

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)
Glen P. Larsen, CLAIMANT)

FINAL ORDER
CLAIM NO. M 118332

Claimant: Glen P. Larsen (the Claimant)

Property: Tax Lot 400, T.9S, R.2W, Section 28, 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 Glen Larsen's establishment of a single family dwelling on the subject property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 92 and 215, and OAR 660, division 33, enacted after August 1988. These land use regulations will not apply to Glen Larsen's use of his property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property in August 1988.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property subject to the standards in effect in August 1988. At that time, the property was subject Marion County's EFU zone and to applicable provisions of Goal 3, ORS 92 and 215, and OAR 660, division 5, then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other

form of authorization or consent, the order will not authorize the use of the property unless the 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 him to obtain a decision under Measure 37, from Marion County or other jurisdiction 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 Oct, 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: M118332

NAME OF CLAIMANT: Glen P. Larsen

MAILING ADDRESS: 14 N 710 W
Blackfoot, Idaho 83321

PROPERTY IDENTIFICATION: Township 9S, Range 2W, Section 28
Tax Lot 400
Marion County

OTHER CONTACT INFORMATION: Mark H. Shipman, Attorney at law
Saalfeld Griggs, PC
250 Church Street, SE
Salem, Oregon 97301

OTHER INTEREST IN PROPERTY: LaFay Larsen
14 N 710 W
Blackfoot, Idaho 83321

DATE RECEIVED BY DAS: April 19, 2005

180-DAY DEADLINE: October 16, 2005

I. SUMMARY OF CLAIM

The claimant, Glen P. Larsen, seeks compensation in the amount of \$153,000 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 establish a single-family dwelling on the 0.92-acre property. The property is located on Marion Road SE, in Marion 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 Glen Larsen's development of a single-family residential dwelling on the property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33, enacted after August 1988. These laws will not apply to the claimant only to the extent necessary to allow Glen Larsen a use of the property permitted at the time he acquired it in August 1988. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 10, 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, no written comments, evidence or information were received in response to the 10-day notice.

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 criterion 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 criterion, 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 identifies numerous provisions in ORS 92, 197, 215, 227 and OAR 660 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

Claimant first acquired an ownership interest in the subject property by land sale contract on April 12, 1972. The previous owner conveyed legal title to the property to the claimant and his wife (LaFay Larsen) on May 3, 1973. Glen Larsen and his wife sold the property, by land sale contract, to Joyce Newkirk in 1979. In 1980, Joyce Newkirk entered into a land sale contract to sell the property to Kenneth and June Fowler. The Fowlers defaulted under that contract, and Joyce Newkirk reacquired the property through a sheriff’s deed in April 1988. Ms. Newkirk then transferred the property to Glen and LaFay Larsen in 1988, to avoid foreclosure under her land sale contract with them.¹ Glen and LaFay Larsen have owned the property since they reacquired it from Newkirk in 1988.

Marion County Assessor records show Glen Larsen and LaFay Larsen² as the current owners.

Conclusions

The claimant, Glen P. Larsen, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of August 1988.

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.

¹ Claimant attempted to divide the .92-parcel from a larger property in 1990 without the then-required county approval. This report does not address the legality of that attempted division or its effect.

² LaFay Larsen is not a claimant for purposes of this Measure 37 claim.

Findings of Fact

The claim identifies numerous provisions in ORS 92, 197, 215 and 227 and OAR 660 as restricting the use of the property but does not identify how these laws restrict the use of the subject property.³

The claim is based, generally, on Marion County's current Exclusive Farm Use (EFU) Zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned Exclusive Farm Use as required by Statewide Planning Goal 3, in accordance with OAR 660, division 33, and ORS 215 because the claimant's property is "Agricultural Land" as defined by Goal 3.⁴ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned exclusive farm use pursuant to ORS 215.

Current land use regulations, particularly ORS 215.283 (1983), 215.284 (1983), and OAR 660, division 33 (1993) as applied by Goal 3, establish standards for dwellings on the subject 0.92-acre parcel.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interpreted 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, 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.)

The claimant acquired the subject property in August 1988. At that time, the property was subject to applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 5 in effect at that time and Marion County's acknowledged EFU zone. At that time, the County's EFU zone permitted partitions to create farm or non-farm parcels if they met certain

³ ORS 92 establishes procedures for subdivisions and partitions. ORS 197 establishes procedures for comprehensive land use planning and ORS 227 establishes procedures for city planning and zoning. The claimant summarily cites these statutes, but does not assert how these statutes limit use of the property. None of these statutes, on their face, restrict the use of the subject property in a manner that reduces its fair market value. In addition, to the extent ORS 92 could be construed to restrict the use of the property, that statute, in general, was enacted prior to the claimant's acquisition of the property and, therefore, is exempt under Section 3(E) of Measure 37. Absent any evidence from the claimant as to how these statutes restrict the use of the property resulting in a reduction in its fair market value, these statutes are not addressed further in this report.

⁴ The claimant's property consists of Class III (Clackamas gravelly loam) and IV (Courtney gravelly silty clay loam) soils. (See Soil Survey of Marion County Area, Oregon, USDA Soil Conservation Service, September 1972, sheet #73 and pp. 86, 88-89.) Marion County has determined this property to be high-value farmland (See copy of June 2, 2005, memorandum from Marion County Planning Division to Marion County Hearings Officer in the department's claim file).

specified conditions.⁵ Contiguous parcels with the same ownership were considered single parcels,⁶ and no more than one dwelling per parcel was permitted.

Conclusions

The dwelling standards for farmland in OAR 660, division 33, were enacted after Glen Larsen acquired the subject property in August 1988 and do not allow a non-farm dwelling on the property, thereby restricting the use of the property relative to the uses allowed when Glen Larsen acquired the property in 1988. In August 1988, the property was subject to the requirements of the County's EFU zone, applicable provisions of Statewide Planning Goal 3, ORS 215.283 and ORS 215.284, and other applicable provisions of OAR 660, division 5, then in effect.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the use 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 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 \$153,000 as the reduction in the property's fair market value as a result of restrictions imposed after the claimant acquired the subject property.

Conclusions

As explained in Section V.(1) of this report Glen Larsen acquired the property in August 1988. Under Ballot Measure 37, Glen Larsen is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since 1988, restrict the claimant's ability to place a dwelling on the subject property for residential use. The claim asserts the reduction in fair market value due to the restriction to be \$153,000.

⁵ See Marion County Zoning Ordinance Section 136.070, in effect in 1988.

⁶ See Marion County Zoning Ordinance Section 136.120, in effect in 1988.

Without an appraisal or other specific 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 state land use regulations that restrict the use of the property relative to the uses allowed in 1988. Those provisions include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660 division 33, which Marion County has implemented through its EFU zone. To the extent that those laws were enacted after claimant acquired the property in August 1988, they are not exempt under Section 3(E) of the measure. Laws in effect when the claimant acquired the property, including applicable provisions of Goal 3, ORS 92 and 215, and OAR 660, division 5, adopted before August 1988, are exempt under Section 3(E) of the Measure, which exempts laws in effect when the claimant 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 the residential development of farm land in Goal 3, ORS 215, and OAR 660, division 33 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. Applicable provisions of Goal 3, ORS 92 and 215, and OAR 660, division 5, in effect when the claimant acquired the property in 1988 are exempt under Section 3(E) of the Measure and will continue to apply to the property.

Other laws in effect when the claimant acquired the property are also 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.

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 claimant has 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 claimant should be aware that the less information he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his 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 claimant's ability to develop the subject 0.92-acre property with a non-farm dwelling. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by \$153,000. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Ballot Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Glen Larsen to use the subject property for a use permitted at the time he acquired the property in August 1988.

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 Glen Larsen's establishment of a single family dwelling on the subject property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 92 and 215, and OAR 660, division 33, enacted after August 1988. These land use regulations will not apply to Glen Larsen's use of his property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property in August 1988.

2. The action by the State of Oregon provides the state's authorization to the claimant to use his property subject to the standards in effect in August 1988. At that time, the property was subject Marion County's EFU zone and to applicable provisions of Goal 3, ORS 92 and 215, and OAR 660, division 5, then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the 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 him to obtain a decision under Measure 37, from Marion County or other jurisdiction 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 23, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's 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.