

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 118367
BALLOT MEASURE 37 (CHAPTER 1,)
OREGON LAWS 2005) OF)
James and Carol Silke, CLAIMANTS)

Claimants: James and Carol Silke (the Claimants)

Property: Tax Lot 1800, T 19S, R 12W, S, Lane 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 denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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)

**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: M118367

NAMES OF CLAIMANTS: James and Carol Silke

MAILING ADDRESS: Post Office Box 21505
Eugene, Oregon 97402

IDENTIFICATION OF PROPERTY: Township 19S, Range 12W, Section 25
Tax Lot 1800
Lane County

DATE RECEIVED BY DAS: April 28, 2005

180-DAY DEADLINE: October 25, 2005

I. CLAIM

The claimants, James and Carol Silke, seek compensation in the amount of \$380,000 for a reduction in fair market value of property as a result of certain land use regulations that are alleged to restrict their use of the property. The claimants desire compensation or the right to divide their 14.29-acre property into one-acre parcels for residential use. The property is located at 83315 Erhart Road, Florence, in Lane 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 this claim is not valid, because neither the Land Conservation and Development Commission (the Commission) nor the department have enforced laws that restrict the claimants' use of private real property relative to the uses allowed when the claimants acquired the property in 1977. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On May 27, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, one comment was received.

The comment is relevant to whether a state law restricts the claimant's use of the property; whether the restriction of the claimants' use of the property reduces the fair market value of the property and whether a state agency has the authority to waive state statutes. The comment has been considered by the department in preparing this report. (See comment letter 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 the two-acre density limitation in OAR 660-004-0040 as the state law that restricts 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 administrative rule history of the 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 regulation 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 of 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

According to the record, James and Carol Silke, acquired the subject property by a Land Sales Contract on November 4, 1977 (see copy in the department’s claim file). A current tax statement has been provided which demonstrates that James and Carol Silke remain current owners of the property.

Conclusions

The claimants, James and Carol Silke, are “owners” of the subject property, as that term is defined in Section 11 of Ballot Measure 37, as of November 4, 1977.

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 claimants or a family member acquired the property.

Findings of Fact

The claim states that the claimants seek “compensation/relief from all regulations of the Land Conservation and Development Commission (LCDC) in OAR 660 that post-date their date of acquisition. In particular, they seek compensation/relief from the rules adopted on June 9, 2000, (effective date October 4, 2000) setting a two-acre minimum size for land divisions on rural lands. Those rules are found at OAR 660-004-0040.”

OAR 660-004-0040 became effective on October 4, 2000 and is an interpretive rule under Statewide Planning Goal 14 (Urbanization). Goal 14 became effective on January 25, 1975. Statewide Planning Goal 14 generally requires that land outside urban growth boundaries (UGB) be used for rural uses.

As interpreted by the courts and the Commission, Goal 14 generally prohibits residential development outside of an urban growth boundary where lot or parcel sizes are less than two-acres. (See, e.g. *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986); *DLCD v. Klamath County*, 38 Or LUBA 769 (2000).) As a result of a 1986 *Curry County* Oregon Supreme Court decision, the Commission amended Statewide Planning Goal 14 (Urbanization) and adopted OAR 660-004-0040, establishing rules for rural residential

development outside urban growth boundaries, which became effective on October 4, 2000.¹ The rule provides among other things that if, on October 4, 2000, a County Rural Residential (RR) zone specifies a minimum lot size smaller than two acres, the area of any new lot or parcel shall equal or exceed two acres. OAR 660-004-0040(5)(b) and (7)(d). A lot or parcel smaller than two acres may be created only if an exception to Goal 14 is taken. OAR 660-004-0040(7)(a).

The claimants' property is currently zoned Rural Residential (RR-1) with a one-acre minimum lot size. As a result of OAR 660-004-0040, the subject property cannot be divided into lots or parcels less than two acres in size.

When the claimants acquired the property in 1977, it was not zoned by Lane County but was subject to the applicable provisions of the County's "Unzoned Area Development Permit." These provisions allowed for the creation of new five-acre lots or parcels. (See Lane County Code Section 9.700(29) and Section 13.070 effective in 1977 in the department's claim file). Therefore, Lane County's current RR-1 zone and OAR 660-004-0040 allow division of the property into smaller parcels that it could have been divided into when the claimants acquired it in 1977.

Further, when the claimants acquired the subject property in 1977, the "Unzoned Area Development Permit" provisions were not acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged Lane County's plan and land use regulations when the claimants acquired the property in 1977², the Statewide Planning Goals applied directly to the property.³

As explained above, Statewide Planning Goal 14 (Urbanization) required that local comprehensive plans identify and separate urbanizable land from rural land. For properties within close proximity of an urban growth boundary Goal 14 requires a minimum lot size of

¹ Before that time, Goal 14 had been held to prohibit residential development in areas outside of urban growth boundaries at densities between one and five-acres per lot. See *DLCD v. Klamath County*, 38 Or LUBA 769 (2000).

² Commission Denial Order dated February 26, 1981 for rural and coastal areas; Acknowledgement Order dated October 3, 1984 (84-ACK-201), affirmed in part and remanded by Oregon Supreme Court, including exception areas under Goal 2, (see *1000 Friends of Oregon v. LCDC (Lane County)*, 305 Or 384 (1988)). Also see Continuance Order 88-CONT-380, dated June 2, 1988, for clarification of the Commission review of exception areas.

³ Statewide Planning Goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the County's plan and implementing regulations. (*Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, rev den 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985)). After the County's plan and land use regulations were acknowledged by Commission, the statewide planning goals and implementing rules no longer directly applied to such local land use decisions, (*Byrd v. Stringer*, 295 Or 311, (1983)). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same in substance, the applicable rules must be interpreted and applied by the County in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

more than one-acre for the creation of new lots or parcels. (See *Doob v. Josephine County*, 32 Or LUBA 364 (1997).⁴

Accordingly, the claimants' 14.29-acre parcel could not have been divided into one-acre parcels when the claimants acquired it in 1977 under either Lane County's "Unzoned" code provisions or the provisions of Goal 14.

Conclusions

Under current land use regulations (Lane County's RR-1 zone, Goal 14, and OAR 660-004-0040), the claimants currently can divide their property into smaller parcels than they could have at the time they acquired the property. In 1977, under either the Lane County "Unzoned" code provisions or Goal 14, the property could only have been divided into parcels of no less than five-acres in size. Thus, the current applicable land use regulations do not restrict the use of the property relative to the uses allowed when the claimants acquired the property in 1977. The creation of parcels or lots of one-acre or less in size near the City's Urban Growth Boundary is also not consistent with Goal 14.

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 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 claim includes an estimate of \$380,000 for the reduction in the property's fair market value due to current regulations. This estimate is based on a marketing analysis conducted by local realtors.⁵ No other information or documentation has been submitted with the claim.

Conclusions

⁴ The subject property is within one-mile of the City of Dunes City's Urban Growth Boundary.

⁵ The basis for this estimate is the determination that ten buildable lots (assuming a proposed plat with septic approvals, paved road, water to each lot line, together with power and telephone), would have a fair market value of about \$1,005,000. Under current law requiring a two-acre minimum lot size, six buildable lots could be created, given topographical constraints, with a fair market value of about \$625,000 ($\$1,005,000 - \$625,000 = \$380,000$).

As explained in Section V.(2) of this report, current land use regulations do not restrict the use of the subject property relative to the uses allowed when the claimants acquired the property in 1977. Because the claimants can divide the subject property into more parcels under the current two-acre minimum lot size for residential development than they could have when they acquired the property in 1977 (under a five-acre minimum lot size), the current land use regulations do not restrict the use of the property. Land use regulations enacted by the State since James and Carol Silke acquired the property that relate to the division of the property or the establishment of an additional dwelling have not had “the effect of reducing the fair market value of the property, or any interest therein.”

James and Carol Silke are not due compensation for land use regulations that do not restrict the use or reduce the fair market value of the subject property.

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 land use regulations that are the subject of this claim are Goal 14 and OAR 660-004-0040, which set forth the requirements for the creation of new lots or parcels in rural residential areas. Goal 14 was in effect when the claimants acquired the property in 1977. Therefore, it is exempt under Section 3(E) of Measure 37. The provisions of OAR 660-004-0040 took effect in 2000, after the claimants acquired the property. OAR 660-004-0040 is not exempt under Section 3(E) of Measure 37.

Conclusions

Laws in effect when the claimants acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants’ use of the property. Goal 14 was enacted before the claimants acquired an interest in the property, and as a result is exempt from the Measure under Section 3(E). However, because there are no state laws that restrict the claimants’ use of the subject property relative to uses permitted when the claimants acquired the property, the exemption provisions of Section 3 of Measure 37 are not applicable to this claim.

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 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 to allow the present owner to carry out a use of the property allowed at the time the present owner acquired the property. The Commission has by rule 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 current record, the claimants have not established that they are entitled to relief under Ballot Measure 37. Neither the Commission nor the department have enforced laws that were enacted after the claimants acquired the property that restrict the claimants' use of the private real property relative to the uses allowed when they acquired the subject property in 1977 that is the subject of this claim.

Conclusion

Based on the record before the department, the claimants have not established that they are entitled to relief under Section 1 of Measure 37, as a result of land use regulations enforced by the Commission or the department. Therefore, this claim is denied.

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.