMARY OF CLAIM

The claimants, Eugene Braukman, Nancy Braukman, Farren Kohler, and Lois Verboort-Kohler, seek compensation in the amount of \$25,373,000 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 116.5-acre property into approximately 20,000 square foot lots and to develop a dwelling on each lot. The property is located at Township 2N, Range 3W, Section 19, tax lot 100 in Washington 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 the claimants' division of the property for residential development: Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215, and applicable provisions of OAR 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow Eugene Braukman and Farren Kohler a use of the property permitted at the time they acquired it in 1971; and to allow Lois Verboort-Kohler and Nancy Braukman a use permitted at the time they acquired it in 1994 and 2001, respectively. The department acknowledges that the relief to which Lois Verboort-Kohler and Nancy Braukman are entitled under Measure 37, will not allow them to use the property in a manner set forth in this claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 13, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments were received in response to the 10-day notice.

IV. TIMELINESS OF CLAIM

Requirement

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

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

Findings of Fact

This claim was submitted to DAS on April 25, 2005, for processing under OAR 125, division 145. The claim identifies OAR 660-14-0040, Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources), OAR 660-16-0000 to 0040, Statewide Planning Goal 3 (Agriculture Lands), OAR 660, division 33, and all statewide planning goals, administrative rules and statutes 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

Eugene and Nancy Braukman are husband and wife. Farren Kohler and Lois Verboort-Kohler are husband and wife. Eugene Braukman and Farren Kohler acquired the subject property on April 6, 1971, as reflected by a land sale contract included with the claim. On February 25, 1994, Farren Kohler conveyed his interest in the property to Farren Kohler and Lois Jean Verboort-Kohler, Trustees of the Kohler Family Trust, a revocable trust established by Farren Kohler, as reflected by a Warranty Deed included with the claim. On September 13, 2001, Eugene Braukman conveyed his interest in the property to Eugene and Nancy Braukman, Trustees of the Braukman Loving Trust, a revocable trust established by Eugene Braukman, as reflected by a Bargain and Sale Deed included with the claim. A copy of a First American Title Report dated April 8, 2005, indicates that Eugene Braukman and Nancy Braukman, Trustees for Braukman Loving Trust and Farren Kohler and Lois Verboort-Kohler, Trustees for the Kohler Family Trust are the current owners of the subject property. Transfer of the property into the revocable trusts does not constitute a change in ownership for purposes of Measure 37.

Conclusions

The claimants, Eugene Braukman, Nancy Braukman, Farren Kohler, and Lois Verboort-Kohler, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. Eugene Braukman and Farren Kohler have been owners since April 6, 1971. Lois Verboort-Kohler has been an owner since February 25, 1994. Nancy Braukman has been an owner since September 13, 2001. Eugene Braukman and Farren Kohler are “family members” as to Nancy Braukman and Lois Verboort-Kohler as defined by Section 11(A) of the Measure 37. The family ownership date is April 6, 1971.

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

The claimants’ representative indicates that state laws have restricted the property so that it cannot be subdivided into approximately 20,000 square foot lots. The claim includes a list of state statutes, statewide planning goals, and administrative rules as applicable to the claim, but does not establish how these laws restrict the use of the property for purposes of Measure 37. Except as discussed in this report, these statutes, goals and rules, do not, on their face, restrict the use of the property. Absent an explanation by the claimants as to how these laws restrict the use of the subject property in a manner that reduces its fair market value, they are not discussed further in this report.

The claim is based, generally, on Washington County’s current Exclusive Farm Use (EFU) Zone and the applicable provisions of state law that require such zoning. The claimants’ property is 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 215.213, 215.263, 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 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 215.213.

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

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

Although Statewide Planning Goal 5 is listed on the claim, the claimants' representative acknowledges that the claimants are not aware of resources located on the site that have been designated Goal 5 resources. Thus, based on the claimants' representations and the record, there is no indication that Goal 5 restricts the claimants' use of the subject property.

Eugene Braukman and Farren Kohler acquired the subject property on April 6, 1971 prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. Washington County's F-1 zoning applied to the subject property in 1971. The F-1 zone did not have a minimum lot size and allowed dwellings by right, and was adopted pursuant to the provisions of ORS 215, as enacted in 1963.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215, and applicable provisions of OAR 660, divisions 14 and 33 were all enacted after Eugene Braukman and Farren Kohler acquired ownership of the subject property in April 1971, and do not allow the division or development of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired. In 1971, the property was subject to the requirements of the County's F-1 zone, which was adopted pursuant to the provisions of ORS 215 then in effect.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the 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 \$25,373,700 as the reduction in the property's fair market value due to current regulations. This amount is based on the claimants' estimate of the market value of 20,000 square foot lots in the area, less the cost of developing the property.

Conclusions

As explained in Section V.(1) of this report, the current owners are Eugene Braukman, Nancy Braukman, Farren Kohler, and Lois Verboort-Kohler. Eugene Braukman and Farren Kohler acquired the property on April 6, 1971, and are family members as to Nancy Braukman and Lois Verboort-Kohler. 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 the claimants acquired the property restrict division of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$25,373,700.

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 state land use regulations that restrict the use of the property relative to what would have been allowed in 1971, when the claimants or their family acquired the property. These provisions include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Washington County has implemented through its EFU zone. With the exception of provisions of ORS 215 in effect on April 6, 1971, none of these laws appear to be exempt under Section 3(E) of Ballot Measure 37. Provisions of ORS 215 adopted before April 16, 1971, are exempt under Section 3(E) of the Measure, which exempts laws in effect when the claimants or claimants' family 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 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. Provisions of ORS 215 in effect when the claimants acquired the property in 1971, are exempt under Section 3(E) of the Measure and will continue to apply to the property.

Other laws in effect when the claimants acquired the property are also 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 Sections 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 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 claimants' ability to create the desired 20,000 square foot lots out of the subject property, and develop those lots for residential use. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$25,373,700. 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 Eugene Braukman and Farren Kohler to use the subject property for a use permitted at the time they acquired the property on April 6, 1971; to allow Lois Verboort-Kohler to use the subject property for a use permitted at the time she acquired the property on February 25, 1994; and to allow Nancy Braukman to use the subject property for a use permitted at the time she acquired the property on September 13, 2001. In 1994 and 2001, the property was subject to the laws that currently apply to the subject property as described 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 the claimants' division and development of the 116.5-acre property: applicable provisions of Statewide Planning Goal 3, Goal 14, ORS 215, and OAR 660, division 33, enacted after the claimants each acquired their interest in the property. These land use regulations will not apply to Eugene Braukman's and Farren Kohler's use of their property only to the extent necessary to allow those claimants a use permitted at the time they acquired the property on April 6, 1971; and will not apply to Lois Verboort-Kohler's and Nancy Braukman's use of the property only to the extent necessary to allow those claimants a use permitted at the time they acquired the property on February 25, 1994, and September 13, 2001, respectively.
2. The action by the State of Oregon provides the state's authorization to Eugene Braukman and Farren Kohler to use the property subject to the standards in effect on April 6, 1971. On that date, the property was subject to applicable provisions of ORS 215 then in effect. It also provides the state's authorization to Lois Verboort-Kohler and Nancy Braukman to use the property subject to the standards in effect on February 25, 1994 and September 13, 2001. On those dates, the property was subject to the current laws in effect, as described in Section V. 2. of this report. The department acknowledges the relief to which Lois Verboort-Kohler and Nancy Braukman are entitled to under Measure 37 does not allow them to use the property in a manner 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 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 29, 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.