

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation**

August 25, 2005

STATE CLAIM NUMBER: M120083

NAME OF CLAIMANT: Diana C. Tormey

MAILING ADDRESS: Post Office Box 631
Dallas, Oregon 97338

PROPERTY IDENTIFICATION: Township 8S, Range 5W, Section 30
Tax Lots 300, 303, 304, 305, 306, 502, 607

Township 8S, Range 5W, Section 29
Tax Lot 1016
Polk County

OTHER CONTACT INFORMATION: Jonathan P. Sushida (attorney)
Wallace W. Lien, PC
1775 32nd Place NE, Suite A
Salem, Oregon 97303-1674

DATE RECEIVED BY DAS: March 9, 2005

180-DAY DEADLINE: September 9, 2005

I. CLAIM

Diana C. Tormey, the claimant, seeks compensation in the amount of \$4,429,031 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 claimant desires compensation or the right to divide the 152-acre property into one-to-five-acre parcels, and to develop each parcel with a single-family dwelling. The property is located at 15400 Ferns Corner Road, near the City of Dallas, in Polk 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 laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not

apply to the claimant to allow her to divide the property into one-to-five-acre parcels, and to develop each parcel with a single-family residence: applicable provisions of Statewide Planning Goal 14 (Urbanization) and OAR 660-04-0040. These laws will not apply to Ms. Tormey only to the extent necessary to allow the claimant a use of the property permitted on the date she acquired each parcel. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 23, 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, there were ten (10) written comments 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

The claim was submitted to DAS on March 9, 2005, for processing under OAR 125, division 145. The claim identifies Polk County Acreage Residential (AR-5) zoning, Statewide Planning Goals, ORS 197 and 215, and OAR 660, as the bases of the claim. Acreage Residential zoning and applicable portions of Oregon's Statewide Planning Goals were all adopted prior to December 2, 2004. (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. The claim is 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. Subsection 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claim involves eight tax lots: Tax Lots 300, 303, 304, 305, 306, 502, 607 and 1016. The claimant’s grandfather, Henry Fern, acquired Tax Lots 306, 502 and 607 by Warranty Deed on August 27, 1902. Mr. Fern acquired Tax Lots 304 and 305 by Warranty Deed on March 2, 1920. Mr. Fern acquired an additional portion of Tax Lot 305 by Warranty Deed on September 15, 1928, and acquired an additional portion of the current Tax Lot 300 by Warranty Deed on May 13, 1929. Mr. Fern also acquired portions of Tax Lots 303 and 305 on December 16, 1943. (See table below for acquisition details.)

Tax Lot	Family Acquisition Dates	Claimant Acquisition Dates
300	May 13, 1929	March 24, 2001
303	December 16, 1943	March 5, 1980
304	March 2, 1920	January 5, 1983
305	March 2, 1920	February 25, 1988
306	August 27, 1902	March 24, 2001
502	August 27, 1902	March 24, 2001
607	August 27, 1902	March 24, 2001
1016	March 25, 1974	February 25, 1988

According to the claim, the claimant’s mother, Esther Wiens, acquired Tax Lots 300, 303, 304, 305, 306, 502, and 607 from Mr. Fern in 1948. A Warranty Deed provided by the claimant also indicates that the claimant’s parents, Frank and Esther Wiens, acquired Tax Lot 1016 on March 25, 1974. The claim does not include documentation to verify additional dates of acquisition by Frank or Esther Wiens, or to verify continuous family ownership of the additional parcels, as alleged in the claim.

The claim includes a Warranty Deed demonstrating the claimant’s acquisition of Tax Lot 303 on March 5, 1980; the claimant’s acquisition of Tax Lot 304 on January 5, 1983; and the claimant’s acquisition of Tax Lots 305 and 1016 on February 25, 1988. The claim also includes a Correction Deed that conveys Tax Lots 300, 306, 502 and 607 to the claimant on March 24,

2001, following the death of the claimant's mother. (See death certificate included in the department's claim file.)

Polk County Tax Statements included in the claim indicate that Diana C. Tormey retains ownership of the eight subject parcels.

Conclusions

The claim establishes that a family member of the claimant, as that term is defined under subsection 11(A) of Measure 37, acquired seven of the subject parcels between 1902 and 1948, and the eighth parcel in 1974. The claim also states that a family member(s) of the claimant have maintained continuous ownership since those dates. However, the claimant has not provided verification of the dates the claimant's parents acquired the properties or that the family has continuously owned the property since its acquisition. Therefore, family acquisition dates and final determination and findings under Section V. of this report, shall be conditioned upon submittal of documentation to substantiate that the subject property has remained in continuous, uninterrupted ownership by the claimant and/or family members of the claimant. Subject to verification by the claimant, it appears that family ownership for seven of the subject tax lots included in the claim dates prior to 1950, and that the family has owned tax lot 1016 since 1974.

Diana C. Tormey, the claimant, is a current owner of the subject property as of March 5, 1980 for Tax Lot 303; January 5, 1983 for Tax Lot 304; February 25, 1988 for Tax Lots 305 and 1016; and March 24, 2001, for Tax Lots 300, 306, 502 and 607.

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 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 cites Statewide Planning Goals, ORS 197, and 215, and OAR 660 as restrictive land use regulations that reduce the fair market value of the subject parcels. The claim also states that:

“When claimant's family purchased the subject property it had no zoning designation and no regulations were in place that restricted its use. Subsequent to the claimant's grandfather's purchase of the subject property, the state and County zoned it Acreage Residential Five-Acre Minimum (AR-5). This significantly restricts the claimant's ability to use the property by prohibiting the use of the property for subdivision into one-acre plus parcels and development with single family residences. Claimant requests compensation for the lost value of the subject property, or if the state and county are unable or unwilling to pay compensation, claimant requests that the restrictions be waived by the state and county.”

In general, ORS 197 addresses procedural requirements, including those regarding creation, enforcement and review of land use regulations and land use applications. The claimant has not established that ORS 197 in itself restricts the use of subject property.

The provisions of ORS 215 pertain to development on lands designated for farm and forest use and do not generally apply to lands for which a Goal 3 or Goal 4 exception has been acknowledged. Polk County's AR-5 zone is not subject to the standards established in ORS 215 for Agricultural and Forest Lands. The claimant has not established that ORS 215 restricts the use of subject property.

The claim is based, in part, on Polk County's AR-5 and state laws that restrict the use of the property. The subject property's AR-5 zoning allows parcels to be divided into 5-acre lots or parcels.

The Polk County comprehensive plan designates the subject Tax Lots as AR-5 in accord with Statewide Planning Goal 14. According to County Planning staff, Polk County adopted the AR-5 zone on December 4, 1975. Although the County's comprehensive plan was not fully acknowledged until 1988, the AR-5 zoning applicable to the subject property was ultimately acknowledged and has applied to the property since 1975.

As a result of a 1986 Oregon Supreme Court decision, in 2000 the Commission amended Goal 14 (Urbanization) and adopted OAR 660-004-0040, which became effective on October 4, 2000.¹ The rule provides that, after October 4, 2000, a county minimum lot size in a rural residential area (including the AR-5 zoning of the parcels subject to this claim) shall not be amended to allow a smaller minimum lot size without taking an exception to Goal 14 (OAR 660-004-0040(6)). This rule would not allow the subject parcels to be divided into one-acre plus lots or parcels without an exception to Goal 14.

The claimant's family acquired tax lots 300, 303, 304, 305, 306, 502, and 607 between 1902 and 1948, prior to the adoption of the Statewide Planning Goals or their implementing regulations. The claimant's parents acquired Tax Lot 1016 in 1974, after the adoption of SB 100 (Chapter 80, Oregon Laws 1973, effective October 5, 1973) but before the adoption of the Statewide Planning Goals effective January 25, 1975. As such, ORS 197.175(1) and 197.280 (1973 edition) required, in addition to any local plan or zoning provisions, the application of interim land use goals set forth in ORS 215.515 (1973 edition) to the preparation, revision, adoption or implementation of any comprehensive plan prior to the effective date of the statewide planning goals (see *Petersen v. Klamath Falls*, 279 Or 249 (1977)).

Conclusions

Statewide Planning Goal 14 and OAR 660-004-0040 restrict the density of residential development outside of an urban growth boundary. Goal 14 became effective in 1975. OAR 660-004-0040 became effective on October 4, 2000. These laws were adopted after the claimant's family acquired the property.

¹ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or App 447 (1986).

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's 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 the property until there is a specific proposal for that use. When the claimant seeks 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 alleges a reduction in fair market value of \$4,429,031. The claim includes Polk County Tax Statements prepared for the 2004-2005 tax year, which indicate that the subject parcels have a total assessed real market value of \$936,420. The claim also indicates that one-acre to four-acre buildable parcels near the subject property are valued at \$34,805 per-acre and estimates that the unregulated value of the subject property would be \$5,315,071. The claim does not include an appraisal or other analyses of the fair market value of the subject property or of comparison properties.

Conclusions

As explained in section V.(1) of this report, Diana Tormey is a current owner of the property and acquired portions of the property in 1980, 1983, 1988, and 2001. Family members of Ms. Tormey originally acquired seven of the eight subject parcels prior to 1948, and the eighth in 1974, and appear to have continuously owned the property since its acquisition. Thus, under Ballot Measure 37, Ms. Tormey is due compensation for land use regulations enacted after those dates that restrict the use of the subject property in a manner that reduces its fair market value.

The claim identifies a reduction in fair market value of \$4,429,031. Without an appraisal or other substantiating documentation, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. However, based on the submitted information, including the claimant's estimates, 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 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 laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

As established above, Statewide Planning Goal 14 and OAR 660, division 4, restrict the use of the property. Under section 3(E) of Measure 37, the measure does not apply to laws enacted prior to the date of acquisition of the property by the owner or by a family member of the owner. Most of the regulations identified in the claim as restricting development of the property are not exempt under the provisions of subsection 3(E) of Measure 37.

Conclusions

Laws in effect when the claimant's family acquired the subject property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimant's use of the property.

There may be other laws that continue to apply to the claimant's 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 claimant seeks 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 subsections 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 claimant should be aware that the less information they have provided to the department in their claim concerning the nature of the use she wishes to carry out, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her 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 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 findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the development of the subject property for one- to five-acre parcels with single-family dwellings on each parcel, and reduce the fair market value of the subject property to some extent. Based on the claimant's estimates, the claim asserts this amount to be \$4,429,031. Without an appraisal or other substantiating documentation, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless,

based on the submitted information, 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.

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 Diana Tormey to use the property for a use permitted at the time she acquired the respective parcels in 1980, 1983, 1988, and 2001.

When the claimant acquired tax lots 303, 304, 305 and 1016, those parcels were zoned AR-5, which allows parcels to be divided into 5-acre lots or parcels.

As stated above, in 2000, the Commission amended Goal 14 and adopted OAR 660-004-0040, which became effective on October 4, 2000. This rule provides that, after October 4, 2000, a county minimum lot size in a rural residential area (including the subject property) shall not be amended to allow a smaller minimum lot size without taking an exception to Goal 14. This rule was in effect when the claimant acquired tax lots 300, 306, 502, and 607.

Conclusion

Based on the record, and subject to the claimant's verification of family acquisition and continuous ownership, 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 Diana Tormey's subdivision of the property into one-to-five acre parcels and the establishment of one dwelling on each new parcel created: the applicable provisions of Statewide Planning Goal 14 and its implementing rules at OAR 660-04-0040 that became effective after March 5, 1980 for Tax Lot 303; after January 5, 1983, for Tax Lot 304; after February 25, 1988, for Tax Lots 305 and 1016; and after March 24, 2001, for Tax Lots 300, 306, 502 and 607.
2. The action by the State of Oregon provides the state's authorization to the claimant to develop the subject property in accordance with the laws in effect on the date she acquired each parcel. Those standards include the provisions of Statewide Planning Goal 14 and OAR 660-04-0040 in effect on March 5, 1980, for Tax Lot 303; on January 5, 1983, for Tax Lot 304; on February 25, 1988, for Tax Lots 305 and 1016; and on March 24, 2001, for Tax Lots 300, 306, 502 and 607.
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 claimant first obtains 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 claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws 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 excepted under section (3) of the measure.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for her 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 claimant 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 August 2, 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.