

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES, THE DEPARTMENT
OF LAND CONSERVATION AND DEVELOPMENT OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM)
FOR COMPENSATION UNDER)
BALLOT MEASURE 37 (CHAPTER 1,)
OREGON LAWS 2005) OF)
John and Constance Andrews, CLAIMANTS)

FINAL ORDER
CLAIM NO. M 118380

Claimants: John and Constance Andrews (the Claimants)

Property: Tax lot 2500, T.3S, R.2E, Section 16D; Tax lots 1290 and 1300, T.3S, R.2E,
Section 21A; and Tax lot 100, T.3S, R.2E, Section 21B, W.M., Clackamas
County

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, the State of Oregon will not apply the requirements of the following
laws enforced by the Commission or the department to the claimants' division of the subject
property: Goal 14 (Urbanization) and OAR 660-004-0040. These laws will not apply to the
claimants' use of the subject property only to the extent necessary to allow John and Constance
Andrews a use of the property permitted when they acquired it on August 31, 1965.
2. The action by the State of Oregon provides the state's authorization to John and Constance
Andrews to use the property subject to the standards in effect on August 31, 1965.
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.

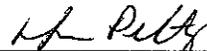
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



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: M118380

NAMES OF CLAIMANTS: John and Constance Andrews

MAILING ADDRESS: 14135 South Clackamas River Drive
Oregon City, Oregon 97045

IDENTIFICATION OF PROPERTY: Township 3S, Range 2E, Section 16D
Tax Lot 2500
Township 3S Range 2E, Section 21A
Tax Lots 1290 and 1300
Township 3S, Range 2E, Section 21B
Tax Lot 100
Clackamas County

OTHER CONTACT INFORMATION: Donald B. Bowerman
Bowerman & Boutin, LLP
Post Office Box 100
Oregon City, Oregon 97045

DATE RECEIVED BY DAS: May 2, 2005

180-DAY DEADLINE: October 29, 2005

I. CLAIM

The claimants, John and Constance Andrews, seek compensation in the amount of \$1,400,000 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 approximately 25-acre property into parcels for residential use.¹ The property is located at 14135 South Clackamas River Drive, near Oregon City in Clackamas County. (See claim.)

¹ For purposes of compensation, the claimants estimate the property's reduction in fair market value based on being able to divide it into 25, one-acre parcels. According to the claimants' attorney, they are requesting removal of all regulations enacted after they acquired the property in 1965, although "their current plans are only to add two or three building sites to the property."

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 valid. Department staff recommends, in lieu of just compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply the following laws to the John and Constance Andrews to allow them to divide the subject property: Statewide Planning Goal 14 (Urbanization) and OAR 660-004-0040. These laws will not apply to the claimants' use of the subject property only to the extent necessary to allow them a use of the property that was permitted at the time they acquired it in 1965. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On May 23, 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, two comments were received in response to the 10-day notice.²

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 Clackamas County's Rural Residential Farm Forest 5-Acre (RRFF-5)

² One of the comment letters represents the comments of 22 area property owners.

zoning and state 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 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

The claimants, John and Constance Andrews, acquired the subject property, which consists of four tax lots, on August 31, 1965 by a Land Sales Contract (Clackamas County Deed Records 69-24139)³. Recent Clackamas County tax statements for the property indicate that the claimants are the current owners of the subject property.

Conclusions

The claimants, John and Constance Andrews, are “owners” of the subject property as that term is defined in Section 11(C) of Ballot Measure 37. John and Constance Andrews acquired the property on August 31, 1965.

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.

³ On October 5, 1990 the claimants acquired title to the property by a Warranty Deed in fulfillment of the contract. (Clackamas County Deed Records 90-49789).

Findings of Fact

The claim states, as laws that restrict the claimants' use of the property and are the basis of the claim, "Senate Bill 100 (1973) and all regulatory enactments adopted thereafter including but not limited to House Bill 3661, ORS Chapter 215 and Rules set forth in Oregon Administrative Rules (OAR) goals and regulatory restrictions."

The claim does not explain how any of these recited laws restrict the claimants' use of the property resulting in a reduction in the fair market value of the property. Except as discussed below, most of these statutes or regulations do not, on their face, restrict the use of the subject property. Absent an explanation by the claimants as to how any of the laws not discussed below restrict the use of the subject property in a manner that reduces its fair market value, they are not addressed further in this report.

The property is currently zoned RRFF-5, which is a rural residential designation under the Clackamas County Comprehensive Plan. The property was zoned the current Rural Residential Farm Forest (RRFF-5) on June 18, 1979.⁴ The RRFF-5 zone requires a minimum of five acres for the creation of new lots or parcels (Clackamas County Zoning Ordinance, Section 309.07.B). The subject property is approximately 25 acres in size and it is possible to divide the subject property under the current RRFF-5 zone.⁵

As a result of a 1986 Oregon Supreme Court decision⁶ in 2000 the Commission amended Statewide Planning Goal 14 (Urbanization), effective January 25, 1975, and adopted OAR 660-004-0040, which became effective on October 4, 2000. The rule provides among other things that after October 4, 2000, any lot or parcel to be divided that is less than one mile from the urban growth boundary for the Metropolitan area and is in a Rural residential area must have a minimum size of 20 acres (OAR 660-004-0040(8)(e)). This rule does not allow the subject property to be divided into lots or parcels smaller than 20-acres.⁷ Statewide Planning Goal 14 generally requires that land outside urban growth boundaries be used for rural uses.

⁴ Source: Clackamas County Staff Report, September 8, 2005, ZC116-05/Andrews.

⁵ The property is subject to additional local zoning. The property is located along the Clackamas River and designated (or partially designated) as Principal River Conservation Area (PRCA) under the Clackamas County Comprehensive Plan (Policies 11.0 through 11.5). All primary and accessory structures located on land designated as PRCA are subject to Clackamas County Zoning Ordinance Section 704.04, River and Stream Setbacks. While the County's provisions for lands designated as PRCA were enacted under the provisions of Statewide Planning Goal 5 and OAR 660, division 16, the river and stream setbacks are not based on state land use laws. No information was included in the claim indicating that Goal 5, and its implementing rules (OAR 660, division 16 and 23); restrict the use of the subject property.

⁶ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

⁷ The Portland metropolitan service area does not have an urban reserve area acknowledged to comply with OAR 660, division 21. Therefore, the provisions under OAR 660-0040040(8)(d) exempting lots or parcels from the 20-acre standard do not apply

The subject property is located within one mile of the urban growth boundary for the Portland metropolitan area and is subject to the 20-acre minimum lot size under OAR 660 004-0040(8)(e), applicable to rural residential areas located within one mile of the urban growth boundary. The subject property (approximately 25 acres) cannot be further divided under the 20-acre minimum lot size standard under OAR 660-004-0040(8)(e).

When the claimants acquired the property in 1965 it was not zoned by Clackamas County. The first zoning of the property was Residential (RA-1) applied on February 20, 1967. The RA-1 zone had an one-acre minimum lot size requirement for the creation of new lots or parcels.

Conclusions

The zoning requirements and minimum lot size standards for rural residential lots or parcels established by Statewide Planning Goal 14 and OAR 660-004-0040 were enacted after the claimants acquired the subject property in 1965, and do not allow the division of the property into lots or parcels less than 20 acres in size, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimants in 1965. The claimants acquired the subject property in 1965, prior to the establishment of the statewide planning goals, and prior to local zoning of the property.

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 states that there has been a reduction in the fair market value of the property of \$1,400,000 due to current restrictions. This amount is based on being able to divide the subject 25 acres into approximately one-acre parcels, with a value of \$70,000 per acre, multiplied by 25, less the value of the existing home site of \$70,000.

No appraisal or other documentation was provided regarding the reduction in the fair market value of the subject property.

Conclusions

As explained in Section V.(1) of this report, the current owners are John and Constance Andrews, who acquired the property on August 31, 1965. 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), laws adopted since 1965 restrict the claimants' ability to divide and develop the property. The claimants state that the reduction due to restrictions is \$1,400,000.

Without an appraisal or other documentation, 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 laws 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 when the property was acquired by the claimants in 1965. These provisions include Statewide Planning Goal 14 (Urbanization) and OAR 660-004-0040, which set forth the requirements for the creation of new lots or parcels in rural residential areas. The provisions of Goal 14 took effect in 1975 and OAR 660-004-0040 took effect in 2000, after the claimants acquired the property. These laws are not exempt under Section 3(E) of Measure 37, which exempts laws in effect when the claimants acquired the property.

The subject property includes land within the flood plain and floodway of the Clackamas River. Regulations enacted to protect public health and safety and regulations required by federal law, as reflected by the floodplain and floodway designation, are exempt under Sections 3(B) and 3(C) of the Measure.⁸ To the extent that the development of the subject property may be regulated to protect public health and safety, or under provisions of federal laws, those laws would be exempt and continue to apply to 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

⁸ Statewide Planning Goal 7 requires local government to identify areas of natural hazards and to adopt ordinances to protect people and property from such hazards. Clackamas County has applied Zoning Ordinance Section 703, Flood Plain Management District, to the areas of the subject property identified as a special flood hazard area. Local ordinances adopted to comply with Goal 7 may be exempt under Section 3(B) of Measure 37.

fall under one or more of the exemptions under Measure 37. It does appear that the general goal and rule restrictions on rural residential development apply to the property and for the most part these laws are not exempt under Section 3(E) of Measure 37.

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. In addition, regulations limiting development in the designated flood hazard areas may be exempt under Sections 3(B) or 3(C) 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 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. 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 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 record before the department, laws enforced by the Commission or the department restrict the claimants' ability to divide and develop the property as described in the claim. The claim asserts the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$1,400,000. Without an appraisal or other documentation, 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.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Measure 37 authorizes the department to modify, remove or not apply all or parts

of certain land use regulations to allow John and Constance Andrews to use the subject property for a use permitted at the time they acquired the property on August 31, 1965.

Conclusion

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation, the State of Oregon will not apply the requirements of the following laws enforced by the Commission or the department to the claimants' division of the subject property: Goal 14 (Urbanization) and OAR 660-004-0040. These laws will not apply to the claimants' use of the subject property only to the extent necessary to allow John and Constance Andrews a use of the property permitted when they acquired it on August 31, 1965.
2. The action by the State of Oregon provides the state's authorization to John and Constance Andrews to use the property subject to the standards in effect on August 31, 1965.
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 5, 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.