

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES, THE DEPARTMENT
OF LAND CONSERVATION AND DEVELOPMENT OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM)
FOR COMPENSATION UNDER)
BALLOT MEASURE 37 (CHAPTER 1,)
OREGON LAWS 2005) OF)
Tim S. and Mary K. Goffrier, CLAIMANTS)

FINAL ORDER
CLAIM NO. M 118366

Claimants: Tim S. and Mary K. Goffrier (the Claimants)

Property: Tax Lot 800, T.7S, R.4W, Section 12, W.M., Polk County

Claim: The demand for compensation and any supporting information received from the Claimants 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 Tim and Mary Goffrier's division or development of the 31.74-acre property: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and OAR 660, division 6 enacted after July 6, 1990. These land use regulations will not apply to Tim and Mary Goffrier's use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on July 6, 1990.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property subject to the standards in effect on July 6, 1990. On that date, the property was subject to Polk County's acknowledged Farm Forest (FF) zone and the applicable provisions of ORS 215 and Goal 4 then in effect.
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

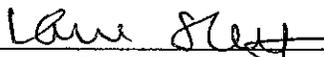
requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

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. The claimant will continue to be subject to ORS 215.730 and those provisions of Goal 4 and its implementing rules (OAR 660, division 6) related to siting dwellings for the protection of public health and safety.

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 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 Deputy 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.

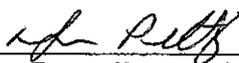
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 19th day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 19th 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.”

FOR INFORMATION ONLY

The Marion County Circuit Court has issued an opinion declaring that 2004 Oregon Ballot Measure 37 (2005 Or Laws chapter 1) is invalid. As of the date of this order, the court has not entered a judgment that gives legal effect to the court's opinion. Once a judgment is entered by the court, and effective, any rights granted by this order may be void or voidable.

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

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

October 19, 2005

STATE CLAIM NUMBER: M118366

NAMES OF CLAIMANTS: Tim S. and Mary K. Goffrier

MAILING ADDRESS: 4337 Orchard Heights NW
Salem, Oregon 97304

PROPERTY IDENTIFICATION: Township 7S, Range 4W, Section 12
Tax Lot 800
Polk County

DATE RECEIVED BY DAS: April 28, 2005

180-DAY DEADLINE: October 25, 2005

I. SUMMARY OF CLAIM

The claimants, Tim S. and Mary K. Goffrier, seek compensation in the amount of \$225,000 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 31.74-acre property into one ten-acre parcel and one 21.74-acre parcel and to develop a dwelling on the 21.74-acre parcel. The property is located at 4337 Orchard Heights NW, near Salem in Polk 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 Tim and Mary Goffrier's division of the property for residential development: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and OAR 660, division 6, enacted after July 6, 1990. These laws will not apply to the claimant only to the extent necessary to allow Tim and Mary Goffrier a use of the property permitted at the time they acquired it on July 6, 1990. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 18, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. In response to the notice, DAS received two comments.

One of the comments does 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.

The other comment is relevant to when the claimants became the present owners of the property and whether a state law restricts the claimants' use of the property. The comments have been considered by the department in preparing this report. (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 28, 2005, for processing under OAR 125, division 145. The claim identifies Polk County's Farm Forest (FF) Zone 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 regulations adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

The claimants, Tim and Mary Goffrier, acquired the subject property on July 6, 1990, by a Warranty Deed included with the claim (Polk County Deed Records, Book 233 Page 2034). A copy of a preliminary Title Report dated March 7, 2005, and a Real Property Assessment Report dated April 22, 2005, for the property verify that Tim S. and Mary K. Goffrier are the current owners of the subject property.

Conclusions

The claimants, Tim and Mary Goffrier, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. Tim and Mary Goffrier acquired the subject property on July 6, 1990.

2. The Laws that are the Basis for this Claim

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a law must restrict the claimants’ use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants or a family member acquired the property.

Findings of Fact

The claim identifies “Chapter 138 F/F Zone 138.100(1)(a) – The minimum size shall be 80 acres” and “Chapter 136 EFU 136.040(A)(1) – Produce at least \$80,000 gross annual income” as laws restricting the use of the property. The claim is based on Polk County’s Farm Forest (FF) Zone and state laws that restrict the use of the property.

The claimants’ property is zoned FF, which is a mixed agricultural and forest land zone adopted to comply with Statewide Goal 4 (Forest Lands) and the implementing provisions of OAR 660-006-0050 (effective February 5, 1990) and subsequently amended on March 1, 1994, to comply with the provisions of HB 3661 (Chapter 792, Oregon Laws 1993).

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

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones which implement the 80-acre minimum lot size specified in ORS 215.780. Under OAR 660-006-055, the claimants' property cannot be divided into parcels smaller than 80 acres as may have been possible under the County zones applied on July 6, 1990. However, no analysis of whether the property can be divided for non-farm dwellings under ORS 215.263(4)(b) has been provided.

At the time the claimants acquired the subject property on July 6, 1990, the minimum lot size standards under the County's acknowledged FF zone applied directly to the creation of new lots or parcels less than 40 acres in size (Ordinance 88-10, Polk County Zoning Ordinance, Section 138.040(A)).¹ These laws determine what division of the property was permitted at the time the claimants acquired the property in 1990.

¹ The 1990 provisions under Polk County's FF zone provided that new parcels may be approved when they have as much acreage and are capable of producing as much gross annual productivity, based on current employment, as is required by the following criteria:

1. The applicant must show in his farm management application that the parcel is capable of producing a yield level as commensurate with the standards listed in the "Commercial Agriculture Justification;"
2. The new parcel(s) will not significantly impact identified sensitive fish and wildlife habitat;
3. The agricultural enterprise is appropriate considering soils, productivity, topography, and other agricultural activities located within ¼ mile to determine if there are conflicts; and
4. The parcel cannot be less than 10 acres.

The "Commercial Agriculture Justification" provides the following discussion regarding gross annual productivity level in the FF zone (pp. 16-17):

"The \$10,000 productivity level figure is considered reasonable as a capability level, based on Census of Agricultural Data. The SIC types of agriculture which most closely reflect the farm types existing in Farm/Forest Zone are Extensive Grazing and General Farming, Primarily Livestock. The mean annual production for Extensive Grazing type is \$11,000 for farms over \$2,500 sales and \$5,000 for all farms in the commodity type. For the general Farm category, only the sales figures for 'all farms' is available, which is \$40,000. Since the two commodity types exhibit similar sales figures in the 'all farms' category, the over \$2,500 sales figures are likely also similar, or approximately \$10,000."

The applicable statutory standards for approval of dwellings are set forth in ORS 215. (See citations of statutory history of Oregon revised Statutes.) At the time the claimants acquired the property on July 16, 1990, Polk County's acknowledged FF zone and the applicable provisions of ORS 215 (1989 edition) applied to the use of the property.

Conclusions

The current provisions applicable to lands zoned Farm Forest (FF) under OAR 660-006-0050 and -0055 relating to land divisions and dwelling standards adopted since the claimants acquired the property on July 6, 1990, restrict the use of the property relative to uses allowed when they claimants acquired it. Additional land use regulations in ORS 215 and OAR 660, divisions 6 and 33 cited by the claimants were adopted after they acquired the subject property in 1990 and also restrict the use of the property relative to the uses allowed when they acquired it.

In 1990, the property was subject to the requirements of Polk County's acknowledged FF zone and ORS 215 (1989 edition) which were adopted pursuant to the provisions of Goal 4, ORS 215 and OAR 660, division 6 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 \$225,000 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 the property if divided into two parcels, the value of the parcel with the home selling for \$650,000, and the value of the new parcel selling for approximately \$275,000, less the current value of the property (\$700,000).

No appraisal or other documentation was provided to substantiate the estimated reduction in the property's fair market value.

Conclusions

As explained in Section V.(1) of this report, the current owners are Tim and Mary Goffrier who acquired the property on July 6, 1990. 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 \$225,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

4. Exemptions under Section 3 of Measure 37

Ballot Measure 37 does not apply to certain land use regulations. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the property relative to what would have been allowed in 1990 when the property was acquired by Tim and Mary Goffrier. These provisions include Statewide Planning Goal 4 (Forest Lands) and applicable provisions of ORS 215 and OAR 660, division 6, which Polk County has implemented through its Farm Forest (FF) zone. These laws are not exempt under Section 3(E) of Ballot Measure 37 to the extent they were enacted after the claimants acquired the property on July 6, 1990. Provisions of what is now ORS 215 and Goal 4 adopted before July 6, 1990, are exempt under Section 3(E) of the Measure, which exempts laws in effect when the claimants acquired the property.

The department notes that ORS 215.730 and OAR 660, division 6 include standards for the siting of dwellings in forest zones. These provisions include fire protection for dwellings and for surrounding forest lands. Section 3(B) of Measure 37 specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes...” Although it is not clear from the claim whether a dwelling would be sited on a forested area of the subject property, siting standards for dwellings in forest zones in ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under Section (3) of Measure 37.

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimants' use of the property, and these laws are not exempt under Section 3(E) of Measure 37 to the extent they were enacted after the claimants acquired the property on July 6, 1990. Provisions of ORS 215 and Goal 4 in effect when the claimants acquired the property in 1990 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. In addition, the siting standards of ORS 215.730, Goal 4 and its implementing rules related to dwelling siting standards based on health and safety are exempt under Section 3(B) and will continue to apply to the property as appropriate.

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 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 ten-acre and 21.74-acre parcels out of the subject property, or to develop a dwelling on the 21.74-acre parcel. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by \$225,000. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Ballot Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Tim and Mary Goffrier to use the subject property for a use permitted at the time they acquired the property on July 6, 1990.

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 Tim and Mary Goffrier's division or development of the 31.74-acre property: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and OAR 660, division 6 enacted after July 6, 1990. These land use regulations will not apply to Tim and Mary Goffrier's use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on July 6, 1990.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property subject to the standards in effect on July 6, 1990. On that date, the property was subject to Polk County's acknowledged Farm Forest (FF) zone and the applicable provisions of ORS 215 then in effect.
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. The claimant will continue to be subject to ORS 215.730 and those provisions of Goal 4 and its implementing rules (OAR 660, division 6) related to siting dwellings for the protection of public health and safety.

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 October 4, 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.