

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. M 118346
BALLOT MEASURE 37 (CHAPTER 1,)
OREGON LAWS 2005) OF)
Robert B. Allsup, CLAIMANT)
Doris E. Allsup, CLAIMANT)

Claimant(s): Robert B. Allsup and Doris E. Allsup (the Claimants)

Property: Tax Lots 507 and 600, T.40S, R.13W, Section 33, W.M., Curry 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 paying just compensation under Measure 37, the State of Oregon will not apply the following laws to Robert and Doris Allsup's division and development of the property: the applicable provisions of Statewide Planning Goal 4 (Forest Lands), Goal 14 (Urbanization), ORS 215, and OAR 660, division 6, enacted after May 13, 1974. These land use regulations will not apply to Robert and Doris Allsup's use of their property only to the extent necessary to them to carry out a use permitted at the time they each acquired the property on May 13, 1974.
2. The relief granted by this order does not authorize Mr. and Mrs. Allsup to use the Property for a use that was not permitted when they acquired their interest in the Property. The use of Property permitted in 1974 was governed by state laws that include, but are not limited to: the interim planning goals set forth in ORS 215 (1973 edition.).
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, this order does 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 215.412 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 this order remains 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 DLCD; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under section (3) of Measure 37.

5. Without limiting the generality of the foregoing terms, in order for the Claimants to use the Property, it may be necessary for the Claimants 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:

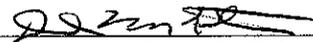
Lane Shetterly, Director



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: M118346

NAMES OF CLAIMANTS: Robert B. Allsup
Doris E. Allsup

MAILING ADDRESS: Post Office Box 2053
Harbor, Oregon 97415

IDENTIFICATION OF PROPERTY: Township 40S, Range 13W, Section 33
Tax Lots 507 and 600
Curry County

DATE RECEIVED BY DAS: April 22, 2005

180-DAY DEADLINE: October 19, 2005

I. CLAIM

The claimants, Robert and Doris Allsup, seek compensation in the amount of \$3,000,000 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 divide the 53.72-acre property into approximately one-acre parcels and develop a residential dwelling on each parcel. The subject property is located at Township 40S, Range 13W, Section 33 in Curry 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 Robert and Doris Allsup's division of the property for residential use: Statewide Planning Goal 4 (Forest Lands), Goal 14 (Urbanization), ORS 215.705 to 215.755, and 215.780, and applicable provisions of OAR 660, division 6, enacted after May 13, 1974. These laws will not apply to the claimants only to the extent necessary to allow Robert and Doris Allsup a use of the property permitted at the time they acquired it on May 13, 1974. (See the complete recommendation in Section VI. of the report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 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, 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 22, 2005, for processing under OAR 125, division 145. The claim identifies Curry County's Forest Grazing (FG) zone as the law that restrict the use of the property and are the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The claim has been submitted within two years of December 2, 2004; the effective date of Measure 37, based on land use regulations adopted prior to December 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, Robert B. Allsup and Doris E. Allsup, acquired the property on May 13, 1974, as supported by the Warranty Deed provided with the claim. A copy of a title report dated March 23, 2005, indicates that Robert and Doris Allsup are current owners of the subject property.

Conclusions

The claimants, Robert B. Allsup and Doris E. Allsup are “owners” of the subject property as that term is defined by Section (11)(C) of Ballot Measure 37, as of May 13, 1974.

2. The Laws That Are the Basis for the Claim

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

Findings of Fact

The claim asserts that the “Property Grazing zoning does not allow any development. Property was zoned R/A when purchased, which allowed minimum lot size of 1 acre.” The claimants state that their “intention is to subdivide our property and based on the acreage of nearly 54 acres and using the previous zoning of one acre minimum lots, we could conceivably have 40 lots.”

The Curry County’s FG zone, a mixed agricultural and forest land zone, adopted to comply with Statewide Goal 4 (Forest Lands) and the implementing provisions of OAR 660-006-0050 (effective February 5, 1990,) and subsequently amended on March 1, 1994, to comply with the provisions of HB 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Statewide Planning Goals 3 and 4 are allowed, except that for dwellings and either the Goal 3 or Goal 4 standards are applicable based on the predominant use of the tract on January 1, 1993. No information was provided in the claim showing the predominant use of the subject property on January 1, 1993. Depending on the predominate use of the property on January 1, 1993, the property is subject to either the requirements for dwellings under exclusive farm use zoning required by Goal 3 and OAR 660, division 33 or the forest zone provisions required Goal 4 and OAR 660, division 6. This includes the land division and dwelling standards asserted by the claimants as restricting the use of the subject property. However, no analysis of whether either of the tax lots can be further divided or approved for dwellings under the applicable farm or forest provisions has been provided.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones, which implement the 80-acre minimum lot size specified in ORS 215.780. Under OAR 660-006-0055, the claimants' property cannot be divided into parcels smaller than 80 acres as may have been possible when the claimants acquired the property in 1974.

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

The Robert and Doris Allsup acquired the property after adoption of SB 100 (Chapter 80, Oregon Laws 1973, effective October 5, 1973), but before the adoption of the statewide planning goals effective January 25, 1975. As such, ORS 197.175(1) and 197.280 (1973 edition) required, in addition to any local plan or zoning provisions, the application of Interim Land Use Goals set forth in ORS 215.515 (1973 edition) to the exercise of planning and zoning responsibilities prior to the effective date of the Statewide Planning Goals (*see Peterson v. Klamath Falls*, 279 Or 249 (1977)).¹ In addition, ORS 215.263 contains standards for the creation of new parcels for farm uses, non-farm uses and dwellings allowed in an Exclusive Farm Use (EFU) zone; and became effective on October 5, 1973. ORS 215 has since been amended significantly. No information has been provided showing that the one-acre development cited by the claimants complies with the interim planning goals set forth in ORS 215 (1973 edition) in effect at the time the claimants first acquired the property in 1974.

¹ The "interim" land use goals are set forth in ORS 215.515(a) to (j) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state," and (j) "To ensure that development of properties within the state is commensurate with the character and the physical limitations of the land." (ORS 215.515, 1973 edition).

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 4 (Forest Lands) and provisions applicable to land zoned for mixed agricultural and forest use under Curry County's FG zone as required by OAR 660-006-0050 and -0055 relating to land divisions and dwellings adopted since the claimants acquired the property in 1974, restrict the use of the property relative to uses allowed when the claimants acquired the property in 1974. In 1974, the property was subject to the interim planning goals and other applicable provision of ORS 215 (1973 edition). It is not clear whether or to what extent the development requested by the claimants would have been permitted in 1974.

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.

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 \$3,000,000 as a result of land use laws enacted after it was acquired by the Robert and Doris Allsup in 1974. That estimate is based on claimants' assessment of the difference in value between the property, as subject to current land use regulations, and its value if divided and developed in the manner set forth in the claim. However, there is no appraisal or other substantiating documentation to substantiate the claimed values either with or without state land use regulations.

Conclusions

As explained in Section V.(1) of this report, the current owners are Robert and Doris Allsup, who acquired the property on May 13, 1974. Under Ballot Measure 37, Robert and Doris Allsup 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 1974, restrict the claimants' ability to divide the subject property. The claim estimates the reduction in fair market value due to restrictions to be \$3,000,000.

Without an appraisal or other documentation, and without evidence regarding whether or to what extent the claimants' requested development would have been permitted when they acquired the property in 1974, 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 Curry County's FG zone and the related provisions of state law that have restricted the use of the property relative to what would have been allowed in 1974, when the claimants acquired the property. Those provisions include Statewide Planning Goal 4 (Forest Lands), OAR 660, division 6, and applicable provisions of ORS 215. With the exception of provisions of ORS 215, in effect on May 13, 1974, none of these laws appear to be exempt under Section 3(E) of Ballot Measure 37. Provisions of what is now ORS 215 adopted before May 13, 1974, are exempt under Section 3(E) of the Measure.

The department notes that ORS 215.730 and OAR 660, division 6 include standards for siting dwellings in forest zones. Those provisions include fire protection standards for dwellings and for surrounding forest lands. Section 3(B) of Measure 37 specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes...." To the extent they may be applicable under OAR 660-006-0050, the department finds that siting standards for dwellings in forest zones under ORS 215.730 and in Goal 4 and its implementing rules, OAR 660, division 6, are exempt under Section (3) of Measure 37.

Conclusions

It appears that the general statutory, goal and rule restrictions on the division, residential development and use of agricultural land apply to the owners' anticipated use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37. Certain provisions of ORS 215, in effect in 1974, when the claimants acquired the property are exempt under Section 3(E) of the Measure and will continue to apply to the property.

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. In addition, the siting standards for dwellings in forest zones under ORS 215.730 and in Goal 4 and its implementing rules, OAR 660, division 6, are exempt under Section (3)(B) of Measure 37. 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 those laws may be exempt under Sections 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 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 divide the subject into approximately one-acre parcels and their development of a residential dwelling on each of those parcels. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$3,000,000. 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, and because it is unclear whether or to what extent the claimant's requested development would have been permitted in 1974, 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 Robert and Doris Allsup to use the subject property for a use permitted at the time they acquired the property on May 13, 1974.

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 Robert and Doris Allsup's division and development of the property: the applicable provisions of Statewide Planning Goal 4 (Forest Lands), Goal 14 (Urbanization), ORS 215, and OAR 660, division 6, enacted after May 13, 1974. These land use regulations will not apply to Robert and Doris Allsup's use of their property only to the extent necessary to them to carry out a use permitted at the time they each acquired the property on May 13, 1974.
2. The action by the State of Oregon provides the state's authorization to Robert and Doris Allsup to use the property subject to the standards in effect on May 13, 1974. On that date, the property was subject to the interim planning goals set forth in ORS 215 (1973 edition.).
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 28, 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.