

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)
Nancy Rehmer, CLAIMANT)

FINAL ORDER
CLAIM NO. M 118331

Claimant: Nancy Rehmer (the Claimant)

Property: Tax Lots 800 and 900, T.8S, R.1W, Section 27, W.M., Marion County

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

Claimant 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 Nancy Rehmer's division and development of the 28-acre property: applicable provisions of Statewide Planning Goals 3 and 14, ORS 215 and OAR 660, division 33 enacted after April 29, 2003. These land use regulations will not apply to Nancy Rehmer's use of her property only to the extent necessary to allow her a use permitted at the time she acquired the property on April 29, 2003. The department acknowledges that the relief to which Nancy Rehmer is entitled under Measure 37, will not allow her to use the property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimant to use her property subject to the standards in effect on April 29, 2003. On that date, the property was subject to Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), and applicable provisions of ORS 215 and OAR 660, division 33 currently 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 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 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:

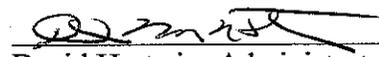
Lane Shetterly, Director



George Naughton, Deputy Director
DLCD

Dated this 7th day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



David Hartwig, Administrator
DAS, State Services Division

Dated this 7th 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 7, 2005

STATE CLAIM NUMBER: M118331

NAME OF CLAIMANT: Nancy Rehmer

MAILING ADDRESS: 41546 Kingston-Lyons Drive
Stayton, Oregon 97383

IDENTIFICATION OF PROPERTY: Township 8S, Range 1W, Section 27
Tax Lots 800 and 900
Marion County

OTHER INTEREST IN PROPERTY: Walter Joseph and Virginia Ann
Breitenstein Family Trust

DATE RECEIVED BY DAS: April 19, 2005

180-DAY DEADLINE: October 16, 2005

I. CLAIM

The claimant, Nancy Rehmer, seeks compensation in the amount of \$1,790,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 28-acre subject property into one, three-acre parcel, on which the existing house is located, and 14 approximately 1.7-acre parcels, and to develop each of the approximately 1.7-acre parcels with a single-family dwelling. The property is located at 13017 Triumph Road, in Marion County, Oregon. (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 Nancy Rehmer's division of the property for residential development: Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), and applicable provisions of ORS

215, and OAR 660, division 33 enacted after April 29, 2003. These laws will not apply to the claimant only to the extent necessary to allow Nancy Rehmer a use of the property permitted at the time she acquired it in 2003. The department acknowledges that the relief to which Nancy Rehmer is entitled under Measure 37 will not allow her to use the property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On May 6, 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, four written comments, evidence or information were received in response to the 10-day notice. One of the comments is relevant to when the claimant became the present owner of the property. The comment has been considered by the department in preparing this report.

The other 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.)

In addition, another comment letter was submitted to the department for this property prior to the filing of the claim with the state and a copy of "Memorandum in Support of Claim" dated August 3, 2005, submitted to Marion County, regarding the claim was also provided to the department (see copies 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 19, 2005, for processing under OAR 125, division 145. The claim states that “current zoning prevents all uses other than farming” and identifies the property’s current zoning, as the land use regulation that restricts the use of the property, and is 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 claimant, Nancy Rehmer, acquired the subject 28-acre property on April 29, 2003, as “First Alternative Trustee” or “successor trustee” of the Walter Joseph and Virginia Ann Breitenstein Family Trust, upon Walter Breitenstein’s death. Nancy Rehmer is the daughter of Walter and Virginia Breitenstein. Virginia Breitenstein passed away in 1993. A title report dated February 23, 2005, states that the last known deed for the property “runs to Walter Joseph and Virginia Ann Breitenstein Family Trust dated May 3, 1990.” Tax statements for 2004-05 from Marion County also note ownership in the name of the Trust with Nancy Rehmer listed as trustee.

The legal memorandum submitted with this claim, indicates that the claimant’s father (Walter Breitenstein) acquired the subject property from his parents on November 20, 1969 (tax lot 800) and March 9, 1970 (tax lot 900) respectively, and the land had been in his family for over 100 years. No deeds confirming the family’s original acquisition of the subject property were submitted with the claim.¹

¹ The hearings officer for Marion County confirmed the acquisition date for tax lot 800, but not for tax lot 900. For tax lot 900, Marion County only found a deed dated January 27, 1973, and an unrecorded land sales contract dated March 9, 1970 (Marion County Case No. M05-26, dated June 21, 2005). Both the legal memorandum and Marion County land sales contract note the creation of the aforementioned Trust on May 3, 1990, along with “correction deeds” regarding it dated July 23, 1998. The correction deeds were submitted with the claim.

Conclusions

The claimant, Nancy Rehmer, is an “owner” of the subject property, as that term is defined in Section 11(C) of Ballot Measure 37, as of April 29, 2003. Walter Breitenstein is a “family member” of the claimant as that term is defined in Section 1(A) of Ballot Measure 37. The claim establishes the family interest in the property since November 20, 1969.

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.

Findings of Fact

The claim identifies “current zoning restriction for farm use only” as the land use regulation that restricts the division of the property into smaller parcels for residential development. According to Marion County, the property is an Exclusive Farm Use (EFU) zone. Thus, the claim is based on Marion County’s EFU Zone and the applicable provisions of state law that require such zoning. The claimant’s property is zoned EFU, as required by Statewide Planning Goal 3 in accord with OAR 660, division 33 because the claimant’s property is “agricultural land” as defined by Goal 3.² Goal 3 became effective on January 25, 1975, and required agricultural land defined by the Goal to be zoned EFU pursuant to ORS 215. Land that is zoned EFU and that is “high-value” farmland under Goal 3, ORS 215.710 and OAR 660, division 33 is subject to restrictions based on certain provisions of ORS 215 and OAR 660, division 33.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, 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). 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 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.)

² The claimant’s property is “agricultural land” because it contains NRCS (Natural Resources Conservation Service) Class I-IV soils.

Statewide Planning Goal 14 would likely apply to the division of the claimant's property into parcels less than two acres in size. Goal 14 generally requires that land outside of urban growth boundaries (UGB) be used for rural uses and also became effective on January 25, 1975.

The claim establishes that claimant's family acquired the property on November 20, 1969, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. According to Marion County, the property was not zoned at that time.

Conclusions

Lot size and dwelling standards established by amendments to Statewide Planning Goal 3, amendments to ORS 215 and OAR 660, division 33 adopted since the claimant acquired the property in 1969, do not allow the division of the property into parcels less than 80 acres in size or allow the approval of dwellings as permitted in 1969.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

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 of the subject property has been reduced by \$1,790,000 as a result of land use laws enacted after it was acquired in 1969. The estimated reduction in value is based on a realtor's analysis dated March 14, 2005. The claim estimates that the current value of the property (28 acres with an existing house) is about \$425,000 and if divided into smaller parcels for residential development of one three-acre parcel (with existing house) and fourteen approximately 1.7-acre parcels (each for single-family dwellings), the value would be about \$2,215,000. Thus, the estimated reduction in value as a result of current land use regulations is about \$1,790,000 (\$2,215,000 - \$425,000).

Except for the current tax statements for the property, the claimant has not provided information regarding the value of the property based on what is allowed under current land use regulations as compared with the assumed value if divided as proposed. There is no appraisal to substantiate the claimed reduction in value as a result of state land use regulations.

Conclusions

As explained in Section V.(1) of this report, the current owner is Nancy Rehmer, whose family acquired the property on or before 1969. Under Ballot Measure 37, Nancy Rehmer is due compensation for land use regulations enacted since 1969 that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimant's family acquired the property in 1969 restrict division of the subject property for residential use. The claimant estimates the reduction in value due to the restrictions to be \$1,790,000.

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

4. Exemptions under Section 3 of Measure 37

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

Findings of Fact

The claim is based on Marion County's EFU zone and the related provisions of state law that allegedly have restricted use of the property and reduced its fair market value. These are Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33. All of these regulations were enacted after the claimant's family acquired the property in 1969. None of these laws is exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimant's family 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 farm land apply to the claimant's 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 claimant's family acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the property that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or

development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

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 set forth in this report, laws enforced by the Commission or the department restrict the division and development of the subject property. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$1,790,000. However, because the claim does not provide an appraisal or 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 Nancy Rehmer to use the subject property for a use permitted at the time she acquired the property on April 29, 2003.

When Nancy Rehmer acquired the property on April 29, 2003, the property was subject to Marion County's EFU zoning and the provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization) and applicable provisions of ORS 215 and OAR 660, division 33 currently in effect, as described in Section V.(2) of this report.

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 Nancy Rehmer's division and development of the 28-acre property: applicable provisions of Statewide Planning Goals 3 and 14, ORS 215 and OAR 660, division 33 enacted after April 29, 2003. These land use regulations will not apply to Nancy Rehmer's use of her property only to the extent necessary to allow her a use permitted at the time she acquired the property on April 29, 2003. The department acknowledges that the relief to which

Nancy Rehmer is entitled under Measure 37, will not allow her to use the property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to the claimant to use her property subject to the standards in effect on April 29, 2003. On that date, the property was subject to Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), and applicable provisions of ORS 215 and OAR 660, division 33 currently 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 claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

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

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

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 19, 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.