

**BALLOT MEASURE 37 (CHAPTER 1, OREGON LAWS 2005)
CLAIM FOR COMPENSATION**

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

August 11, 2005

STATE CLAIM NUMBER: M119873

NAME OF CLAIMANT: Frederick Wallender

MAILING ADDRESS: 65302 Airport Lane
La Grande, Oregon 97850

IDENTIFICATION OF PROPERTY: 48909 Foothill Road
Haines, Oregon 97833

Township 7S, Range 38E, Sections 2 & 3
Tax Lot 700,
Baker County

OTHER INTEREST IN THE PROPERTY: Powder Valley Water Control District
(Permanent 40-foot easement for
Underground Irrigation Water Pipeline)

DATE RECEIVED BY DAS: February 22, 2005

180-DAY DEADLINE: August 21, 2005

I. CLAIM

The claimant, Frederick Wallender, seeks compensation in the amount of \$657,828 for a 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 develop his approximately 263-acre property into 40-acre parcels and to develop each resulting parcel with a residential dwelling. The property is located at 48909 Foothill Road, near Haines, in Baker 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 claimant to allow him to divide his property into 40-acre parcels and to develop each parcel with a residential dwelling: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780, and OAR 660, division 33, enacted after May 30, 1991. These laws will not apply to the claimant only to the extent necessary to allow Mr. Wallender a use of the subject property permitted at the time he acquired it on May 30, 1991. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On March 8, 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, two written comments were received in response to the 10-day notice.

The comments regarding agricultural land 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 February 22, 2005, for processing under OAR 125, division 145. The claim identifies a state administrative rule (OAR 660-033-0135) that restricts 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

The claimant, Frederick Wallender, acquired the subject property by deed on May 30, 1991. A current year Baker County Tax Assessor’s Tax Statement was attached to the claim to document Frederick Wallender’s current ownership of the subject property. (See the department’s claim file.)

Conclusions

The claimant, Frederick Wallender, is the “owner” of the subject property as that term is defined in Section 11(c) of Ballot Measure 37, as of May 30, 1991.

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 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 claim states that “OAR 660-033-0135 restricts development of property into 40-acre parcels.”

The claim is based, in part, on Baker 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 Goal 3 in accord with OAR 660, division 33 and ORS 215 because the claimant’s property is “Agricultural Land” as defined by Goal 3.¹ Goal 3 became effective on

¹ The claimant’s property is “agricultural land because it contains NRCS (Natural Resources Conservation Service) Soils, Hibbard silt loam, 2 – 7% slopes, Class IIIe if irrigated, Class IVe, if not; Ladd silt loam, 2 - 7% slopes, Class IIe irrigated or not; and Baker silt loam, 2 – 7% slopes, Class IIIe, if irrigated, Class IVe, if not.

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 claimant acquired the subject property on May 30, 1991. When the claimant acquired the subject property, division of the property into smaller 40-acre lots and placement of residential farm dwellings would have been governed by the Baker County EFU zone and statutory provisions then in effect. Statutory provisions in effect at that time included the then applicable portions of ORS 215 (1989 Edition).

Conclusions

Lot size and dwelling standards established by amendments to Statewide Planning Goal 3, amendments to ORS 215, and OAR 660, division 33, adopted since the claimant acquired the property in 1991, do not allow the division of the property into parcels less than 80-acres in size or allow the approval of dwellings as may have been possible in 1991. The County's EFU zone is based on the standards required by Goal 3, ORS 215 and OAR 660, division 33. Land use laws adopted since 1991 restrict the use of the property from what could have been done when the claimant acquired the property in 1991. However, it is unclear whether the claimant's requested level of development complies with the standards in effect when he acquired the property on May 30, 1991.

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 use(s) 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 a 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 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 the fair market value for the subject property has been reduced by \$657,828 as a result of land use laws enacted after Mr. Wallender acquired the property in 1991.

The claimant has provided information regarding the value of the property based on information about recent sales of similar properties provided by staff at the Baker County Assessors Office. According to an attachment to the claim, a per-acre price was calculated based on similar properties of approximately 40-acres in size and then applied to the claimant's property, effectively doubling the price per-acre from \$2,500 per-acre to \$5001 per-acre.

There is no certified appraisal accompanying the claim materials to substantiate the claimed values, either before or with state land use regulations that affect it.

Conclusions

As explained in section V.(1) of this report, Frederick Wallender is the current owner of the subject property as of May 30, 1991. Thus, under Ballot Measure 37, Mr. Wallender is due compensation for land use laws 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 claim asserts the reduction in value due to the restriction to be \$657,828. However, 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 Baker County's EFU zone and the related provisions of state law that have restricted use of the property and reduced its fair market value, including applicable provisions

of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33. With the exception of provisions of Goal 3, ORS 215, and OAR 660 in effect when the claimant acquired the property, those specified laws that restrict the current use of the claimant's property, are not exempt under subsection 3(E) of Ballot 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 appears that the general statutory, goal and rule restrictions on the division and use of agricultural land apply to the claimant's use of the property, and to the extent those laws were enacted after the claimant acquired the property, for the most part these laws do not appear to come under the exemption in subsection 3(E) of Measure 37. The restrictions in Statewide Planning Goal 3, ORS 215, and OAR 660 in effect when the claimant acquired the property are exempt under subsection 3(E) and will continue to apply to the property.

Laws in effect when the claimant acquired the property are exempt under subsection 3(E) of Measure 37, and will continue to apply to the claimant's use of the property. 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 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 use(s) 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. Claimant 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 to allow the present owner to carry out a use of the property permitted at the time the present 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 in this report, laws enforced by the Commission or the department, prohibit the division of the subject property into 40-acre parcels and the placement

of residential dwellings on each parcel, though it is unclear what level of development would be allowed under the laws in effect in 1991 when the claimant acquired the property. The claim asserts these restrictions reduce the fair market value of the property by \$657,828. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, no appraisal or other substantiating documentation was submitted and it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, the department acknowledges that state land use laws 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 just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow Frederick Wallender to use the subject property for a use permitted at the time they acquired the property on May 30, 1991.

Conclusions

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 Mr. Wallender's division of his property into 40-acre parcels and placement of a residential dwelling on each: applicable provisions of Statewide Planning Goal 3, ORS 215.263, 215.780 and 215.284, and OAR 660, division 33, enacted after May 31, 1991. These laws will not apply to Mr. Wallender's use of his property only to the extent necessary to allow the claimant to a use permitted at the time they acquired the property on May 31, 1991.
2. The action by the State of Oregon provides the state's authorization to the claimant to use their property subject to the standards in effect on May 30, 1991. On that date, the property was subject to Statewide Planning Goal 3, OAR 660, and applicable provisions of ORS 215 (1989 Edition).
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 215.412 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.
4. Any use of the property by the 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 him 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 July 19, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's 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.

Endnotes

i. In response to the Commission's 1985 continuance order, Baker County amended Agricultural Policy 3 to read as follows (County Ordinance 85-2, pp. 2-3):

"Recognizing that current Goal 3 language deals with 'existing Commercial Agricultural practices' Baker County is determined to allow for changing technology in Agricultural Enterprises of the future. Toward that objective, the county shall provide for a minimum parcel size that affordably allows for innovative, smaller-scale, Commercial Agricultural operations. For purposes of Agricultural Land policies, 'Commercial Agriculture' shall be defined as consisting of farm or ranch operations which will:

- a. contribute in a substantial way to the area's existing agricultural economy; and
- b. help maintain agricultural processors and established farm markets; and
- c. when determining whether a farm is part of the Commercial Agricultural Enterprise, not only what is produced but how much and how it is marketed shall be considered."

The County's EFU Zone (Section 301(H)) was amended in 1985 to include the following definition of "Commercial Agriculture" consistent with OAR 660-05-005(2) (County Ordinance 85-3):

"H. Minimum Lot Sizes: In the EFU zone, partitioned may be allowed after findings have been reached that each of the parcels resulting from the proposed partition:

1. Generally:

- a. Is appropriate for the continuation of the existing Commercial Agricultural Enterprises in the area.
- b. Complies with the purpose and intent of the Oregon Agricultural Land Use Policy (OSR 215.243).
- c. Is not detrimental to the parent farm or ranch.

2. Specifically:

- a. Partitions lands fully covered by adjudicated water rights into no less than 40-acres or a sixteenth of a Section, whichever is smaller. See also Section 502 of this Ordinance for roads and survey adjustments.
- b. Partitions dry land into parcels no less than 160-acres.
- c. Partitions dry lands containing less than 40-acres of adjudicated irrigation water rights by requiring four-acres for each dry-acre less than 40-acres; for example: 30-acres of irrigated land would require a minimum parcel size of 70-acres.
- d. Partitions land with non-adjudicated water resources into parcels of no less than 40-acres when said water resources are judged to be sufficient to meet the commercial farm test on a case-by-case

basis. The criteria are as follows. The applicant can demonstrate to the satisfaction of the Planning Commission:

- 1) That sufficient water is available during a typical year from any one or a combination of the following sources: Moisture in the form of rainfall and/or snowpack; existing wells and ponds on which no filing has been made (giving consideration to the depth of the well and to lift on pumps for both wells and ponds); land that subirrigate;
 - 2) That the soil, growing season, and energy are adequate and available for the planned farm use;
 - 3) That markets for the farm products are available; and
 - 4) That the proposal is found to be commercial.
- e. Partitions land for outright uses permitted under Subsection A.3 and 5 of Section 301 with no minimum parcel size required.
- f. For all Conditional Uses: Partitions lots not specifically established elsewhere by the Ordinance into:
- 1) The minimum amount of land determined by the governing body or its designate to be necessary for the proposed use; and
 - 2) Parcels large enough to comply with state and local standards and the criteria set forth in this Ordinance.”

The above provisions were acknowledged by the Commission on April 4, 1986 as complying with Statewide Planning Goal 3 and OAR 660-05-005(2).