

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 118348  
BALLOT MEASURE 37 (CHAPTER 1, )  
OREGON LAWS 2005) OF )  
James G. and Marjorie L. Barham, CLAIMANTS )

Claimants: James G. and Marjorie L. Barham (the Claimants)

Property: Tax Lot 1500, T.3S, R.3E, Section 31, W.M., Clackamas County

Claim: The demand for compensation and any supporting information received from the Claimant 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 James and Marjorie Barham's division of the 13.3-acre property into two parcels; one four-acre parcel and one 9.3 acre parcel: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to James and Marjorie Barham's use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on June 30, 1971.
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 June 30, 1971.
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.

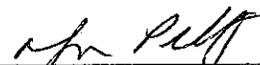
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under Measure 37, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under Measure 37, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:

  
\_\_\_\_\_  
Lane Shetterly, Director  
DLCD

Dated this 8<sup>th</sup> day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
\_\_\_\_\_  
Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 8<sup>th</sup> 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:** M118348

**NAMES OF CLAIMANTS:** James G. and Marjorie L. Barham

**MAILING ADDRESS:** 23922 South Schuebel School Road  
Beavercreek, Oregon 97123

**PROPERTY IDENTIFICATION:** Township 3S, Range 3E, Section 31  
Tax Lot 1500  
Clackamas County

**OTHER CONTACT INFORMATION:** Andrew H. Stamp  
K-M Professional Offices, Suite 9  
4248 Galewood Street.  
Lake Oswego, Oregon 97035

**OTHER INTEREST IN PROPERTY:** Darin Kraft  
26526 Sparky Lane  
Estacada, Oregon 97023

**DATE RECEIVED BY DAS:** April 25, 2005

**180-DAY DEADLINE:** October 22, 2005

**I. SUMMARY OF CLAIM**

The claimants, James and Marjorie Barham, seek compensation in the amount of \$225,000 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 their 13.3-acre property into two parcels, one four-acre parcel and one 9.3 acre parcel.<sup>1</sup> The property is located at 23922 South Schuebel School Road, in the Beavercreek area, of Clackamas County. (See claim.)

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<sup>1</sup> Currently there are two dwelling units on the subject property. The second dwelling was approved as part of a farm management plan approved by Clackamas County in 1982. The claimant is not proposing any new residential development.

## **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 James and Marjorie Barham's division of the property for residential use: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33. 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 in 1971. (See the complete recommendation in Section VI. of this report.)

## **III. COMMENTS ON THE CLAIM**

### **Comments Received**

On May 12, 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 25, 2005, for processing under OAR 125, division 145. The claim identifies Statewide Planning Goals 2, 3, 14 and OAR 660-015-000(3), as laws 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 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, James and Marjorie Barham, acquired the subject property by land sale contract on June 30, 1971. A Warranty Deed, dated May 17, 1979, included in claim file, verifies fulfillment of the 1971 land sale contract. A copy of a title insurance report prepared on April 19, 2005, confirms that James and Marjorie Barham are current owners of the subject property

### **Conclusions**

The claimants, James and Marjorie Barham, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of June 30, 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 claimant’s use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

### **Findings of Fact**

The claimants’ property is currently developed with two residential dwellings. The claimants desire to divide their property into two parcels, with one existing dwelling on each parcel. The claim includes a list of state goals, statutes and regulations that are “sought to be removed from the subject property” to allow the desired division. The list includes Statewide Planning Goals 2 (Exception Standards), 3 (Agricultural Lands) and 14 (Urbanization), ORS 92.046(5), several provisions of ORS 215, and OAR 660, divisions 4, 12, and 33.<sup>2</sup>

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<sup>2</sup> With the exception of the laws discussed in this report, on their face, the laws in the claim do not restrict the use of the subject property in a manner that reduces the fair market value of the property for purposes of Measure 37. Absent an explanation by the claimants as to how any of these listed laws restrict the use of the subject property, they are not addressed further in this report.

The claim is based, generally, on Clackamas County's current Exclusive Farm Use-80 (EFU-80) zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Statewide Planning Goal 3, in accord with OAR 660, division 33, and ORS 215 because the claimants' property is "Agricultural Land" as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, and 215.780 and OAR 660, division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels of less than 80 acres.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

The claimants acquired the subject property on June 30, 1971, prior to the adoption of the statewide planning goals and their implementing statutes and rules. Clackamas County first applied a zoning district of Rural Area Single-Family (RA-1) in November, 1973; the property was not zoned at the time the claimants acquired it on June 30, 1971.

### **Conclusions**

The zoning requirements and minimum lot size standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted after James and Marjorie Barham acquired ownership of the subject property in June 30, 1971, and do not allow the division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimants in 1971.

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 \$225,000 as the reduction in the property's fair market value as a result of current regulations. This estimate is based on a comparative market analysis prepared by a local property management and real estate firm.

### **Conclusions**

As explained in Section V.(1) of this report, the current owners are James and Marjorie Barham, who acquired the property on June 30, 1971. Under Ballot Measure 37, James and Marjorie Barham 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 division of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$225,000.

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 land use regulations that restrict the use of the property relative to what would have been allowed in 1971, when the property was acquired by James and Marjorie Barham. These provisions include applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33, which Clackamas County has implemented through its EFU-80 zone. None of these laws is exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimants acquired the property.

### **Conclusions**

Without a more specific proposal, 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 division and residential use of farm land apply to the claimants' use of the property, and for the most part these laws are not exempt under Section 3(E) of Measure 37.

Laws in effect when the 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. 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 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 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 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 two parcels. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$225,000. However, because the claim does not provide an appraisal or other documentation establishing 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 James and Marjorie Barham to use the subject property for a use permitted at the time they acquired the property on June 30, 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 James and Marjorie Barham's division of the 13.3-acre property into two parcels; one four-acre parcel and one 9.3 acre parcel: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to James and Marjorie Barham's use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on June 30, 1971.
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 June 30, 1971.
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 29, 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.