

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)
Lena Page, CLAIMANT)

FINAL ORDER
CLAIM NO. M 118361

Claimant: Lena Page (the Claimant)

Property: Tax Lot 1900, T.7S, R.1W, Section 19, W.M., Marion 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 Lena Page's division of the 50-acre property into approximately 1.5-acre parcels or to her establishment of a single-family dwelling on each parcel created: Statewide Planning Goals 3 and 14, ORS 215, and OAR 660, division 33. These land use regulations will not apply to Lena Page's use of her property, only to the extent necessary to allow her a use permitted at the time she acquired the property, on April 11, 1962.
2. The action by the State of Oregon provides the state's authorization to Lena Page to use her property subject to the standards in effect on April 11, 1962.
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

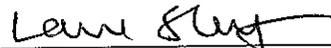
as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

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 her 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.

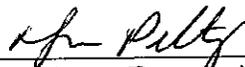
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 8th day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 8th 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: M118361

NAME OF CLAIMANT: Lena Page

MAILING ADDRESS: 10520 Sunnyview Road NE
Salem, Oregon 97301

PROPERTY IDENTIFICATION: Township 7S, Range 1W, Section 19
Tax Lot 1900
Marion County

OTHER CONTACT INFORMATION: Mark Shipman
Saalfeld Griggs
Post Office Box 470
Salem, Oregon 97308

DATE RECEIVED BY DAS: April 26, 2005

180-DAY DEADLINE: October 23, 2005

I. SUMMARY OF CLAIM

The claimant, Lena Page, seeks compensation in the amount of \$1,800,000 for the reduction in the 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 divide the 50-acre property into approximately 1.5-acre parcels and to develop a dwelling on each parcel. The property is located at 10520 Sunnyview Road NE, near Salem, in Marion 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 Lena Page's division of the 50-acre property into approximately 1.5-acre parcels or to her development of a dwelling on each parcel: Statewide Planning Goals 3 (Agricultural

Lands) and 14 (Urbanization), ORS 215 and OAR 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow Lena Page a use of the property permitted at the time she acquired it in 1962. (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, eleven written comments were received in response to the 10-day notice. Seven of the 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.

Four of the comments include information relevant to whether the claimant is an owner; when the claimant became the present owner of the property; whether a state law restricts the claimant's use of the property; and whether the restriction of the claimant's use of the property reduces the fair market value of the property. The comments have been considered by the department in preparing this report. (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 26, 2005, for processing under OAR 125, division 145. The claim identifies “any land use regulations (as defined in Measure 37) that prohibits or impairs a property owner’s ability to use the property by partitioning” as the laws that restricts the use of the property as the basis for the claim.¹ 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, Lena Page, and Clinton Page (deceased) acquired the subject property on April 11, 1962, by a Warranty Deed included with the claim (Marion County Deed Records Volume 557, Page 297, Recorded April 17, 1962).

On January 9, 1998, the claimant created the Lena Page Living Trust, revocable living trust with herself as trustee, and transferred the subject property to the trust (Marion County Deed Records Reel 1454, Page 462, Recorded January 14, 1998). This transfer of the property into a revocable trust does not constitute a change in ownership for purposes of Measure 37.

A copy of a chain of title report, dated April 22, 2005, indicates that the Lena Page Living Trust is the current owner of the subject property.

¹ Exhibit C of the claim identifies 17 different administrative rules under OAR 660, all provisions under ORS 92, ORS 197, ORS 215 and ORS 227, as current laws enacted after April 11, 1992, that the claimant maintain restrict the use and reduce the value of the subject property. (See the department’s claim file.)

Conclusions

The claimant, Lena Page, is the “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. Lena Page acquired the property on April 11, 1962.

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 states that “[w]e have identified a number of State of Oregon land use regulations currently in effect which were enacted subsequent to April 17, 1962, and which restrict the use and reduce the value of the property. These regulations are listed in Exhibit C to this letter.”

Exhibit C of the claim identifies Commission administrative rules, OAR 660, divisions 1, 2, 4, 8, 11, 12, 15 (all Statewide Planning Goals), divisions 16, 21, 22, 23, 25, 31, 33, and 34, and all provisions under ORS 92, ORS 197, ORS 215 and ORS 227, as current laws enacted after April 17, 1992, that the claimant maintains restrict the use and reduce the value of the subject property. Except as discussed below, none of these goals, statutes or regulations, on their face, restrict the use of the subject property. Absent an explanation by the claimant as to how any of these laws restrict the use of the subject property in a manner that reduces its fair market value, they are not discussed further in this report.²

The claim is based, generally, on Marion 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. 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 80 acres and establish standards for allowing the existing or any proposed parcels to have farm or non farm dwellings on them.

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

² In addition, to the extent ORS 92 could be construed to restrict the use of the property, for the most part, that statute was enacted prior to the claimant’s acquisition of the property, and therefore is exempt under Section 3(E) of Measure 37.

(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).

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 citations of administrative rule history for OAR 660-033-0100,- 0130 and -0135.)

Statewide Planning Goal 14 would likely apply to the division of the claimant's property into parcels less than two-acres in size. The claim proposes dividing the property into approximately 1.5-acre parcels. Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses. Goal 14 became effective on January 25, 1975.

The claimant acquired the subject property on April 11, 1962, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. At that time, the subject property was not zoned by the county.³

Conclusions

The zoning requirements, minimum lot size and dwelling 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 Lena Page acquired ownership of the subject property in April 1962, 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 Lena Page in 1962. In 1962, the subject property was not zoned and state land use regulations were not in effect.

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 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 Source: Marion County Staff Report, dated June 6, 2005.

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 estimate of \$1,800,000 as the reduction in the property’s fair market value due to current regulations. This amount is based on the claimant’s estimate of the market value if the property was divided into approximately 1.5-acre lots, less \$200,000 which the claim indicates is the current value of the property under current regulations.

No appraisal or other explanation was provided in the claim to substantiate the specific dollar amount the claimant demands for compensation.

Conclusions

As explained in Section V.(1) of this report, the claimant, Lena Page, acquired the property on April 11, 1962. Under Ballot Measure 37, Lena Page 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 division and development of the subject property. The claimant estimates the reduction in value due to the restrictions to be \$1,800,000.

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

As stated in Section V.2 of this report, the claim is based on state land use regulations that restrict the use of the property relative to what would have been allowed in 1962, when the property was acquired by Lena Page. These provisions include Statewide Planning Goal 3 (Agricultural Lands), Goal 14 (Urbanization) and applicable provisions of ORS 215 and OAR 660, division 33, which Marion County has implemented through its EFU zone, all of which were enacted after the claimant acquired the property. None of these laws is exempt under Section 3(E) of 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 residential development 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 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 uses 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 she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her 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 Lena Page's division of the 50-acre property into approximately 1.5-acre parcels and development of residential dwellings on those parcels. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$1,800,000. 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 Lena Page to use the subject property for a use permitted at the time she acquired the property on April 11, 1962.

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 Lena Page's division of the 50-acre property into approximately 1.5-acre parcels or to her establishment of a single-family dwelling on each parcel created: Statewide Planning Goals 3 and 14, ORS 215, and OAR 660, division 33. These land use regulations will not apply to Lena Page's use of her property, only to the extent necessary to allow her a use permitted at the time she acquired the property, on April 11, 1962.
2. The action by the State of Oregon provides the state's authorization to Lena Page to use her property subject to the standards in effect on April 11, 1962.
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 her 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 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.