

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. M118336
BALLOT MEASURE 37 (CHAPTER 1,)	
OREGON LAWS 2005) OF)	
Roger and Ann Skoe, CLAIMANTS)	

Claimants: Roger and Ann Skoe (the Claimants)

Property: Tax Lot 1700, T.4S, R.1E, Section 14, W.M., Clackamas 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 Roger and Ann Skoe's construction of a single-family dwelling and accessory structures on the subject property: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, enacted after October 10, 1975. These land use regulations will not apply to Roger and Ann Skoe's use of their property only to the extent necessary to allow them a use permitted at the time they acquired the property on October 10, 1975.
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 October 10, 1975. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3 and ORS 215 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 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.

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 12th day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



David Hartwig, Administrator
DAS, State Services Division

Dated this 12th 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 12, 2005

STATE CLAIM NUMBER: M118336

NAMES OF CLAIMANTS: Roger and Ann Skoe

MAILING ADDRESS: 1853 N Teakwood Circle
Canby Oregon 97013

PROPERTY IDENTIFICATION: Township 4S, Range 1E, Section 14
Tax Lot 1700
Clackamas County

OTHER CONTACT INFORMATION: Jill Gelineau and Joseph Schaefer
Schwabe, Williamson & Wyatt, PC
1211 SW Fifth Avenue, Suite 1600
Portland, Oregon 97204

DATE RECEIVED BY DAS: April 20, 2005

180-DAY DEADLINE: October 17, 2005

I. SUMMARY OF CLAIM

The claimants, Roger and Ann Skoe, seek compensation in the amount of \$200,000 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 claimants desire compensation or the right to construct a single-family dwelling and accessory structures on the subject 20.73-acre property, located near Canby, 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 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 Roger and Ann Skoe's construction of a single-family dwelling

and accessory structures on the subject property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33, enacted after October 10, 1975. These laws will not apply to the claimants only to the extent necessary to allow them a use of the property permitted at the time they acquired it on October 10, 1975. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 11, 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 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 20, 2005, for processing under OAR 125, division 145. The claim identifies OAR 660-033-135(7) as the law 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 regulations adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

Ballot Measure 37 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in the Measure. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimants, Roger and Ann Skoe, acquired the subject property on October 10, 1975, as reflected by a Warranty Deed included with the claim, and as shown on a Title Report dated March 10, 2005. The Title Report indicates that Roger and Ann Skoe are the current owners of the subject property.

Conclusions

The claimants, Roger and Ann Skoe, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of October 10, 1975.

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 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 claimant or a family member acquired the property.

Findings of Fact

The claim states that the division 33 income standards for high-value farmland, specifically OAR 660-033-0135(7), prevent the construction of a single-family dwelling and accessory buildings on the subject property.

The claim is based on Clackamas County’s Exclusive Farm Use (EFU) Zone, which requires that a property predominantly composed of high-value farmland earn at least \$80,000 in gross farm income in order to qualify for the approval of a single-family farm dwelling. This provision is required by Statewide Goal 3 (Agricultural Lands) and the applicable provisions of OAR 660-033-0135(7). The claimants’ property is zoned EFU 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 3.¹

¹ The claimants’ property is “Agricultural Land” and high value soil because it is predominantly made up of Natural Resources Conservation Service (NRCS) Aloha silt loam, 0 – 3% slopes, Class IIW (Soil Survey of Clackamas County, Panel 32, Issued November 1985).

Current land use regulations, particularly ORS 215.284, and OAR 660, division 33, as applied by Goal 3 establish standards for the approval of farm and non-farm dwellings.

OAR 660-033-0135(7), applicable to farm dwellings on high-value farmland, became effective on March 1, 1994, and implements the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0135(7) requires that for the approval of a dwelling “customarily provided in conjunction with farm use” on high-value farmland, the owner demonstrate that the farm operation produced at least \$80,000 in gross annual income from the sale of farm products in the last two or three of the prior five years.

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.)

The claimants acquired the subject property after the adoption of the Statewide Planning Goals on January 25, 1975, but before Clackamas County’s comprehensive plan and land use ordinances were acknowledged by the Commission to be in compliance with the Goals. On October 10, 1975, the property was zoned by Clackamas County as General Use (GU). However, because that zone was not acknowledged under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251, the Statewide Planning Goals, specifically Goal 3, applied directly to the subject property at that time.²

Under the Goal 3 standards in effect on October 10, 1975, farm dwellings were allowed if determined to be “customarily provided in conjunction with farm use” under ORS 215.283(1)(e) (1975 edition). Before a farm dwelling could be established on Agricultural Land, the farm use to which the dwelling relates must “be existing.”³ Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use. ORS 215.283(3) (1975 edition). A non-farm dwelling was authorized only where the dwelling was compatible

² Statewide Planning Goal 3 became effective on January 25, 1975 and was applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the Clackamas County's EFU-20 and GAD (General Agriculture District) zones on December 31, 1981. See *Summyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), and *Alexanderson v. Polk County*, 289 Or 427, *rev den* 290 Or 137 (1980)). After the County's plan and land use regulations were acknowledged by LCDC, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions (*Byrd v. Stringer*, 295 Or 311 (1983)).

³ *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984), *affirmed without opinion* 70 Or App 179 (1984) and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33 (November 23, 1988).

with farm uses, consistent with the intent of ORS 215.243, and did not interfere seriously with accepted farming practices on adjacent lands, did not materially alter the stability of the land use pattern for the area, and was situated on land generally unsuitable for production of farm crops and livestock ORS 215.213(3) (1975 edition).⁴

No information has been provided to establish that the claimants' request for a single-family dwelling and accessory structures complies with state standards for farm or non-farm dwellings under Goal 3 and ORS 215 (1975 edition) in effect when the claimants acquired the property.

Conclusions

Dwelling standards established by Statewide Planning Goal 3, ORS 215 and OAR 660, division 33, adopted since the claimants acquired the property in 1975, do not allow the approval of a single-family dwelling and accessory structures as may have been possible in 1975. Land use laws adopted since 1975, restrict the use of the property from what could have been done when the property was acquired by the claimants in 1975. However, it is unclear whether the claimants' requested level of development complies with the standards in effect when they acquired the property on October 10, 1975.

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 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 a letter from the claimants' attorney that states the loss of fair market value caused by OAR 660-033-0135(7) is \$200,000. This restriction is construed to reduce the value of the property by requiring Roger and Ann Skoe to invest in farm development and management necessary to meet the rule's income standard. According to the letter, the value is reduced by \$200,000 because this is the cost of farm equipment and related expenses necessary to generate the \$80,000 gross annual farm income required for construction of a farm dwelling.

⁴ When determining whether land is "generally unsuitable for the production of farm crops and livestock" under ORS 215.213(3), the entire parcel or tract must be evaluated rather than a portion thereof. *Smith v. Clackamas County*, 313 Or 519 (1992).

Conclusions

As explained in Section V.(1) of this report, the current owners are Roger and Ann Skoe, who acquired the property on October 10, 1975. Under Ballot Measure 37, Roger and Ann Skoe are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimants acquired the property restrict construction of a single-family dwelling on the subject property. The claimants estimate the reduction in value due to the restrictions to be \$200,000.

Without an appraisal or other documentation, and without verification that the requested level of development was permitted when the claimants acquired the property in 1975, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

4. Exemptions under Section 3 of Measure 37

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the property relative to what would have been allowed in 1975 when the property was acquired by Roger and Ann Skoe. These provisions include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its EFU zone. To the extent they were enacted after the claimants acquired the property on October 10, 1975, these laws are not exempt under Section 3(E). Those provisions of Statewide Planning Goal 3 and ORS 215 in effect on October 10, 1975 are exempt under Section 3(E) of the Measure, 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 farm land apply to the claimants' use of the property, and these laws are not exempt under Section 3(E) of Measure 37 to the extent they were enacted after the claimants acquired the property. Provisions of Goal 3 and ORS 215 in effect when the claimants acquired the property in 1975 are exempt under Section 3(E) of the Measure and will continue to apply to the property.

Other laws in effect when the claimants acquired the property are also 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 use that the claimants have identified. Similarly, this report only addresses the exemptions provided for under Section (3) of Measure 37 that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the property.

VI. FORM OF RELIEF

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimants' ability to construct a single-family dwelling and accessory structures on the subject property. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$200,000. However, because the claim does not provide an appraisal or other specific documentation of how the specified restrictions reduce the fair market value of the property, and without verification that the requested level of development was permitted when the claimants acquired the property on October 10, 1975, 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 Roger and Ann Skoe to use the subject property for a use permitted at the time they acquired the property on October 10, 1975.

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 Roger and Ann Skoe's construction of a single-family dwelling and accessory structures on the subject property: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, enacted after October 10, 1975. These land use regulations will not apply to Roger and Ann Skoe's use of their property only to the extent necessary to allow them a use permitted at the time they acquired the property on October 10, 1975.
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 October 10, 1975. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3 and ORS 215 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 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 21, 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.