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

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

August 31, 2005

STATE CLAIM NUMBER:	M120104
NAME OF CLAIMANTS:	Julius and Kathleen Bialostosky
MAILING ADDRESS:	22620 Southeast Main Court Gresham, Oregon 97030
PROPERTY IDENTIFICATION:	Township 2S, Range 3E, Section 10C Tax Lot 1100 Clackamas County
OTHER INTEREST IN PROPERTY:	Michael Hammons (Agent) 20320 Southeast Highway 212 Damascus, Oregon 97015
DATE RECEIVED BY DAS:	March 11, 2005
180-DAY DEADLINE:	September 7, 2005

I. CLAIM

The claimants, Julius and Kathleen Bialostosky, seek compensation in the amount of $879,500 for a 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 subdivide the property into smaller lots. According to the claimants' agent, the claimants seek to subdivide the property into nine (9) 0.3-acre lots and keep the balance as a single lot. The 11.45-acre property is located in the City of Damascus, south of Highway 212 and west of 232nd Avenue. The property is located just south of the current urban growth boundary.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) finds that the claim is valid. The department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the Bialostoskys, to allow them to subdivide their 11.45-acres to create ten (10) parcels each with a building site: applicable provisions of Statewide Planning Goal 14 (Urbanization) and OAR 660-004-0040. These laws will not apply to the claimants only to the extent necessary to allow the Bialostoskys a use of the property permitted at the time they acquired it in 1948. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On March 21, 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, one written comment, evidence or information was 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 the comment letter 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 March 11, 2005, for processing under OAR 125, division 145. The claim identifies Oregon Administrative Rule (OAR) 660-004-0040 as the law that restricts the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use 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, Julius and Kathleen Bialostosky, acquired an ownership interest in the subject property on March 26, 1948 by deed (submitted with claim). A Title Report submitted with the claim indicates that Julius and Kathleen Bialostosky still own the property.[1]

Conclusions

The claimants, Julius and Kathleen Bialostosky, are "owners" of the subject property as that term is defined in Section 11 of Ballot Measure 37, as of March 26, 1948.

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 states that OAR 660-0040-0040(8):

> "limits size of property to 20-acre minimum lot size for new lots"

OAR 660-040-0040(8)(e) places a 20-acre limit on the size of land divisions within one mile of the Portland metropolitan area urban growth boundary. The property is located within the City of Damascus, but just south of the urban growth boundary. As a result, OAR 660-004-0040(8) applies to this property.

When the Bialostoskys acquired the property, the statewide land use planning laws were not in effect. The property is currently zoned RRFF-5, which is a rural residential zone for purposes of OAR 660-004-0040.

This claim analysis also considers Goal 14. Statewide Planning Goal 14: (Urbanization) was effective January 25, 1975 and required that local comprehensive plans identify and separate urbanizable land from rural land, in order to provide for an orderly and efficient transition from rural to urban land use. This Goal generally required that land outside of urban growth

[1] The claim identifies five of the claimants' children as having an interest in the subject property, but no interest is shown as being of record in the title report submitted with the claim.

boundaries be used for rural uses and also became effective on January 25, 1975. In 2000, as a result of a 1986 Oregon Supreme Court decision,[2] the Commission amended Goal 14 and adopted OAR 660-004-0040 Application of Goal 14 (Urbanization) to Rural Residential Areas, which was effective October 4, 2000. The rule provides that after October 4, 2000, an exception to Goal 14 is required to create a lot or parcel in a rural residential zone that is smaller than the county's minimum lot size standard.

However, the property is within one mile of the Metropolitan urban growth boundary (UBG). Thus the minimum lot size is 20-acres (see OAR 660-004-0040(8)(e)). This standard applies to the subject property because it is located within one mile of the UGB, and it does not allow the subject 11.45-acre property to be divided without a Goal 14 exception. (See OAR 660-004-0040(7) and (8).)

Goal 14 and OAR 660-004-0040 do not allow the subject property to be divided into lots or parcels smaller than 20-acres without a Goal 14 exception.

Conclusions

Lot size standards for rural residential lots or parcels established by OAR 660-004-0040, and the general limitation on urban uses outside of urban growth bounders in State Planning Goal 14, have been adopted since the claimants acquired the property in 1948 and prohibit division of the property into smaller lots or parcels for residential development. Land use laws adopted since 1948 restrict the use of the property from what could have been done when the claimants acquired the property in 1948.

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 use(s) that the claimant 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 a 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 states that the fair market value of the subject property has been reduced by $879,500 as a result of land use laws enacted after they acquired the property in 1948. The claimants supplied three different Comparative Market Analyses (CMA) demonstrating the value of properties in the vicinity with site characteristics similar to the existing character of the subject property and similar to the potential character of the subject property. The CMAs provided

[2] *1000 Friends of Oregon vs. LCDC Curry County.*

suggested prices for 10-acres sites; a 7.75-acre site; and for .33-acre sites. There is no certified appraisal to substantiate the claimed values either before or with state land use regulations.

Conclusions

As explained in section V. (1) of this report, Julius and Kathleen Bialostosky are the current owners of the subject property as March 26, 1948. Thus, under Ballot Measure 37, the Bialostoskys are due compensation for land use laws 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 claim asserts the reduction in value due to the restriction to be $879,500. However, 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 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 OAR 660-004-0040, the State's rules implementing Goal 14 in Rural Residential Areas. All of the specific state land use regulations cited in the claim were enacted after the claimants acquired the property in 1948. As a result, Goal 14 and OAR 660-004-0040 are not exempt under subsection 3(E) of Measure 37.

The department notes that materials submitted with the claim indicate that Clackamas County would not have approved a subdivision of this property into lots of less than 40,000 square feet back in 1978 in order to have adequate room on each lot for a septic drain field. State and local laws relating to water and septic systems are exempt under subsection 3(B) of Measure 37 and will continue to apply to this property, and may require larger lot sizes if the property is served by individual water and septic systems.

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine precisely what laws may apply to the contemplated use of this property, or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that few laws will be exempt under subsection 3(E) of the measure given the early date of acquisition of this property.

Laws in effect when the claimant 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 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 use(s) that the claimant has 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 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 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 of Fact

Based on the findings and conclusions set forth in this report laws enforced by the Commission or the department restricts the division of the subject property into ten (10) parcels with potential home sites. The claimants cannot create the desired lot sizes out of the subject property because laws enacted after the claimants acquired the property prohibit it. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by $879,500. However, because the claim does not provide an appraisal or other specific explanation for how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow the Bialostoskys to use the subject property for a use permitted at the time they acquired the property on March 26, 1948.

Conclusions

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

1. In lieu of compensation, the requirements of the following state laws will not apply to the Bialostoskys, to allow them to subdivide their 11.45-acres to create ten (10) lots each with a building site: applicable provisions of Statewide Planning Goal 14 (Urbanization) and OAR 660-004-0040. These laws will not apply to the claimants only to the extent necessary to allow them a use of the property permitted at the time they acquired it in 1948.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on March 26, 1948.

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 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 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 July 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.