

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 118377  
BALLOT MEASURE 37 (CHAPTER 1, )  
OREGON LAWS 2005) OF )  
Alva and Susan Mascall, CLAIMANTS )

Claimants: Alva and Susan Mascall (the Claimants)

Property: Tax Lot 2200, Township 6S, Range 39E, Section 27, Baker 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 claimants' division of the 169.3 acre property: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33 enacted after March 11, 1977. These land use regulations will not apply to claimants' division of the property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on March 10, 1977.
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 March 10, 1977. On that date, the property was subject to applicable provisions of Goal 3 and ORS 215 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

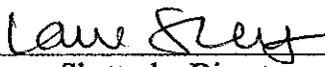
requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

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 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:

  
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Lane Shetterly, Director  
DLCD

Dated this 21<sup>st</sup> day of October, 2005.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
\_\_\_\_\_  
Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 21<sup>st</sup> day of October, 2005.

**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:** M118377

**NAMES OF CLAIMANTS:** Alva and Susan Mascall

**MAILING ADDRESS:** Post Office Box 249  
North Powder, Oregon 97867

**PROPERTY IDENTIFICATION:** Township 6S, Range 39E, Section 27  
Tax Lot 2200  
Baker County

**DATE RECEIVED BY DAS:** May 2, 2005

**180-DAY DEADLINE:** September 19, 2005

**I. SUMMARY OF CLAIM**

The claimants, Alva and Susan Mascall, seek compensation in the amount of \$845,000 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 subject 169.3-acre property into 20-acre parcels. The property is located at 49876 Hwy. 30 near North Powder, in Baker 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 claimants' division of their property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33, enacted after 1977. These laws will not apply to the claimants' use only to the extent necessary to allow them a use of the property permitted at the time they acquired it in 1977. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On June 2, 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, three 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 May 2, 2005, for processing under OAR 125, division 145. The claim identifies Baker County zoning and state regulations that restrict the division of the claimants' 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, Alva and Susan Mascall, acquired the subject property on March 10, 1977, as reflected by a land sale contract included with the claim. A copy of property tax records from 2004 indicates that claimants are current owners of the subject property.

### **Conclusions**

The claimants, Alva and Susan Mascall, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of March 10, 1977.

### **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 claimant or a family member acquired the property.

### **Findings of Fact**

The claim states that laws do not “... allow to put in 20 acre parcels.”

The claim is based generally on Baker 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 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 and 215.780 and OAR 660, division 33 as applied by Goal 3, do not allow the subject property to be divided into parcels of less than 80 acres.

ORS 215.780 established an 80-acre minimum size for the creation of new 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.

The claimants acquired the subject property on March 10, 1977, after the establishment of the Statewide Planning Goals and their implementing statutes and rules, but before the Commission's acknowledgment of Baker County's comprehensive plan and land use regulations for compliance with the Statewide Planning Goals on April 24, 1986. Because the county's regulations were not acknowledged at that time, the Statewide Planning Goals, and in particular, Goal 3, applied directly to property on the date of acquisition.<sup>1</sup>

In 1977, the State standards for a land division involving property where the local zoning was not acknowledged were that the resulting parcels must be of a size that are "appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area" (Statewide Planning Goal 3). Thus, the opportunity to divide the property when the claimants acquired it in 1977 was limited to land divisions done consistent with Goal 3, that required the resulting farm or non-farm parcels to be: (1) "appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area;" and (2) shown to comply with the legislative intent set forth in ORS 215.243. (See endnote<sup>1</sup>.)

No information has been provided showing that the claimants' request for 20-acre parcels complies with the Goal 3 standard for the size of farm parcels in effect in 1977.

### **Conclusions**

The zoning requirements and minimum lot size standards established by amendments to Statewide Planning Goal 3, amendments to ORS 215, and OAR 660, division 33, adopted since the claimants acquired the property in 1977, do not allow the division of the property into parcels smaller than 80-acres in size, as may have been possible in 1977. However, it is unclear whether or to what extent the claimants' requested use complies with the standards for land divisions under Goal 3 in effect when they acquired the property on March 10, 1977.

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

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<sup>1</sup> Statewide Planning Goal 3 was applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the County's Goal 3 program on April 24, 1986. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, *rev den*, 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the County's plan and land use regulations were acknowledged by the 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); *Kenagy v. Benton County*, 115 Or App 131 (1992).

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 informal estimate of \$845,000 as the reduction in the property's fair market value due to current regulations. This amount is based on the claimants' estimate of the market value of 20-acre parcels in the area, less the cost of developing such parcels.

#### **Conclusions**

As explained in Section V.(1) of this report, the current owners of the subject property are Alva and Susan Mascall, who acquired the property on March 10, 1977. Under Ballot Measure 37, the claimants 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 \$845,000.

Without an appraisal or other documentation and without verification that the requested use was allowed under the standards in effect when the claimants acquired the property, 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 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 1977 when the claimants acquired the property. These provisions include Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33, which Baker County has implemented through its EFU

zone. These laws are not exempt under Section 3(E) of Ballot Measure 37 to the extent they were enacted or adopted after the claimants acquired the property on March 10, 1977. Provisions of Goal 3 and ORS 215 in effect on March 10, 1977, are exempt under Section 3(E) of the Measure, which exempts laws in effect when the claimants 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 claimant's 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 claimants acquired the property. Provisions of Goal 3 and ORS 215 in effect when the claimants acquired the property in 1977 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 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 his 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 20-acre parcels out of the subject property. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$845,000. 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, and without verification that the requested use was allowed under the standards in effect when the claimants acquired 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 Alva and Susan Mascall to use the subject property for a use permitted at the time they acquired the property on March 10, 1977.

## **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 claimants' division of the 169.3 acre property: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33 enacted after March 11, 1977. These land use regulations will not apply to claimants' division of the property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on March 10, 1977.
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 March 10, 1977. On that date, the property was subject to applicable provisions of Goal 3 and ORS 215 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 claimant.

## 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 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.

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<sup>i</sup> The Goal 3 standard for the review of land divisions or the establishment of a minimum lot size states:

“Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing Commercial Agricultural Enterprise within the area.”

On August 20, 1977, the Commission distributed a policy paper explaining the meaning of the Goal 3 minimum lot size standard (see “Common Questions about Goal #3; Agricultural Lands”, August 30, 1977, as revised and added to July 12, 1979). Further interpretation of the Goal 3 minimum lot size standard can be found in *Meeker v. Clatsop County*, 287 Or 665 (1979), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427 and *Thede v. Polk County*, 3 Or LUBA 336 (1981).

In 1982, the policy paper and court decisions were incorporated into an administrative rule to guide the interpretation and application of the Goal 3 minimum lot size standard (see OAR 660, division 5, specifically rules 15 and 20 effective July 21, 1982).

For further guidance on the interpretation and application of this standard and rule see *Kenagy v. Benton County*, 6 Or LUBA 93 (1982); *Goracke v. Benton County*, 8 Or LUBA 128 (1983); 68 Or App 83 (1984); 12 Or LUBA 128 (1984); 13 Or LUBA 146 (1985); 74 Or App 453 (1985), *rev den* 300 Or 322 (1985); and OAR 660-05-015 and -020 as amended effective June 7, 1986 (repealed effective August 7, 1993).

The 1982 administrative rule (OAR 660-05-015 and -020) was further amended to incorporate the holdings of these cases (effective June 7, 1986, and repealed effective August 7, 1993).