

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 120529  
BALLOT MEASURE 37 (CHAPTER 1, )  
OREGON LAWS 2005) OF )  
Ralph H. Guerre, CLAIMANT )  
Carol Guerre, CLAIMANT )

Claimants: Ralph H. Guerre and Carol Guerre (the Claimants)

Property: Tax Lot 600, T.29S, R.15W, Section 12, W.M., Coos County

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

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

ORDER

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

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Ralph and Carol Guerre's division of the 7.89-acre property: applicable provisions of Statewide Planning Goal 14, and OAR 660-004-0040. These land use regulations will not apply to the Guerres' use of their property only to the extent necessary to allow them a use permitted at the time they acquired the property on April 28, 1962.
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 April 28, 1962
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.

This Order is entered by the Deputy Director of the DLCDC as a final order of DLCDC 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 DLCDC AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:  
Lane Shetterly, Director

\_\_\_\_\_  
George Naughton, Deputy Director  
DLCDC

Dated this \_\_\_ day of \_\_\_\_\_, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

\_\_\_\_\_  
Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this \_\_\_ day of \_\_\_\_\_, 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**

September 30, 2005

**STATE CLAIM NUMBER:** M120529

**NAMES OF CLAIMANTS:** Ralph H. Guerre  
Carol Guerre

**MAILING ADDRESS:** 8572 Merle Circle  
Huntington Beach, CA 92647

**PROPERTY IDENTIFICATION:** Township 29S, Range 15W, Section 12D  
Tax lot 600  
Coos County

**OTHER CONTACT INFORMATION:** Joshua A. Clark  
Gleaves, Swearingden, Potter & Scott LLP  
P.O. Box 1147  
Eugene, OR 97401-3156

**DATE RECEIVED BY DAS:** April 11, 2005

**180-DAY DEADLINE:** October 8, 2005

**I. SUMMARY OF CLAIM**

The claimants, Ralph H. and Carol Guerre, seek compensation in the amount of \$378,213, 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 partition the subject 7.89-acre property into six parcels for residential development. The subject property is located in Coos 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 Ralph H. and Carol Guerre's division of the subject property: Statewide Planning Goal 14 (Urbanization) and OAR 660-004-0040. These laws will not apply to the claimants only

to the extent necessary to allow the Guerres a use of the property permitted at the time they acquired it in 1962. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On April 26, 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, two written comments, evidence or information were received in response to the 10-day notice.

The comments are relevant to whether a state law restricts the claimants' use of the property; and whether the restriction of the claimants' use of the property reduces the fair market value of the property. The comments have been considered by the department in preparing this report.

### **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 11, 2005, for processing under OAR 125, division 145. The claim identifies ORS 197 and 215, OAR 660 (including OAR 660, division 6), Statewide Planning Goals, as well as the Coos County Zoning and Land Development Ordinance, 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 claimants, Ralph H. and Carol Guerre, acquired the subject property on April 28, 1962, as reflected by a Warranty Deed included with the claim. A copy of a Property Analysis Report, dated June 24, 2005, indicates that Ralph H. and Carol Guerre are the current owners of the subject property.

### **Conclusions**

The claimants, Ralph H. and Carol Guerre, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of April 28, 1962.

### **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 states that “restrictive local regulations include CCZLDO (Coos County Zoning and Land Development Ordinance) Section 4.4.400 (1) (A) and related regulations in the CCZLDO. Other restrictive regulations that restrict or may restrict the Guerre’s ability to develop the property as they would have been able to on April 28, 1962, includes all state statutes, administrative rules, and county ordinances and rules restricting the use of land that were enacted or enforced against the land subsequent to April 28, 1962, which include but are not limited to the relevant portions of ORS 197 and 215, OAR 660 (including OAR, Division 6), Statewide Goals, land classifications and designations, and all county provisions implementing the state statutes and administrative rules.”

The property is currently zoned RR-2 (rural residential, 2-acre minimum lot size) by Coos County. Statewide Planning Goal 14 (urbanization), generally, requires that land outside of urban growth boundaries be used for rural uses and became effective on January 25, 1975. OAR 660-004-0040 restricts the lot size in rural residential areas to a minimum of two acres. This rule became effective on October 4, 2000.<sup>1</sup>

The claimants acquired the subject property on April 28, 1962, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. There were no local zoning ordinance provisions or minimum lot size standards affecting this property in 1962.

### **Conclusions**

The minimum lot size standards, established by Goal14 (Urbanization) (OAR 660-004-0040), were enacted after Ralph H. and Carol Guerre acquired the subject property, in April 1962, and do not allow the division of the property below a minimum lot size of two acres, thereby restricting the use of the property relative to the uses allowed when the property was acquired. In 1962, there were no state or local zoning ordinance provisions or minimum lot size standards affecting this property.

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 \$378,213, as the reduction in the property's fair market value as a result of current regulations. This amount is based on the claimants' estimate of an average price of comparables for the property as it could currently be subdivided into three legal lots versus the proposed development plan of six lots.

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<sup>1</sup> The claimants also cite ORS 197 and 215, and divisions of OAR 660 that do not on their face restrict the use of the property. In the absence of an explanation by the claimant as to how those regulations restrict the use of the subject property, this report does not address those regulations.

## **Conclusions**

As explained in Section V.(1) of this report, the current owners are Ralph H. and Carol Guerre who acquired the property on April 28, 1962. Under Ballot Measure 37, Ralph H. and Carol Guerre 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 in effect since 1962, restrict the claimants' ability to divide the property. The claim estimates the reduction in property value due to the restrictions to be \$378,213.

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 1962, when the property was acquired by the Guerres, including Goal 14 (Urbanization), and OAR 660-004-0040, which Coos County has implemented through its Rural Residential zone. These relevant regulations were all enacted after the claimants acquired the property and, therefore, are not exempt under Section 3(E) of Measure 37, which exempts laws in effect when the claimants acquired the property.

## **Conclusions**

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that the general statutory, goal and rule restrictions on residential development and use of rural lands apply to the claimants' use of the property, and for the most part these laws are not exempt under Section 3(E) of Measure 37.

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

And, in some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

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

## **VI. FORM OF RELIEF**

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or 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 six lots for residential development. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$378,213. Without an appraisal or other documentation establishing how the restricting regulations have reduced the value of the property, that amount cannot be substantiated. 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 Ralph H. and Carol Guerre to use the subject property for a use permitted at the time they acquired the property on April 28, 1962.

### **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 Guerres' division of the 7.89-acre property: applicable provisions of Statewide Planning Goal 14, and OAR 660-004-0040. These land use regulations will not apply to the

Guerres' use of their property only to the extent necessary to allow them a use permitted at the time they acquired the property on April 28, 1962.

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 April 28, 1962.

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 15, 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.