

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)
Harold and Marjorie Myhra, CLAIMANTS)

FINAL ORDER
CLAIM NO. M118318

Claimants: Harold and Marjorie Myhra (the Claimants)

Property: Tax Lot 400, T.2S, R.1E, Section 33DA, Clackamas 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 the Myhras' division of the property into three one-acre parcels, and residential development of those parcels: Statewide Planning Goal 14 and the applicable provisions of OAR 660-004-0040. These laws will not apply to Harold and Marjorie Myhra's use of the subject property only to the extent necessary to allow them a use of the property permitted when they acquired it on July 1, 1970.
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 1, 1970.
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.

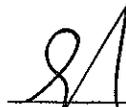
4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to Measure 37 including, 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 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



George Naughton, Deputy Director
DLCD

Dated this 4th day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 4 day of October, 2005.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to the following judicial remedies:

1. **Judicial review under ORS 293.316:** Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. **Judicial review under ORS 183.484:** Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County and the Circuit Court in the county in which you reside.
3. **A cause of action under Oregon Laws 2005, chapter 1 (Measure 37 (2004)):** A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that “[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost.”

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

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

October 4, 2005

STATE CLAIM NUMBER: M118318

NAMES OF CLAIMANTS: Harold and Marjorie Myhra¹

MAILING ADDRESS: 23275 S.W. Bosky Dell Lane
West Linn, Oregon 97068

IDENTIFICATION OF PROPERTY: Township 2S, Range 1E, Section 33DA
Tax Lot 400
Clackamas County

OTHER INTEREST IN THE PROPERTY: The Myhra Joint Living Trust

DATE RECEIVED BY DAS: April 14, 2005

180-DAY DEADLINE: October 11, 2005

I. CLAIM

The claimants, Harold and Marjorie Myhra, seek compensation in the amount of \$350,317, for a reduction in fair market value of property as a result of certain land use regulations that are alleged to restrict their use of the property. The claimants desire compensation or the right to partition their 3.01-acre property into approximately one-acre lots for residential use. The property is located approximately ¼-mile from the City of West Linn, at 23275 SW Bosky Dell Lane, 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 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 claimants to allow them to divide the subject property into approximately one-acre lots: Statewide Planning Goal 14 (Urbanization) and the applicable provisions of OAR 660-004-0040. This rule will not apply to the claimants' use of the subject property only to the extent

¹ Harold R. and Marjorie A. Myhra are co-trustees of The Myhra Living Trust, a revocable trust.

necessary to allow them a use of the property that was permitted at the time they acquired it on July 1, 1970. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On April 28, 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, no comments were received.

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 14, 2005, for processing under OAR 125, division 145. The claim identifies OAR 660-004-0040(7)(a) and OAR 660-004-0040(8)(e) as regulations that restrict the use of the property and are 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

According to the claim, Harold and Marjorie Myhra acquired the subject property by a Warranty Deed on July 1, 1970. (See Warranty Deed in the department’s claim file.)

Harold and Marjorie Myhra, transferred the property to The Myhra Joint Living Trust, a revocable living trust established by the claimants, on September 27, 1999. (See the Certification of Trust dated September 27, 1999, and the Clackamas County Official Record of Descriptions of Real Property located in the department’s claim file). Transfer of property to a revocable trust does not result in a change of ownership for purposes of this Measure 37 claim.

The Clackamas County Official Record of Descriptions of Real Property shows that the Myhras remain current owners of the property.

Conclusions

The claimants, Harold and Marjorie Myhra, are “owners” of the subject property as that term is defined in Section 11(C) of Ballot Measure 37, as of July 1, 1970.

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 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 cites OAR 660-004-0040(7)(a) and OAR 660-004-0040(8)(e) as regulations that restrict the division of this property. The claimants append a note to the claim that requests “the current zoning RRF-5 be changed back to RA-1.”

The property is currently zoned Rural Residential Farm Forest 5-Acre (RRF-5), a designation under the Clackamas County Comprehensive Plan. The RRF-5 zone generally requires a minimum of ten acres for the creation of new lots or parcels. The subject property consists of 3.01-acres and cannot be divided under the current RRF-5 zone.

Statewide Planning Goal 14 (Urbanization) was effective January 25, 1975, and required that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,² the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 (Urbanization) to Rural Residential Areas) which was effective October 4, 2000. The rule provides that after October 4, 2000, an exception to Goal 14 is required to create a lot or parcel in a rural residential zone that is smaller than the County's minimum lot size standard. For rural residential land within one mile of the Portland metropolitan area urban growth boundary (UGB), that minimum lot size is 20 acres (OAR 660-004-0040(8)(e)). This standard applies to the subject property because it is located within ¼-mile of the UGB. Accordingly, the subject 3.01-acre property cannot be divided without a Goal 14 exception. (See OAR 660-004-0040(7) and (8).)

When the claimants acquired the subject property in 1970, it was zoned Single-Family Residential (RA-1) and allowed a single-family dwelling on a parcel of at least one acre in size. The statewide planning goals, and their implementing statutes and regulations, had not been adopted in 1970.

Conclusions

Lot size standards for rural residential lots or parcels established by OAR 660-004-0040 and adopted since the claimants acquired the property in 1970, prohibit division of the property into smaller lots or parcels for residential development. Land use laws adopted since 1970, restrict the use of the property from what could have been done when the claimants acquired the property in 1970.

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 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 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."

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

Findings of Fact

The claim states that there has been a reduction in the fair market value of the property of \$350,317 as a result of restricting regulations. The claim states it is based on comparable property sales, but does not contain any evidence supporting this figure.

Conclusions

As explained in Section V.(1) of this report, the current owners are Harold and Marjorie Myhra, who acquired the property on July 1, 1970. Thus, under Ballot Measure 37, Harold and Marjorie Myhra 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, state laws enacted since 1970 restrict the claimants' ability to divide their property. The claimants state that the reduction in the value of the property due to the restrictions is \$350,317.

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 laws 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 land use regulations that are the subject of this claim are Goal 14 and OAR 660-004-0040, which set forth the requirements for the creation of new lots or parcels in rural residential areas. The provisions of Goal 14 took effect in 1975, and OAR 660-004-0040 took effect in 2000, after the claimants acquired the property in 1970. As a result, Goal 14 and OAR 660-004-0040 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 residential land apply to the claimants' use of the property, and for the most part these laws are not exempt under Section 3(E) of Measure 37.

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 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 allowed at the time the present owner acquired the property. The Commission has by rule 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 record before the department, laws enforced by the Commission or the department restrict the division of the property into approximately one-acre parcels. The claim asserts that laws enforced by the Commission or the department reduce the fair market value of the subject property by \$350,317. 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.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Harold and Marjorie Myhra to use the subject property for a use permitted at the time they acquired the property on July 1, 1970.

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 requirements of the following laws to the claimants to allow them to divide the subject property into three, approximately one-acre residential parcels: Statewide Planning Goal 14 and the applicable provisions of OAR 660-004-0040. These laws will not apply to Harold and Marjorie Myhra's use of the subject property only to the extent necessary to allow them a use of the property permitted when they acquired it on July 1, 1970.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on July 1, 1970. On that date, the property was subject to Clackamas County's RA-1 zoning in effect at that time.
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.