

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation**

September 27, 2005

OREGON CLAIM NUMBER: M120412

NAME OF CLAIMANT: Olivella C. Wilcox, Trustee of the
Wilcox Family Trust

MAILING ADDRESS: 803 E Sixth Street
Molalla, Oregon 97038

PROPERTY DESCRIPTION: Township 5S, Range 3E, Section 3
Tax Lot 306 (Parcel 2, Partition Plat
No. 1996-130)
Clackamas County

OTHER CONTACT INFORMATION: Mark P. O'Donnell and
Kristian Roggendorf
O'Donnell & Clark, LLP
1706 NW Glisan Street, Suite 6
Portland, Oregon 97209

OTHER INTEREST IN PROPERTY: 10-foot pipeline right-of-way on eastern
boundary for Colton Water District

DATE RECEIVED BY DAS: April 1, 2005

180-DAY DEADLINE: September 28, 2005

I. CLAIM

The claimant, Olivella C. Wilcox, seeks compensation in the amount of \$500,000 to \$1,050,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to subdivide the 8.32 acre property to accommodate 8 to 16 dwellings. The property is located at 30153 S Gray's Hill Road in Clackamas 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 Olivella Wilcox's division of the property into 8 to 16 lots and the establishment of a dwelling on each lot: Statewide Planning Goal 14 (Urbanization) and applicable provisions of OAR 660, division 4, enacted after 1965. These laws will not apply to the claimant's use of the property only to the extent necessary to allow Olivella Wilcox a use of the property permitted at the time she acquired it in 1965. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On April 14, 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, three written comments, evidence or information were received in response to the 10-day notice.

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 1, 2005, for processing under OAR 125, division 145. The claim identifies lot size restrictions of rural residential zoning as laws that restrict the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37 are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulations adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

Ballot Measure 37 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in the Measure. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimant, Olivella Wilcox, acquired the subject property by Warranty Deed on May 15, 1965. On October 30, 1993, the claimant transferred the subject property into the Wilcox Family Trust, a revocable family trust that she established. A copy of a Title Report prepared January 26, 2005 by Chicago Title Insurance Company of Oregon shows that Olivella Wilcox, Trustee of the Wilcox Family Trust, is the current owner of the subject property. The transfer to a revocable trust did not result in a change of ownership under Measure 37.

Conclusions

The claimant, Olivella Wilcox is the current owner of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. Olivella Wilcox acquired the property on May 15, 1965.

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 claim states that: The property is zoned for rural residential use and subdivision is prohibited. Additional information submitted by the claimant's representative indicates that state laws have restricted the 8.32 acre property so that it cannot be subdivided into 16 residential lots.

According to the claim, when the claimant acquired the property on May 15, 1965, it was not zoned. The property is currently zoned Rural Residential Farm Forest (RRFF-5) designation under the Clackamas County Comprehensive Plan. This County zone was first applied to the subject property in 1979. The RRFF-5 zone requires a minimum lot size of five acres for the creation of new lots or parcels (Clackamas County Zoning Ordinance). The subject property is 8.32-acres, and cannot be divided under the RRFF-5 zone.

The claim lists a large number of specific land use regulations as potentially restricting the use of the subject property. In addition, according to the claim "[w]e will not accept 'waiver' unless it is accompanied by a zone change for the property to RA-1." (See letter from claimant's attorney, dated March 24, 2005 in the department's claim file.) This report addresses only those state laws administered by the department or Commission.¹ The department and Commission have no authority to change the zoning of the property. The authority of the department is limited to not applying state laws to allow the claimant to use the property for a use permitted at the time she acquired it.

The following is the department's analysis of whether the listed land use regulations administered by the department or the Commission apply to the use of the property described by the claimant in a manner that restricts that use relative to the use allowed when the claimant acquired the property in 1965.

Analysis

The claim is based on state laws that restrict the claimant's division of the property into 8 to 16 lots or parcels, and the development of a dwelling on each lot or parcel. The property is zoned RRFF-5 by Clackamas County. Based on the information in the record for this claim, the state laws that the department is able to determine do restrict the division of the property and the development of dwellings, to the extent described in the claim, are Statewide Land Use Planning Goal 14 and its implementing rules, and certain provisions of ORS 92. Without additional information concerning how the state laws listed in the claim restrict the ability of the claimant to divide the property and to develop a dwelling on each lot or parcel, the department is unable to determine if the remainder of the listed laws restrict the claimant's use of the property.

¹ Separate reports prepared by the Oregon Department of Forestry, and the Oregon Department of Environmental Quality, address state laws administered by those agencies.

Goal 14 and Its Implementing Rules

As a result of a 1986 Oregon Supreme Court decision², the Commission amended Statewide Planning Goal 14 (Urbanization) and adopted OAR 660-004-0040, which became effective on October 4, 2000. The rule provides that if, on October 4, 2000, a County Rural Residential zone specifies a minimum lot size of two-acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size which is already in effect (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h).

In addition, the Oregon courts have interpreted Goal 14 as generally prohibiting urban development on rural lands. Residential densities of between one and five acres per dwelling have been found to be urban in nature, and thus prohibited on rural lands outside of an acknowledged urban growth boundary. The level of density described in the claim, up to 16 dwelling units on approximately 3.82 acres, is clearly urban in nature, and therefore would be prohibited by Goal 14.

The claimant acquired the subject property on May 15, 1965, prior to the establishment of the Statewide Planning Goal 14 or its implementing rules.

ORS 92

The claim lists the following statutes in ORS 92: 92.012, 92.016, 92.025, 92.040, 92.042, 92.044, 92.050 and 92.100. No explanation or information is provided concerning how these statutes restrict the claimant's division of the property or her development of a dwelling on each lot or parcel. In general, however, ORS 92.012, 92.016 and 92.025 prohibit the subdivision or partition of land without local government approval under 92.040 to 92.044. In addition, ORS 92.016 and 92.025 prohibit the sale of a lot or parcel without prior approval.

ORS 92.016 and 92.025 were in effect when the claimant acquired the property, as were 92.040 to 92.044. Without additional information concerning how the statutes in ORS 92 restrict the use of the property relative to what was permitted when the claimant acquired the property, the department is unable to determine if the current versions of these laws restrict the claimant's use of the property.

Conclusions

The prohibition under Statewide Planning Goal 14 (Urbanization) and its implementing rules on urban uses of land outside of an urban growth boundary restrict Olivella Wilcox's ability to divide the property into 8 to 16 lots or parcels, and develop a dwelling on each lot or parcel relative to the use of the property permitted when she acquired ownership on May 15, 1965. As a result, the department concludes that these laws restrict the claimant's use of the property

² *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or App 447 (1986).

under Measure 37. Although the claim lists additional state laws that are administered by the department, the department is unable to determine, based on the information in the record for this claim, that the listed state laws administered by the department restrict the use of the property described in the claim.

This report addresses only those state laws that the department is able to determine, based on the record for this claim, restrict the use of the property described in the claim. 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. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any land use regulation described in Section V. (2) of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes an informal estimate of \$500,000 to \$1,050,000 as the reduction in the property's fair market value due to current regulations. This estimate is based on the claimant's estimate of the market value of 16 residential lots in the area.

Conclusions

As explained in Section V. (1) of this report, the current owner is Olivella Wilcox who acquired the property on May 15, 1965. Under Ballot Measure 37, Olivella Wilcox is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V. (2) of this report, laws adopted since the claimant acquired the property restrict division of the subject property. The claimant estimates the reduction in value due to the restrictions to be \$500,000 to \$1,050,000

Without an appraisal based on the value of 16 residential lots or other explanation, 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 includes several lists of specific state land use regulations that it appears the claimant alleges restrict her ability to divide the property into 8 to 16 lots or parcels and to develop a dwelling on each lot or parcel, relative to what she was permitted to do in 1965 when she acquired the property. As noted in Section V. 2. of this report, the only state laws that the department is able to determine restrict the use of the property based on this record are the provisions of Statewide Planning Goal 14 (Urbanization), and applicable provisions of OAR 660, division 4. None of these laws appear to be exempt under subsection 3(E) of Ballot Measure 37, because they were enacted after the claimant 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 goal and rule restrictions on rural residential development apply to the claimant's use of the property, and that these laws are not exempt under subsection 3(E) of Measure 37.

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. These include the provisions of ORS 92 listed in the claim. There may be other laws that continue to apply to the claimant's use of the property that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

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

VI. FORM OF RELIEF

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the division of the subject property into parcels or lots, and the use of the property for residential purposes. The claimant cannot create the desired 8 to 16 residential lots out of the subject property, or develop those lots for residential use because laws enacted after the claimant acquired the property prohibit subdivision. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$500,000 to \$1,050,000. However, because the claim does not provide an appraisal or other specific explanation 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 Olivella Wilcox to use the subject property for a use permitted at the time she acquired the property on May 15, 1965.

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 Olivella Wilcox's division of the 8.32-acre property into 8 to 16 lots or parcels, or to the establishment of a single family dwelling on each lot or parcel created: applicable provisions of Statewide Planning Goal 14 and OAR 660, division 4. These state land use regulations will not apply to Olivella Wilcox's use of her property only to the extent necessary to allow the claimant a use permitted at the time she acquired the property on May 15, 1965.
2. The action by the State of Oregon provides the state's authorization to the claimant to use her property subject to the standards in effect on May 15, 1965.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under Section (3) of the Measure.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for her to obtain a decision under Measure 37 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under Measure 37 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 1, 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.