

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 118370
BALLOT MEASURE 37 (CHAPTER 1,)
OREGON LAWS 2005) OF)
Tim Austen and Bruce Timpe, CLAIMANTS)

Claimants: Tim Austen and Bruce Timpe (the Claimants)

Property: Tax Lot 1500, T 3S, R 2E, S 32, Tax Lot 1500, 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 Tim Austen and Bruce Timpe's division or development of the 39.7-acre property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33, enacted after June 1, 1987. These land use regulations will not apply to Tim Austen and Bruce Timpe's use of the property only to the extent necessary to allow them a use permitted at the time they acquired the property on June 1, 1987.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on June 1, 1987. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 5, 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.

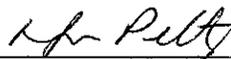
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 19th day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 19th 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, and effective, 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 19, 2005

STATE CLAIM NUMBER: M118370

NAMES OF CLAIMANTS: Tim Austen
Bruce Timpe

MAILING ADDRESS: 13173 South Spangler Road
Oregon City, Oregon 97045

PROPERTY IDENTIFICATION: Township 3S, Range 2E, Section 32
Tax Lot 1500
Clackamas County

DATE RECEIVED BY DAS: April 28, 2005

180-DAY DEADLINE: October 25, 2005

I. SUMMARY OF CLAIM

The claimants, Tim Austen and Bruce Timpe, seek compensation in the amount of \$1,250,550 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 39.7-acre parcel into approximately five-acre parcels and to develop a dwelling on each parcel. The property is located at 13173 South Spangler Road between Oregon City and Canby, in Clackamas 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 the claimants' division of the property for residential development: Statewide Planning Goal 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780, and applicable provisions of OAR 660, division 33, enacted after June 1, 1987. These laws will not apply to the claimants only to the extent necessary to allow Tim Austen and Bruce Timpe a use of the property permitted at the time they acquired the parcel on June 1, 1987. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 19, 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, seven written comments, evidence or information were received in response to the 10-day notice.

The comments are relevant to whether the claimants are both owners, when the claimants became the present owners of the property, whether the restriction of the claimants' use of the property reduces the fair market value of the property and whether the laws that are the basis for the claim are exempt under Section 3 of Measure 37. The comments have all 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 28, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County Exclusive Farm Use (EFU) zoning as the 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 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

Tim Austen’s parents, Don and Anita Austen, acquired the subject property on December 20, 1963. (See Satisfaction of Mortgage included in the claim.)¹

The claimants, Tim Austen and Bruce Timpe, acquired the subject property on June 1, 1987, as reflected by a Real Estate Contract included with the claim. A Lot Book Service report included in the claim indicates that Tim Austen and Bruce Timpe are the owners of the subject property as of December 14, 2004.

Conclusions

The claimants, Tim Austen and Bruce Timpe are “owners” of the subject property as that term is defined by Section 11(C) of Ballot Measure 37, as of June 1, 1987.

Don and Anita Austen are “family members,” as that term is defined by Section 11(A) of Measure 37, as to Tim Austen. They acquired the property on December 20, 1963.

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 Clackamas County’s EFU-80 zoning “(p)rohibits lots of record less than 80 acres.” The claim further requests compensation or that the property be rezoned to RRFF-5 (Rural Residential, Farm and Forest – five acre minimum parcel size).

¹ The claim indicates that Don and Anita Austen acquired the property by Contract of Sale in 1962, although the claim does not include documentation to substantiate that date.

The claim is based on Clackamas County's current Exclusive Farm Use (EFU) Zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Statewide Planning Goal 3 in accord with OAR 660, division 33, and ORS 215 because the claimants' property is "Agricultural Land" as defined by Goal 3.² 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 (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.)

Tim Austen's family acquired the subject property on December 20, 1963, before the establishment of Statewide Planning Goals and their implementing statutes and rules. At that time the property was not zoned by Clackamas County.

Bruce Timpe acquired his interest in the property on June 1, 1987. At that time the property was subject to applicable provisions of Statewide planning Goal 3, ORS 215, and OAR 660, division 5, as implemented through the County's acknowledged comprehensive plan and land use regulations.

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 prior to Don and Anita Austen's acquisition of the subject property in 1963. Bruce Timpe acquired his interest in the property on June 1, 1987. When Bruce Timpe acquired his interest in the property, the property was subject to applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and

² The claimants' property is "Agricultural Land" because it contains NRCS (Natural Resources Conservation Service) Soils. The property predominantly consists of Jory silty clay loam (45B and 45C, capability subclass II).

OAR 660, division 5 then in effect, as implemented by the County's acknowledged Comprehensive Plan and land use regulations. Current laws limit the division and development of the property, thereby restricting the use of the property relative to the uses allowed when Tim Austen's family acquired the property in 1963 and when Bruce Timpe acquired the property in 1987.

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 \$1,250,550 as the property's reduction in fair market value as a result of current regulations. This estimate is based on the value of five-acre lots near the subject property. The claim does not include a formal appraisal or other documentation to substantiate the property's estimated reduction in value as a result of land use regulations.

Conclusions

As explained in Section V.(1) of this report, the current owners are Tim Austen and Bruce Timpe, who acquired the property on June 1, 1987. Tim Austen's family acquired the property in 1963. Under Ballot Measure 37, Tim Austen and Bruce Timpe 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 Tim Austen's family acquired the property in 1963 and since Bruce Timpe acquired his interest on June 1, 1987, restrict division of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$1,250,550.

Without an appraisal or other documentation of reduction in value, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enacted or 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 in 1963 when the property was acquired by the parents of Tim Austen and relative to what would have been allowed when Bruce Timpe acquired the property on June 1, 1987. These provisions include Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its EFU zone. None of these laws appear to be exempt under Section 3(E) of Ballot Measure 37 as to Tim Austin. These laws are not exempt as to Bruce Timpe to the extent they were enacted or adopted after June 1, 1987. Applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33 in effect on June 1, 1987, are exempt under Section 3(E) of the Measure as to Bruce Timpe's claim, which exempts laws in effect when the claimant or the claimant's family 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 and use of farm land apply to the claimants' use of the property, and these laws are not exempt under Section 3(E) of Measure 37 to the extent they were enacted or adopted after the claimant or claimant's family acquired the property. Provisions of ORS 215 in effect when Tim Austen's parents acquired the property in 1963 are exempt under Section 3(E) of the Measure and will continue to apply to the property as to Tim Austen's use of the property. Provisions of Statewide Planning Goal 3, ORS 215, and OAR 660 in effect when Bruce Timpe acquired his interest in the property are exempt under Section 3(E) of the Measure and will continue to apply to his use of 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. There may be other laws that continue to apply to the claimants' use of the property that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under Sections 3(A) to 3(D) of Measure 37.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under Section (3) of Measure 37 that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the property.

VI. FORM OF RELIEF

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply 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 create the desired five-acre lots out of the subject property or develop those lots for residential uses. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$1,250,550. 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 Tim Austen and Bruce Timpe to use the subject property for a use permitted at the time they acquired the property on June 1, 1987.

The property was zoned EFU under Clackamas County's acknowledged Comprehensive Plan when the claimants acquired the property in 1987.

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 Tim Austen and Bruce Timpe's division or development of the 39.7-acre property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and

OAR 660, division 33, enacted after June 1, 1987. These land use regulations will not apply to Tim Austen and Bruce Timpe's use of the property only to the extent necessary to allow them a use permitted at the time they acquired the property on June 1, 1987.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on June 1, 1987. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 5, 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.