BALLOT MEASURE 37 (CHAPTER 1, OREGON LAWS 2005)
CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation
June 16, 2005

STATE CLAIM NUMBER:	M119036
NAME OF CLAIMANTS:	Jeffery R. and Marilyn S. Yarbor
MAILING ADDRESS:	P.O. Box 686 St. Helens, Oregon 97051
IDENTIFICATION OF PROPERTY:	28071 Pittsburg Road Township 5N, Range 2W, Section 30 Tax lot 405, Columbia County
DATE RECEIVED BY DAS:	December 21, 2004
180-DAY DEADLINE:	June 19, 2005

I. CLAIM

Jeffery and Marilyn Yarbor, the claimants, seek compensation in the amount of $84,792.83 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 property and presumably build dwellings on the subject property. The property is located at 28071 Pittsburg Road in Columbia County, near the City of St. Helens. (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 certain state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, specifically Statewide Planning Goal 4 (Forest Lands) and OAR 660, Division 6, not apply to the subject property to the extent necessary to allow the Yarbors a use of the property permitted at the time they acquired it on October 9, 1981. As a result, the Yarbors' use of the property will be subject to those laws in effect on October 9, 1981. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On February 14, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS), provided written notice to surrounding property owners. According to DAS, no written comments, evidence or information were received in response to the 10-day notice.

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

The claim was filed with DAS on December 21, 2004 for processing under OAR 125, Division 145. The claim identifies land use regulations that were enacted prior to December 2, 2004, the effective date of Measure 37 as the basis for the claim. (See citations to statutory and rule history in the Oregon Revised Statutes and Administrative Rules.)

Conclusions

The claims were 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 are therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

Ballot Measure 37 provides for payment of compensation or relief from specific laws to "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 property subject to this claim was acquired, in part, by Irene Yarbor on July 3, 1952 and by John and Irene Yarbor on January 29, 1959. The property was later conveyed by contract to Jeffery R. Yarbor and Marilyn Prince on October 9, 1981 and a quitclaim deed, transferring title in fulfillment of the contract, was recorded by Jeffery R. Yarbor and Marilyn S. Yarbor for the property on November 3, 1989.[1]

Conclusions

John and Irene Yarbor are "family members" as defined by Section 11(A) of Ballot Measure 37 and the claimants Jeffery R. and Marilyn Yarbor are the "owners" of the subject property as defined by Section 11(C) of Ballot Measure 37.

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 claimant's 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 generally states that under current land use regulations **"**this land can only be used for reforestation." The claim identifies the Columbia County comprehensive plan and PF-76 (Primary Forest) zoning as the land use regulations that restrict the use of the property. The claimants do not explain what land uses were allowed in 1981 when they acquired the property.

The cited Columbia County regulations implement Statewide Planning Goal 4 (Forest Lands) (OAR 660-015-0000(4)) and statutes applicable to land zoned for forest use under ORS 215, including ORS 215.705 to 215.755 and 215.780, and provisions of OAR 660, Division 6 that restrict the property's zoning, use and division. The subject property is composed primarily of Bacona Silt Loam soils (NRCS Capability Class VI) with a forest cubic foot site class of 2 (Soil Survey of Columbia County, Oregon, pp. 18-19 and map sheet # 30, published in 1986 based on fieldwork completed in 1982). Goal 4 became effective on January 25, 1975, and required forest land as defined by the Goal to be zoned for forest use. (See citations to statutory and rule history under OAR 660-015-0000(4).) The forest land administrative rule, OAR 660, Division 6, became effective September 1, 1982. ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Or Laws 1993) and were implemented by OAR 660-006-0026 and 0027 on March 1, 1994. (See citations to rule history under OAR 660-006-0026 and 0027.) ORS 215.730(1)(b) establishes approval standards for dwellings on lands zoned for forest use

[1] According to a May 19, 2005 phone conversation with Sue Johnson, Jeffrey Yarbor's sister, Marilyn Prince married Jeffrey Yarbor and now goes by the name of Marilyn Yarbor.

to protect the public health and safety with regard to fire safety, water supply and development on steep slopes.

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 0027 establish an 80-acre minimum lot size for the creation of a new parcel in a forest zone and also establish the standards for dwellings in forest zones.

Conclusions

The minimum lot size and dwelling standards established by ORS 215.705 to 215.755 and 215.780, Statewide Planning Goal 4 and OAR 660-006-0026 and 0027 and the Columbia County PF-76 Primary Forest Zone were all adopted after the Yarbor family acquired the properties in 1952 and 1959 and do not allow the division of the properties into parcels less than 80 acres in size or the approval of dwellings on smaller parcels. The current land use regulations, all adopted since 1952 and 1959, restrict the use of the properties from what could have been done when the properties were acquired by the Yarbor family in 1952 and 1959.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that the current land use regulation(s) 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 form submitted to Columbia County and included with the State claim specifies a reduction in fair market value of $207,220 because the property could have been divided into smaller parcels before it was zoned. (See the department's claim file.) However, the claim also includes a document that states the subject property is (1) worth $122,427.17 "as is," (2) has a "fair market value" of $207,220 and (3) has a "loss of" value of $84,792.83 on the basis that "because of zoning this property cannot be sold for what it is worth." The claim also includes a "Comparative Market Analysis" for the property with information about real estate sales in Columbia County. The claim also states that "Longview Fiber will only pay up to $1000 per reforested acre." The current tax statement submitted with the claim indicates the property has a total real market value of $108,500. No statement has been submitted explaining how current land use laws have reduced the fair market value of the subject property as specified by the claimants.

Conclusions

As explained in Section V.(2) of this report, the current land use regulations, all adopted since 1952 and 1959, restrict the partition and use of the property from what could have been done when the property was first acquired by the Yarbor family in 1952 and 1959.

Without an appraisal based on the value of the property when divided for residential development or another explanation of the reduction in fair market value, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. However, 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. The type of land use regulations not subject to a claim for compensation under Ballot Measure 37 are set forth in section 3 of the Measure.

Findings of Fact

The claim includes specific reference to County ordinances and general claims based on state land use regulations that restrict the use of the property relative to what would have been allowed in 1952 and 1959 when the Yarbor family acquired the property. Most laws that qualify as "land use regulations" under the Measure were adopted after 1959.

While not directly raised by the claimant, the department notes that ORS 215.730 and OAR 660, Division 6 include standards for siting dwellings in forest zones. Those provisions include fire protection standards for dwellings and for surrounding forest lands. Section 3(B) of Measure 37 specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes…" The department finds that siting standards for dwellings in forest zones in ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, Division 6) are exempt under subsection (3) of Measure 37.

Conclusions

Without a specific proposed use or a specific listing of laws that are the basis for the claim, 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 forest land apply to the owners' anticipated use of the property and for the most part these laws would not come under any of the exemptions in Measure 37.

The siting requirements of ORS 215.730, Goal 4 and its implementing rules related to dwelling siting standards based on health and safety are exempt and will also continue to apply. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure, because they were not identified in the claim, or because they are laws that are not covered by the Measure to begin with.

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 permitted at the time the present 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

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the division of the subject property into parcels less than 80 acres or the approval of dwellings on smaller parcels and therefore reduce the fair market value of the property. It appears the claim asserts this amount to be $84,792.83. However, because the claim does not provide a specific explanation for how the specified restrictions reduce the fair market value of the property from what they could have done under the regulations in place at the time the family acquired the property in 1952 and 1959, a specific amount of compensation cannot be determined. Nevertheless, based on the current 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, Measure 37 authorizes the department to modify, remove or not apply all or parts of one or more land use regulations to allow the Yarbors to use the subject property for a use permitted at the time they acquired the properties on October 9, 1981.

Conclusions

Based on the record before the department, the Yarbors have established that they are entitled to relief. Therefore, department staff recommends that, in lieu of compensation (and except for ORS 215.730 and those provisions of Goal 4 and its implementing rules (OAR 660, Division 6) relating to siting standards for dwellings for the protection of public health and safety) the requirements of the following state laws enforced by the Commission or the department not apply to the Yarbors' use of the property: the minimum lot size and dwelling standards established by ORS 215.705 to 215.755 and 215.780, Statewide Planning Goal 4 and OAR 660-006-0026 and 0027. These laws will not apply to the property to allow the Yarbors to divide the property and establish one or more dwellings as permitted on October 9, 1981 when they acquired the property that is the subject of the claim.

On October 9, 1981, the Columbia County comprehensive plan and implementing land use regulations were not acknowledged by the Commission under ORS 197.251. Since the Commission had not acknowledged Columbia County's comprehensive plan and land use regulations, including any County code provisions applicable to the property at that time, the provisions of Statewide Planning Goal 4 in effect at that time applied directly to property on the date of acquisition. Columbia County also required the subject property to "be treated in accordance with Goal 4" under Columbia County Interim County Land Use Ordinance No. 80-8, "Interim Measures for Reviewing Land Use Actions on Agricultural Land Pursuant to Goal 3, OAR 660-15-000(3)" enacted June 12, 1980. Section 4 of Ordinance 80-8 specifies that "forest cubic foot site class 1-5 land shall be treated in accordance with Goal 4."[2] No evidence was submitted to indicate whether the subject property was lawfully partitioned under Goal 4 or ORS 92 as required on October 9, 1981. In general, Goal 4 required local land use regulations to "conserve forestlands for forest uses." Specifically, Goal 4 only allowed land divisions that would protect commercial forestlands for commercial forest uses. Dwellings in forest zones were required to be "necessary and accessory" to a forest use.[3]

The opportunity to divide the property and to place residential dwelling on the property when the claimants acquired it in 1981 was limited to land divisions that were consistent with the provisions of Statewide Planning Goal 4 that were in effect in 1981.[4]

Any use of the property by the claimant remains subject to the following laws: (a) those laws not specified in the claim to the State of Oregon, dated December 21, 2004 or

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[2] Statewide Planning Goals 1-14 become effective (OAR 660-015-0000) and applied to legislative land use decisions and some quasi-judicial land use decisions prior to acknowledgement of a jurisdiction's comprehensive plan and land use regulations (*Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (1977), *1000 Friends v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979) and *Alexanderson v. Polk County*, 289 Or 427, *rev. denied*, 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985).) After the local 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, state statutes continue to apply and insofar as the local implementing provisions are materially the same as the rules, the local provisions must be interpreted consistent with the substance of the rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

[3] Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for forest lands as well as those that were not necessary and accessory to an enumerated forest use, *Lamb v. Lane County*, 7 Or LUBA 137 (1983). Dwellings in forestlands were required to be "necessary and accessory" to show that such dwellings comply with the Goal 4 requirement that local land use regulations must "conserve forest lands for forest uses *1000 Friends v. LCDC/Curry County*, 301 Or 447 (1986). A dwelling that may "enhance" forest uses is not "necessary and accessory" to a forest use to the extent required by Goal 4, *1000 Friends of Oregon v. LCDC/Lane County*, 305 Or 384 (1988).

[4] For guidance, the Goal 4 provisions were interpreted under OAR 660, Division 6, effective September 1, 1982 and in *Lamb v. Lane County*, 7 Or LUBA 137 (1983), *1000 Friends v. LCDC/Curry County*, 301 Or 447 (1986), and *1000 Friends of Oregon v. LCDC/Lane County*, 305 Or 384 (1988). Another indication of the appropriate standards that applied to the property in 1981 are the land division and dwelling standards in Columbia County's later-acknowledged forest zone (PF-76), acknowledged by the Commission on August 9, 1985.

identified in this report; (b) any laws enacted or enforced by a public entity other than the Commission or department; and (c) those laws not subject to Measure 37 including without limitation, those laws exempt under Section (3) of the Measure.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on May 25, 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.