

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 118365
BALLOT MEASURE 37 (CHAPTER 1,)
OREGON LAWS 2005) OF)
Melvin and Robin Babb, CLAIMANTS)

Claimants: Melvin and Robin Babb (the Claimants)

Property: Tax Lot 301, T 4S, R 2E, S 3, Clackamas County (the Property)

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

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

ORDER

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

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Melvin and Robin Babb's' division of their 20-acre property into approximately nine parcels and their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215, and OAR 660, division 6 enacted after October 19, 1973. These land use regulations will not apply to Melvin and Robin Babb'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 October 19, 1973.
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 October 19, 1973. On that date, the property was subject to applicable provisions of ORS 215, including the Interim Statewide Planning Goals then in effect.
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 21st day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 21st 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 21, 2005

STATE CLAIM NUMBER: M118365

NAMES OF CLAIMANTS: Melvin and Robin Babb

MAILING ADDRESS: 15600 South Spangler Road
Oregon City, Oregon 97045

PROPERTY IDENTIFICATION: Township 4S, Range 2E, Section 3
Tax Lot 301
Clackamas County

DATE RECEIVED BY DAS: April 28, 2005

180-DAY DEADLINE: October 25, 2005

I. SUMMARY OF CLAIM

The claimants, Melvin and Robin Babb, seek compensation in the amount of \$610,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 20-acre property into approximately nine, single-family residential parcels.¹ The property is located at 15604 South Spangler Road, near Oregon City, in Clackamas County.

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 Melvin and Robin Babb's division of their property into approximately nine parcels

¹ The claim also requests to sell the resulting residential parcels for development. In effect, the claimants request 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." This report therefore addresses whether claimants could divide and develop the property. It cannot and does not create a transferable waiver.

for residential development: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215, and OAR 660, division 6. These laws will not apply to the claimants only to the extent necessary to allow Melvin and Robin Babb a use of the property permitted at the time they acquired it on October 19, 1973. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 3, 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, four written comments, submissions of evidence or submissions of information were received in response to the 10-day notice.

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. (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 28, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's Agriculture/Forest (AG/F) District, OAR 660-006-0026 and -0027, and ORS 215.705 and 215.780 as laws that restrict the use of the property as 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, Melvin and Robin Babb, acquired the subject property on October 19, 1973, as reflected by a Warranty Deed included with the claim. A copy of a Title Report dated February 16, 2005, indicates that Melvin and Robin Babb are the current owners of the subject property. Ownership of the subject property has been confirmed by the Clackamas County Assessor's Office.

Conclusions

The claimants, Melvin and Robin Babb, are "owners" of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of October 19, 1973.

2. The Laws that are the Basis for this Claim

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a law must restrict the claimants' use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants or a family member acquired the property.

Findings of Fact

The claim states that the property's Agriculture/Forest District (AG/F 80) "does not allow any development of the property."

The property is currently zoned AG/Forest District (AG/F) a mixed agricultural and forestland zone adopted to comply with Statewide Goal 4 (Forest Lands) and the implementing provisions of OAR 660-006-0050 (effective February 5, 1990) and subsequently amended on March 1, 1994, to comply with the provisions of HB 3661 (Chapter 792, Oregon Laws 1993)

Under OAR 660-006-0050, all the uses permitted under Statewide Planning Goal 3 (Agriculture Lands) and Goal 4 (Forest Lands) are allowed except that for dwellings either the Goal 3 or Goal 4 standards are applicable based on the predominant use of the tract on January 1, 1993. Depending on the predominate use of the property on January 1, 1993, the property is subject to either the requirements for dwellings under exclusive farm use zoning required by Goal 3 and OAR 660, division 33 or the forest zone provisions required by Goal 4 and OAR 660, division 6. This includes the land division and dwelling standards asserted by the claimants as restricting the use of the subject property. According to a 2002 aerial photograph of the subject property, the property is mostly forest and thus, the property would be subject to the requirements for dwellings applicable under forest zoning required by Statewide Planning Goal 4 and OAR 660, division 6.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones which implements the 80-acre minimum lot size specified in ORS 215.780. The claimants' property is 20 acres. Under OAR 660-006-055, the claimants' property cannot be divided into smaller parcels as requested in the claim.

Clackamas County's RA-1 zoning applied to the subject property when the claimants acquired it on October 19, 1973. The RA-1 zone had a one-acre minimum with single-family dwellings as a primary use. However, the claimants acquired the subject property after the October 4, 1973 effective of Senate Bill 100, but prior to the adoption of the Statewide Planning Goals and their implementing statutes and rules. During the period between October 4, 1973 and January 25, 1975, when the Statewide Planning Goals became effective, ORS 197.175(1) and 197.280 (1973 edition) required, in addition to any local plan or zoning provisions, the application of Interim Land Use Goals set forth in ORS 215.515 (1973 edition) to the exercise of planning and zoning responsibilities prior to the effective date of the Statewide Planning Goals (see *Peterson v. Klamath Falls*, 279 Or 249 (1977)).² No information has been provided

² The "interim" land use goals are set forth in ORS 215.515(a) to (j) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state," and

establishing whether or to what extent the claimants' desired division of the property for residential development complies with the interim planning goals set forth in ORS 215 (1973 edition) in effect at the time the claimants first acquired the property on October 19, 1973.

Conclusions

The division and dwelling standards established under OAR 660-006-0050 and -0055 relating to land divisions and dwelling standards, adopted since the claimants acquired the property in 1973, do not allow the division of the property or the development of dwellings on the subject property as desired by the claimants. However, it is unclear whether or to what extent the claimants' requested level of development complies with the standards in effect when they acquired the property on October 19, 1973.

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. 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 estimate of \$610,000 as the property's reduction in fair market value due to current regulations. This estimate is based on an appraisal by a certified appraiser, which estimates a reduction in value between \$385,000 and \$610,000. The appraisal assumes that the claimants' desired use of the property would have been allowed under the standards in effect when the claimants acquired the property. However, the claim does not establish whether or to what extent the claimants' desired use of the property would have been allowed under those standards in effect on October 19, 1973.

(j) "To ensure that development of properties within the state is commensurate with the character and the physical limitations of the land." (ORS 215.515, 1973 edition).

Conclusions

As explained in Section V.(1) of this report, the current owners are Melvin and Robin Babb who acquired the property on October 19, 1973. Under Ballot Measure 37, Melvin and Robin Babb 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 \$610,000.

Although the claim is based on an appraisal, that appraisal is based on an assumption that the claimants' requested level of development would have been allowed when the claimants acquired the property, whereas the claim does not establish that that requested level of development would have been allowed at the time. Nonetheless, 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 Clackamas County's agricultural/forest zone that implement provisions of state law that have restricted use of the property. These are Statewide Planning Goal 4 and applicable provisions of ORS 215 and OAR 660, division 6. These laws are not exempt to the extent they were enacted after the claimants acquired the property on October 19, 1973. Applicable provisions of ORS 215 in effect when claimants acquired the property, including the Interim Statewide Planning Goals, none are exempt, under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimants acquired the property.

The department notes that ORS 215.730 and OAR 660, division 6, include standards for the siting of dwellings in forest zones. This provision includes fire protection standards for dwelling and surrounding forest lands. Section 3(B) of Measure 37 specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes...." Siting standards for dwellings in forest zones in ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under Section (3) of Measure 37.

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that the general statutory, goal and rule restrictions on residential development and use of farm land apply

to the claimant's use of the property. These laws are not exempt under Section 3(E) of Measure 37 to the extent they were enacted after the claimants acquired the property on October 19, 1973. Provisions of ORS 215, including the Interim Statewide Planning Goals in effect when the claimant acquired the property in 1973 are exempt under Section 3(E) of the Measure and will continue to apply to the property.

Other laws in effect when the claimants acquired the property are also exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. In addition, the siting standards for dwellings in forest zones under ORS 215.730 and in Goal 4 and its implementing rules, OAR 660 division 6, are exempt under Section (3)(B) of Measure 37. 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 subsections 3(A) to 3(D) of Measure 37.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the 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 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 claimants' ability to divide their property into approximately nine parcels for residential development. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$610,000. Without evidence establishing whether or to what extent the claimants' requested level of development would have been permitted when the claimants acquired the property, the amount of compensation demanded cannot be substantiated. Nevertheless, based on the record for this claim, the department acknowledges that it is more likely than not that the laws on which the claim is based 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 Melvin and Robin Babb to use the subject property for a use permitted at the time they acquired the property on October 19, 1973.

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 Melvin and Robin Babb's' division of their 20-acre property into approximately nine parcels and their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215, and OAR 660, division 6 enacted after October 19, 1973. These land use regulations will not apply to Melvin and Robin Babb'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 October 19, 1973.
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 October 19, 1973. On that date, the property was subject to applicable provisions of ORS 215, including the Interim Statewide Planning Goals then in effect.
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 October 4, 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.