

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. M118323
BALLOT MEASURE 37 (CHAPTER 1,)	
OREGON LAWS 2005) OF)	
Bruce and Rozella Wendt, CLAIMANTS)	

Claimants: Bruce and Rozella Wendt (the Claimants)

Property: Tax Lot 3000, T.7S, R.3W, Section 16A, W.M., Marion 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:

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 Wendts' division of their approximately 13-acre property into ten approximately 1.25-acre parcels or twelve approximately 1-acre parcels and development of a residential dwelling on each resulting parcel: applicable provisions of Statewide Planning Goal 3, Goal 14, ORS 215.263, 215.780 and 215.284, and OAR 660, division 33. These land use regulations will not apply to the Wendts' use of their property only to the extent necessary to allow the claimants to a use permitted at the time they acquired the property on January 26, 1965.
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 January 26, 1965, including any applicable provisions of ORS 92 and 215.

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 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 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 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 6th day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



David Hartwig, Administrator

DAS, State Services Division

Dated this 6th 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 6, 2005

STATE CLAIM NUMBER: M118323

NAMES OF CLAIMANTS: Bruce and Rozella Wendt

MAILING ADDRESS: 2090 Wallace Road NW
Salem, Oregon 97304-2123

PROPERTY IDENTIFICATION: Township 7S, Range 3W, Section 16A
Tax Lot 3000
Polk County

DATE RECEIVED BY DAS: April 15, 2005

180-DAY DEADLINE: October 12, 2005

I. CLAIM

The claimants, Bruce and Rozella Wendt, seek compensation in the amount of \$1,220,000, for a reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to develop the approximately 13-acre easterly portion of their property into ten, approximately 1.25-acre parcels or twelve, approximately 1 acre parcels, and to develop each resulting parcel with a residential dwelling. The property is located at 2090 Wallace Road 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 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 their property into ten, approximately 1.25-acre or twelve, approximately 1-acre parcels, and to develop each parcel with a residential dwelling: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands) and Goal 14 (Urbanization), ORS 215.263, 215.284, and 215.780, and OAR 660, division 33. These laws will not apply to the claimants' use of the property, only to the extent necessary to allow Mr. and Ms. Wendt a use of the subject property permitted at the time they acquired it on January 26, 1965. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On May 3, 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, several written comments, evidence or information were received in response to the 10-day notice.

In general, 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.)

One comment, alleging that the date of ownership appears to be in 2004, is relevant to when the claimants became the present owner of the property. The comment has 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 15, 2005, for processing under OAR 125, division 145. The claim identifies state statutes and rules implemented in the Polk County Exclusive Farm Use (EFU) Zone that restricts the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

Ballot Measure 37 provides for payment of compensation 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, Bruce and Rozella Wendt, acquired the subject property on January 26, 1965. (See Deed and Title Guarantee Report in department’s claim file.) A Title Guarantee Report, dated March 14, 2005, was attached to document the claimants’ current ownership of the subject property.¹

Conclusions

The claimants, Bruce and Rozella Wendt, are the “owners” of the subject 13-acre property as that term is defined in Section 11(C) of Ballot Measure 37 as of January 26, 1965.

2. The Laws that are the Basis for the Claim

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

¹ A Deed included with the original Title Report, but not shown on the chain of Title, shows that Bruce and Rozella Wendt transferred 3.49 acres to Adam Wendt in 1989. The claimants’ attorney stated that Adam Wendt is the claimants’ son. It is not clear whether this acreage was originally part of the subject property or a separate tax lot. In any case, this acreage is adjacent to tax lot 3000, and is now shown on Polk County assessor’s maps as tax lot 3001, and is not part of the property that is the subject of this claim.

A statutory Warranty Deed dated January 31, 2005, is also shown on the updated and corrected Title Report furnished by the claimants’ attorney via e-mail on August 15, 2005. Agency staff requested this information and additional material from the claimants’ attorney by a phone call on August 11, 2005. According to information from the claimants’ attorney, the January 2005, deed conveyed a 5-acre portion of tax lot 3000 adjacent to Wallace Road NW, that is now included in the City of Salem UGB from the Wendts to prospective developers. (See the department’s claim file.) The property conveyed by deed on January 31, 2005, also is not a part of the property that is the subject of this claim.

Findings of Fact

The claim materials state that state statutes in ORS 92, ORS 215, ORS 197, and ORS 227, and administrative rules in OAR 660 restrict the claimants' use of the property by placing a minimum lot size of 80-acres on the 13-acre parcel and by not allowing residential dwellings to be placed on it.²

The claim is based generally on Polk County's EFU zone, and applicable provisions of state law that require such zoning. The subject property is zoned EFU by Polk County, as required by Goal 3 in accord with OAR 660, division 33, and ORS 215 because the claimants' property is "Agricultural Land" as defined by Goal 3.³ Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current state land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660, division 33 as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80 acres and establish standards for allowing the existing or any proposed parcel(s) to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). Polk County implemented an 80-acre minimum lot size for its EFU zone (ORS 215.780(1)(a)) that was subsequently acknowledged by the LCDC. ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f).

OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. Subsequent amendments to comply with HB 3326, (Chapter 704, Oregon Laws 2001, and effective January 1, 2002,) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

Statewide Planning Goal 14 (Urbanization) generally requires that land outside urban growth boundaries be used for rural uses. Goal 14 became effective on January 25, 1975.

² ORS 92 relates to requirements for partitions and subdivision of real property and in general was enacted prior to 1965. ORS 197 addresses procedural requirements, including those regarding creation, enforcement, and review of land use regulations and land use applications. The claimant does not establish how either of these statutes restricts the use of his property in a manner that reduces its fair market value. On its face, ORS 197 in itself does not restrict the use of claimant's property. Even if ORS 92 could be construed to restrict the use of the property, it is exempt under Measure 37(E) because it was in effect when the claimants acquired the property. Because neither of these statutes provides a basis for relief, they are not discussed further in this report

³ The claimants' property is "Agricultural Land" and includes "High Value" farm soils because it contains NRCS (Natural Resources Conservation Service) Soils: Cove silty clay loam, Class IVw, Malabon silty clay loam, Class IIs, and Malabon silty clay loam, occasionally flooded, Class IIw.

The claimants acquired the subject property in 1965, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. Depending upon the local zoning in effect at the time, applicable provisions of ORS 215 may have applied to the property when the claimants acquired it.

Conclusions

Lot size and dwelling standards established Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, adopted since the claimants acquired the property in 1965, do not allow the division of the property into parcels less than 80 acres in size or allow the approval of dwellings as may have been possible in 1965. Land use laws adopted since 1965, restrict the use of the property from what could have been done when the property was acquired by the claimants in 1965.

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 laws described in Section V.(2) of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim states that the fair market value for the subject property has been reduced by \$1,220,000, as a result of land use laws enacted after the claimants acquired the subject property in 1965.

The claimants' attorney has alleged that the fair market value for the 13-acre parcel under the current EFU zoning is \$30,000. The attorney's letter states that the value of the 13-acre parcel partitioned into ten (10) approximately 1.25-acre parcels is approximately \$1,250,000. The letter states that the difference or loss in fair market value is therefore \$1,220,000. There is no certified appraisal accompanying the claim materials to substantiate the claimed property values.

Conclusions

As explained in Section V.(1) of this report, Bruce and Rozella Wendt are the current owners of the subject property as of January 26, 1965. Thus, under Ballot Measure 37, the Wendts are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this

report, laws adopted since the claimants acquired the property restrict division of the subject property and development of residential dwellings. The claim asserts the reduction in value to be \$1,220,000. However, without an appraisal or other substantiating 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 Polk County's EFU zone and the related provisions of state law that have restricted use of the property and reduced its fair market value, including Statewide Planning Goal 3 (Agricultural Lands) and Goal 14 (Urbanization), and applicable provisions of ORS 215 and OAR 660, division 33. None of these specified laws appears to be exempt under Section 3(E) of Ballot Measure 37 with the exception of provisions of ORS 215, enacted prior to the claimants' acquisition of the property in 1965, which may have applied to 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 farm land apply to the claimants' use of the property, and, with the exception of provisions of ORS 215 adopted prior to 1965, that may have applied to the property at that time, these laws are not exempt under Section 3(E) of Measure 37.

Other laws in effect when the claimants acquired the property are exempt under Section 3(E) of Measure 37, and also 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. 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 to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions in this report, laws enforced by the Commission or the department prohibit the division of the subject 13-acre property into ten (10) approximately 1.25-acre parcels or twelve (12) approximately 1-acre parcels and the development of residential dwellings on each parcel. The claim asserts these restrictions reduce the fair market value of the subject property by \$1,220,000. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, no certified appraisal or other substantiating documentation was submitted and it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, the department acknowledges that state land use laws have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow Bruce and Rozella Wendt to use the subject property for a use permitted at the time they acquired the property on January 26, 1965.

Conclusions

Based on the record, the department recommends that the claim be approved, subject to the following terms.

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to the Wendts' division of their approximately 13-acre property into ten approximately 1.25-acre parcels or twelve approximately 1-acre parcels and development of a residential dwelling on each resulting parcel: applicable provisions of Statewide Planning Goal 3, Goal 14, ORS 215.263, 215.780 and 215.284; and OAR 660, division 33. These land use regulations will not apply to the Wendts' use of their property only to the extent necessary to allow the claimants to a use permitted at the time they acquired the property on January 26, 1965.

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 January 26, 1965, including any applicable provisions of ORS 92 and 215.

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 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.