

BALLOT MEASURE 37 (2004) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF FORESTRY

Staff Report and Recommendation

September 28, 2005

OREGON CLAIM NUMBER: M 120412

NAME OF CLAIMANTS: Olivella C. Wilcox, Trustee of the
Wilcox Family Trust

MAILING ADDRESS: 803 E 6th Street
Molalla, OR 97038

PROPERTY DESCRIPTION: Township 5S, Range 3E, Section 3
Tax Lot 306 (Parcel 2, Partition Plat
No. 1996-130)
Clackamas County

**OTHER CONTACT INFORMATION
FOR CLAIMANT:** Mark P. O'Donnell and
Kristian Roggendorf
O'Donnell & Clark, LLP
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Portland, OR 97209
(503) 222-9981

OTHER INTEREST IN PROPERTY: 10-foot pipeline right-of-way on eastern
boundary for Colton Water District.

DATE RECEIVED BY DAS: April 1, 2005

180-DAY DEADLINE: September 28, 2005

I. CLAIM

See Department of Land Conservation and Development (DLCD) staff report.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Forestry has determined the claim is not valid because none of the laws identified in the claim as administered by the Board of Forestry (Board) or by the Department of Forestry (Department) restrict the claimant's right to divide the property and develop it for residential use. ORS 527.730 provides that "[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." The claim submitted by the claimants proposes a conversion. To the extent that the claimants may propose a forest operation in conjunction with the conversion, claimants have not submitted a written notification as required by law, and without a notification the Department is unable to determine whether the laws listed in the claim apply to the claimant's use of the property or restrict her use of the property. As a result, the Department has not enforced an existing state land use regulation with respect to the claimant's use of the property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

See DLCD staff report.

IV. TIMELINESS OF CLAIM

See DLCD staff report for requirements.

Findings of Fact

Exhibit 4 to the claim identifies certain specific regulations as applying to the claimant's ability to use the land by subdividing the property and developing it for residential use. The regulations identified in the claim include portions of Oregon Revised Statute chapters 526 and 527 and Oregon Administrative rules chapter 629, divisions 1, 20, 45, and 600 *et seq.* 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 enacted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

The findings of the Draft Staff Report of the Department of Land Conservation and Development on this claim regarding ownership are incorporated into this report by this reference.

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 claimant wishes to subdivide the subject property into 8 to 16 residential lots. The claim lists a number of specific statutes and rules from ORS chapters 526 and 527 and OAR chapters 1, 20, 45, and 600 *et seq.* These regulations are administered by the Board and the Department.

One of the cited regulations, ORS 527.730, Conversion of forestland to other uses, states, "Nothing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." There are no laws that are enforced by the Board or the Department that restrict the use of the property that is described in the claim: the division of land or its development for a single family home.

The subject property does appear to include trees. Certain uses of property are "operations" regulated under the Forest Practices Act. If trees are harvested for commercial use, some laws listed in the claim will apply to the operation.

A notification of intent to conduct a forest operation is required in order for the Department to determine whether laws it or the Board may enforce restrict the use of the subject property, and reduce its fair market value.

Conclusions

Nothing in the laws that the Department or Board enforces applies to or restricts the division of the property into legal parcels or the development of dwellings.

Persons proposing to conduct a forest operation are required to submit a notification of the operation to the Department. Nothing in Measure 37 relieves an operator from this obligation, and until a notification is submitted, the Department is unable to determine whether laws it or the Board administers apply to the claimant's use of the property.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires the current land use regulation(s) described in Section V. (2). of this report to have “the effect of reducing the fair market value of the property, or any interest therein.”

Findings of Fact

The claimant has not demonstrated that any land use regulations administered by the Department or the Board restrict their use of the subject property.

Conclusions

The claimant has not demonstrated that Oregon Department of Forestry laws restrict her use of private real property and thus, has not demonstrated that those laws reduce the fair market value of the subject property.

4. Exemptions under section 3 of Measure 37

Ballot Measure 37 (2004) 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 lists numerous specific laws as potentially restricting the use of the subject property. All of the cited regulations were enacted after 1965. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.) However, some regulation of forest practices existed when Mrs. Wilcox acquired the subject property on May 21, 1965. Those regulations, part of the Oregon Conservation Act, and the rules enacted to implement the Act, will apply to commercial forest operations on the subject property, and are exempt under subsection 3(E) of Measure 37.

FPA regulations in OAR 629, division 625 were enacted to comply with the federal Clean Water Act. Subsection 3(B) of Measure 37 specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety..., including pollution control”. Subsection 3(C) of Measure 37 exempts laws that are required to comply with federal law. These exemptions may apply to some or all of the state land use regulations that may apply to claimant if claimant undertakes a commercial forest operation.

Conclusions

The Department concludes that certain of the specified land use regulations are likely exempt under subsection (3) of Measure 37. Until there is a notification of an operation,

however, a final determination of the applicability of the listed laws to a particular use of the property cannot be made.

VI. FORM OF RELIEF

Based on the current record, the claimant is not entitled to relief under ballot Measure 37. Department staff recommend this claim be denied because neither the Board nor the Department has enforced laws that restrict the division of the subject property in to parcels or lots, and the use of the property for residential purposes.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 1, 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.