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 H.M. and Willa Mae O'Rourke, CLAIMANTS	)))))	FINAL ORDER CLAIM NO. M 118349

Claimants: H.M. and Willa Mae O'Rourke (the Claimant)

Property: Tax Lot 1100 and 1400, T.2S, R.45E, Section 29, Wallowa County

Claim: The demand for compensation and any supporting information received from the Claimant by the State of Oregon (the Claim).

Claimant submitted the Claim to the State of Oregon under Ballot Measure 37 (2004) (Oregon Laws 2005, Chapter 1) (hereafter, Measure 37). Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to H.M. and Willa Mae O'Rourke's division of the subject property into 33 parcels or to the development of a dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33. These land use regulations will not apply to H.M. and Willa Mae O'Rourke's' use of the property only to the extent necessary to allow the claimants a use permitted at the time they acquired tax lot 1400 on August 16, 1957, and tax lot 1100 on March 24, 1969.

2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lot 1400 subject to the standards in effect on August 16, 1957, and to use tax lot 1100 subject to the standards in effect on March 24, 1969.

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 properties, 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 properties. 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:	M118349
NAMES OF CLAIMANTS:	H. M. and Willa Mae O'Rourke
MAILING ADDRESS:	63977 Imnaha Highway Joseph, Oregon 97846
OTHER CONTACT INFORMATION:	Agent: D. Rahn Hostetter Post Office Box 400 Enterprise, Oregon 97828
PROPERTY IDENTIFICATIION:	Township 2S, Range 45E, Section 29 Tax Lots 1100 and 1400 Wallowa County
DATE RECEIVED BY DAS:	April 22, 2005
180-DAY DEADLINE:	October 19, 2005

I. CLAIM

The claimants, H.M. and Willa Mae O'Rourke, seek compensation in the amount of $1,980,000 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 the right to divide the 68.91-acre property into 33 parcels, and to develop a residential dwelling on each parcel. The property located at 63977 Imnaha Highway, near the City of Joseph in Wallowa 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 H.M. and Willa Mae O'Rourke's division of the subject property into 33 parcels or to the development of a dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33. These laws will not

apply to the subject property only to the extent necessary to allow the claimants a use of the property permitted at the time they acquired tax lot 1400 on August 16, 1957, and tax lot 1100 on March 24, 1969. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 15, 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, two written comments 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 includes a list of local land use regulations, all of which were enacted prior to December 2, 2004, the effective date of Measure 37. (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 claim involves two adjacent tax lots The claimants acquired tax lot 1400 on August 16, 1957, and tax lot 1100 on March 3, 1969, as documented by copies of deeds included in the claim. A copy of the 2004-05 Real Property Tax Statement, from Wallowa County, lists the claimants as the current owners of tax lot 1400. A call to the Wallowa County tax office confirmed H.M. and Willa Mae O'Rourke's current ownership of tax lot 1100.

Conclusions

The claimants, H.M. and Willa Mae O'Rourke are "owners" of the property as that term is defined under Section 11(C) of Ballot Measure 37. They acquired tax lot 1400 on August 16, 1957, and tax lot 1100 on March 3, 1969.

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

According to the claim, the properties are currently zoned Exclusive Farm Use -160 (EFU-160) by Wallowa County. Thus, the claim is based, generally, on Wallowa County's current EFU 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, 215.284, 215.780 and OAR 660, division 33 as applied by Goal 3 do not allow the subject property to be divided into parcels less than 160 acres.

ORS 215.780 establishes a 160-acre minimum size for the creation of new lots or parcels in EFU zones that are designated rangeland 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.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f).

The claimants acquired the subject property on August 16, 1957 and March 24, 1969, prior to the establishment of the statewide planning goals and their implementing statutes and rules, and prior to county zoning of the property.

Conclusion

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 and ORS 215, including ORS 215.284, 215.263 and 215.780, and OAR 660-033-0100 were all adopted after the claimants acquired the subject property, and restrict the division and development of the property relative to the uses allowed when the claimants acquired the property.

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.[1] 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 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 claimants state that the fair market value of the subject property has been reduced by $1,980,000 due to land use restrictions enacted after they acquired the property. The claimants apparently based their estimate on local property sales information but no documentation for the estimate is included in the claim.

[1] Claimants also cite to the waiver of Wallowa County Land Development Ordinance Articles 32 and 31 but have not cited to any corresponding state land use regulations. This report does not address waiver of County regulations.

Conclusions

As explained in Section V.(1) of this report, the current owners of the subject property are H.M. and Willa Mae O'Rourke. They acquired the property in 1957 and 1969, respectively. Thus, under Ballot Measure 37, H.M. and Willa Mae O'Rourke 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), land use laws restrict the ability of the claimants to divide the properties. The claim states that the reduction in value due to land use restrictions is $1,980,000.

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 enforced by the Commission or the department.

4. Exemptions Under Section 3 of Measure 37

Ballot Measure 37 does not apply to certain laws. 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 1957, and 1969, when the claimants acquired the subject properties. These laws include Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33, which Wallowa County has implemented through its EFU-160 zone. All of these laws were enacted after the claimants acquired the subject properties. Accordingly, none of these laws are exempt under Section 3(E) of Measure 37, 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 the division and residential development and use of farm land apply to the claimant's use of the property, and 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 properties. 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 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 a law to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, that 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 conclusion set forth in this report, laws enforced by the Commission or the department restrict the claimant's division and development of the subject properties. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the property by $1,980,000. However, because the claim does not provide an appraisal or specific documentation for how the specified restrictions reduce the fair market value of the properties, 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 more likely than not 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, H.M. and Willa Mae O'Rourke, a use of the property permitted at the time they acquired it in 1957, and 1969.

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 H.M. and Willa Mae O'Rourke's division of the subject property into 33 parcels or to the development of a dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33. These land use regulations will not apply to H.M. and Willa Mae O'Rourke's' use of the property only to the extent necessary to allow the claimants a use permitted at the time they acquired tax lot 1400 on August 16, 1957, and tax lot 1100 on March 24, 1969.

2. The action by the State of Oregon provides the state's authorization to the claimants to use tax lot 1400 subject to the standards in effect on August 16, 1957, and to use tax lot 1100 subject to the standards in effect on March 24, 1969.

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 properties, 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 properties. 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.