

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)
Paul Sherier, Herb and Beverly Chamberlin, CLAIMANTS)

FINAL ORDER
CLAIM NO. M 118347

Claimants: Paul Sherier, Herb and Beverly Chamberlin

Property: Tax Lot 1200, T.5S, R.3E, Section 7, 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:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Paul Sherier and Herb and Beverly Chamberlins' proposed division of the 12.21-acre property into 12 parcels or the development of a residential dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), Goal 14 (Urbanization), ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6. Those land use regulations will not apply to the claimants' use of their property only to the extent necessary to allow them a use permitted at the time they acquired the property on January 1, 1971.
2. The action by the State of Oregon provides the state's authorization to Paul Sherier and Herb and Beverly Chamberlin to use the property subject to the laws in effect when they acquired the property on January 1, 1971. The claimants' use of the property will also be subject to ORS 215.730 and those provisions of Goal 4 and its implementing rules (OAR 660, division 6) related to siting standards for dwellings for the protection of public health and safety and to any other laws that are exempt under Subsection 3(E) of Measure 37.

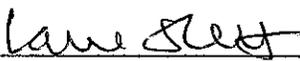
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first 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 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 Deputy 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.

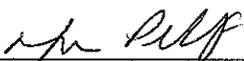
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 18th day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 18th 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."

FOR INFORMATION ONLY

The Marion County Circuit Court has issued an opinion declaring that 2004 Oregon Ballot Measure 37 (2005 Or Laws chapter 1) is invalid. As of the date of this order, the court has not entered a judgment that gives legal effect to the court's opinion. Once a judgment is entered by the court, any rights granted by this order may be void or voidable.

**BALLOT MEASURE 37 (CHAPTER 1, OREGON LAWS 2005)
CLAIM FOR COMPENSATION**

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation**

October 18, 2005

STATE CLAIM NUMBER: M118347

NAMES OF CLAIMANTS: Paul Sherier
Herb and Beverly Chamberlin

MAILING ADDRESS: Paul Sherier
2415 NE 88th Avenue
Portland, Oregon 97228

Herb and Beverly Chamberlin
21916 SE Ash
Gresham, Oregon 97030

OTHER INTEREST IN PROPERTY: The Sherier Family Trust
2415 NE 88th Avenue
Portland, Oregon 97228

PROPERTY IDENTIFICATION: Township 5S, Range 3E, Section 7
Tax Lot 1200
Clackamas County

DATE RECEIVED BY DAS: April 25, 2005

180-DAY DEADLINE: October 22, 2005

I. SUMMARY OF CLAIM

The claimants, Paul Sherier and Herb and Beverly Chamberlin, seek compensation in the amount of \$1,100,000 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 12.21-acre property into 12 parcels, and to develop a residential dwelling on each parcel. The property is located 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 Paul Sherier and Herb and Beverly Chamberlin's division of the property into 12 parcels and development of a residential dwelling on each parcel: applicable provisions of Statewide Planning Goals 4 (Forest Lands) and 14 (Urbanization), ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6. Those laws will not apply to the claimants only to the extent necessary to allow the claimants a use of the property permitted at the time they acquired it in 1971. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 20, 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, three written comments, evidence or information were received in response to the 10-day notice.

One comment is relevant to whether the restriction of the claimants' use of the property reduces the fair market value of the property. This 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.)

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 25, 2005, for processing under OAR 125, division 145. The claimants identify Clackamas County's designation of the property as "Timberland" as a 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, Paul Sherier and Herb and Beverly Chamberlin, acquired the subject property on January 1, 1971, as reflected by a Warranty Deed included with the claim. Paul Sherier transferred his interest in the property to the Sherier Family Trust on January 28, 1997, a revocable trust established by Paul Sherier. Paul Sherier's transfer of his interest in the property to a revocable living trust does not constitute a change of ownership for the purpose of a Measure 37 claim. A copy of the property tax statement indicates that Paul Sherier and Herb and Beverly Chamberlin are current owners of the subject property.

Conclusions

The claimants, Paul Sherier and Herb and Beverly Chamberlin, are "owners" of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of January 1, 1971.

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, "We are requesting removal of regulations prohibiting breaking this property into twelve lots or compensation." The subject property is currently zoned County Timber (TBR), which precludes division of subject property to the extent that the claimants desire. Clackamas County's TBR zone was adopted in 1994, to comply with the Statewide Planning Goal 4 (Forest Lands) and OAR 660, division 6.

Statewide Planning Goal 4, (Forest Lands) (OAR 660-015-0000(4)), and laws applicable to land zoned for forest use under ORS 215, including ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6 restrict the division and residential development of the subject property. Goal 4 became effective on January 25, 1975, and required forest land, as defined by the goal, to be zoned for forest use. (See statutory and rule history under OAR 660-015-0000(4).) The forest land administrative rules (OAR 660, division 6) became effective September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes. (See citations to rule history under OAR 660-015-0000(4)).

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and -0027 establish an 80-acre minimum lot size for the creation of a new parcel in a forest zone, and also establish the standards for dwellings in forest zones under Statewide Planning Goal 4.

Statewide Planning Goal 14 would also likely 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 and also became effective on January 25, 1975.

No county zoning applied to the property at the time the claimants acquired it in 1971. Clackamas County applied the Transitional Timber District (TT-20) to the property in 1979, and then applied the TBR zone in 1994.

Conclusions

The minimum lot size and dwelling standards established by Statewide Planning Goal 4, OAR 660-006-0026 and -0027, and provisions of ORS 215 were all adopted after the claimants acquired the property in 1971, and do not allow the division of the property into parcels of less than 80 acres or for the residential development proposed by the claimants.

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 an informal estimate of \$1,100,000 as the reduction in the property’s fair market value as a result of restrictions imposed after they acquired the property. This estimate is based on the claimants’ assessment of comparable properties in the area.

Conclusions

As explained in Section V.(1) of this report, the claimants are current owners of the subject property and acquired the subject property on January 1, 1971. Under Ballot Measure 37, the claimants are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enacted or 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 1971, when the claimants acquired the property. These provisions include Statewide Planning Goals 4 (Forest Lands) and 14 (Urbanization), and relevant provisions of ORS 215 and OAR 660, division 6. Those laws were adopted after 1971, when the claimants acquired the property. Accordingly, none of those laws is exempt under Section (3)(E) of Measure 37, which exempts land use regulations enacted before the claimants acquired the property.

The department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. These 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...” The department finds that siting standards for dwellings in forest zones in ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under Section 3(B) of Measure 37.

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 Forest Land apply to the claimants’ use of the property, and these laws generally are not exempt under Section 3(E) of Measure 37. Siting standards required under ORS 215.730 are exempt under Section 3(B) of the Measure.

The laws in effect when the claimants acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants’ use of the property. The restrictions in ORS 215.730 and provisions of OAR 660, division 6, that establish fire protection standards for dwellings in forest zones are also exempt under Section 3(B) of the Measure and will continue to apply to the subject property. There may be other laws that continue to apply to the claimants’ use of the property that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the 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. 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 division of the subject property into 12 parcels for residential development. The claim asserts that laws enforced by the Commission or department reduce the fair market value of the subject property by \$1,100,000. However, because the claim does not provide an appraisal or other documentation to establish 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 the claimants to use the subject property for a use permitted at the time they acquired the property on January 1, 1971.

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 Paul Sherier and Herb and Beverly Chamberlins' proposed division of the 12.21-acre property into 12 parcels or the development of a residential dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), Goal 14 (Urbanization), ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6. Those land use regulations will not apply to the claimants' use of their property only to the extent necessary to allow them a use permitted at the time they acquired the property on January 1, 1971.
2. The action by the State of Oregon provides the state's authorization to Paul Sherier and Herb and Beverly Chamberlin to use the property subject to the laws in effect when they acquired the property on January 1, 1971. The claimants' use of the property will also be subject to ORS 215.730 and those provisions of Goal 4 and its implementing rules (OAR 660, division 6) related to siting standards for dwellings for the protection of public health and safety and to any other laws that are exempt under Subsection 3(E) of Measure 37.
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 27, 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.