

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 118356
BALLOT MEASURE 37 (CHAPTER 1,)
OREGON LAWS 2005) OF)
Roy W. Nance, CLAIMANT)

Claimant: Roy W. Nance (the Claimant)

Property: Tax Lot 100, T 11S, R 13E, S 28 , Jefferson County (the Property)

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 the claimant's use of the property: applicable provisions of Statewide Planning Goal 3 and Goal 14, ORS 215 and OAR 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow Roy Nance a use of the property permitted at the time he acquired it.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property subject to the standards in effect in July 1970.
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 claimant first obtains 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 claimant 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 claimant to use the property, it may be necessary for him 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 claimant 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 claimant.

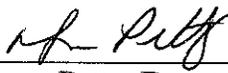
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under Measure 37, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under Measure 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: M118356

NAME OF CLAIMANT: Roy W. Nance

MAILING ADDRESS: 2383 SW Dover Lane
Madras, Oregon 97741

PROPERTY IDENTIFICATION: Township 11S, Range 13E, Section 28
Tax Lot 100
Jefferson County

OTHER CONTACT INFORMATION: Tia M. Lewis and Isa A. Taylor
Merrill O'Sullivan, LLP
1070 Bond Avenue, Suite 303
Bend, Oregon 97701

DATE RECEIVED BY DAS: April 25, 2005

180-DAY DEADLINE: October 22, 2005

I. SUMMARY OF CLAIM

The claimant, Roy W. Nance, seeks compensation in the amount of \$616,000¹ 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 claimant desires compensation or the right to use the property in a manner permitted at the time he acquired it in 1970.² The property is located near the City of Metolius, at 2383 SW Dover Lane, in Jefferson County. (See claim.)

¹ The claim as originally submitted included two tax lots, 100 and 300. On September 19, 2005, the claimant revised his claim to withdraw the claim as to tax lot 300. The revision did not include a revised amount of compensation sought. For the purposes of this report, the amount included in the original claim is used.

² The claimant has also requested that a decision of the department to not apply (waive) certain laws as set forth in this report be transferable with the property. Under OAR 660-002-0010(8), the Department only may "not apply" a statute, rule or goal that is the basis for a claim. Measure 37 only authorizes a state agency to not apply a law to allow the owner a use of the property permitted at the time the owner acquired the property. The Oregon Department of Justice has advised the department that "[i]f the current owner of the real property conveys the property before a new use allowed by the public entity is established, then the entitlement to relief will be lost."

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 Roy Nance's use of the subject property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands) and Goal 14 (Urbanization), ORS 215 and OAR 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow Roy Nance a use of the property permitted at the time he acquired it in 1970. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 17, 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, one set of written comments, evidence or information was received in response to the 10-day notice. The comments are relevant to whether the restriction of the claimant's use of the property reduces the fair market value of the property and have been considered by the department in drafting this report. (See comments 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 claim identifies numerous state statutes, administrative rules, statewide planning goals and local plan and zoning provisions 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 claimant, Roy Nance, acquired the subject property in July 1970, as reflected by a Bargain and Sale Deed included with the claim. A copy of a Title Report dated April 13, 2005, and tax information provided by the Jefferson County Assessor’s Office indicate that Roy Nance is the current owner of the subject property.

Conclusions

The claimant, Roy Nance, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of July 1970.

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 claim identifies Statewide Planning Goals 3 and 14, ORS 92 and 215, and OAR 660, division 33 as current laws that the claimant maintains restrict the use and reduce the value of the subject property.³

³ The claimant identifies ORS 92, but does not establish how that statute restricts the use of the property in a manner that reduces the fair market value. ORS 92 establishes procedures for subdivisions and partitions. None of its provisions, on their face, restrict the use of the subject property for purposes of Measure 37. Absent any evidence from the claimant as to how that statute restricts the use of the property resulting in a reduction in its fair market value, it is not addressed further in this report. In addition, to the extent ORS 92 could be construed to restrict the use of the property, that statute was in effect when the claimant acquired the property and therefore is exempt under Section 3(E) of Measure 37.

The claim is based, generally, on Jefferson County's current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU as required by Statewide Planning Goal 3, in accord with OAR 660, division 33 and ORS 215, because the claimant's property is "Agricultural Land" as defined by Goal 3.⁴ Goal 3 became effective on January 25, 1975, and required that Agricultural Land as defined by the goal be zoned EFU pursuant to ORS 215.

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 allowed in an EFU zone.

OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. Subsequent amendments to comply with HB 3326, (Chapter 704, Oregon Laws 2001, and effective January 1, 2002,) were adopted by the Commission effective May 22, 2002. (See administrative rule history for OAR 660-033-0100, 660-033-0130 and 660-033-0135.)

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 (UGB) be used for rural uses. Goal 14 became effective on January 25, 1975.

Conclusions

The requirements and standards established by Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33 restrict the use of the property relative to the uses allowed at the time claimant 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 use that the claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and that may continue to apply to the claimant's 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 claimant seeks 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."

⁴ The claimant's property is "Agricultural Land" because it contains Natural Resources Conservation Service Class I-VI soils.

Findings of Fact

The claim includes an estimate of \$616,000.00 as the reduction in the property's fair market value due to current regulations. That estimate is based on a market analysis by a real estate agent of the value of the property if divided into 22 parcels for residential development compared to its value as currently regulated.

Conclusions

As explained in Section V.(1) of this report, the claimant is Roy Nance. Under Ballot Measure 37, Mr. Nance is 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 claimant acquired the property restrict the use of the subject property relative to the uses allowed at the time claimant acquired the property. The claimant estimates the reduction in value due to the restrictions to be \$616,000.00.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

4. Exemptions under Section 3 of Measure 37

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the property relative to what would have been allowed when Roy Nance acquired the property, in 1970. These provisions include Statewide Planning Goal 3 (Agricultural Lands), Goal 14 (Urbanization) and applicable provisions of ORS 215; and OAR 660, division 33. None of these laws appear to be exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimant 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 industrial development and use of farm land apply to the claimant's 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 claimant acquired the property that are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's 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 claimant seeks 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 claimant should be aware that the less information he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his 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 use of the property for residential development. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by \$616,000. 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, 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 Roy Nance to use the subject property for a use permitted at the time he acquired the property in July 1970.

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 the claimant's use of the property: applicable provisions of Statewide Planning Goal 3 and Goal 14, ORS 215, and OAR 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow Roy Nance a use of the property permitted at the time he acquired it.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property subject to the standards in effect in July 1970.
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 claimant first obtains 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 claimant 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 claimant to use the property, it may be necessary for him 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 claimant 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 claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 30, 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.