

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

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

August 26, 2005

STATE CLAIM NUMBER: M120056

NAME OF CLAIMANTS: Gary and Patty Kenner

MAILING ADDRESS: 16001 Northwest Oakridge Road
Yamhill, Oregon 97148

PROPERTY IDENTIFICATION: Township 3S, Range 5W
Section 3
Tax Lot 1100,
Yamhill County

OTHER INTEREST IN THE PROPERTY: Access road easement for neighbor

DATE RECEIVED BY DAS: March 8, 2005

180-DAY DEADLINE: September 4, 2005

I. CLAIM

The claimants, Gary and Patty Kenner, seek compensation in the amount of \$400,000 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 develop their approximately 40-acre property into approximately 10-acre parcels and to develop each resulting parcel with a residential dwelling. The property is located at 16001 Northwest Oakridge Road, in Yamhill 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 this claim is valid. Department staff recommends, in lieu of compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimants to allow them to divide their property into 10-acre parcels, and to develop each parcel with a residential dwelling: applicable provisions of Statewide Planning Goal 4 (Forest Lands), the provisions required in Agriculture/Forest zones under OAR 660-006-050 and 055 and the provisions of ORS 215.780. These laws will not apply to the claimants only to the extent necessary to allow Mr. and Mrs. Kenner a use of the subject property permitted at the time

they acquired it on July 1, 1967. (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, 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

This claim was submitted to DAS on March 8, 2005, for processing under OAR 125, division 145. The claim identifies a Yamhill County Agriculture/Forestry AF-40 zone that restricts the use of the property as the basis for the claim. The Yamhill County AF-40 zone is based on the requirements of Statewide Planning Goal 4 (Forest Lands), the provisions required in Agriculture/Forest zones under OAR 660-006-050 and 055 and the provisions of ORS 215.780. 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, Gary and Patty Kenner, acquired the subject property on July 1, 1967, by land sale contract, from Gary Kenner’s parents, Howey John Kenner and Irene F. Kenner. (See land sale contract and fulfillment deed, dated July 29, 1977, in department’s claim file.) The claimants’ family first acquired the property in 1952 (see sales contract in file). No current year Yamhill County Tax Assessor’s Tax Statement was attached document the claimants’ current ownership of the subject property, however, the decision on the claimants’ county Measure 37 claim (Docket Number M37-36-05, dated June 22, 2005) confirms Gary and Patty Kenner are the current owners of the subject property. (See the department’s claim file.)

Conclusions

The claimants, Gary and Patty Kenner, are the “owners” of the subject property as that term is defined in Section 11(C) of Ballot Measure 37.

The claimants’ family, John and Irene Kenner acquired the subject property in 1952 and are “family members” to Gary and Patty Kenner, as that term is defined by Section 11(A) of 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 states that “[t]he implementation of the zoning regulations and land use regulations that are in effect now but were not in effect when we purchased our property, restricts our ability to build so our family can have homes on our 40-acres.”

The claimants’ property is zoned AF-40, which is a mixed agricultural and forestland zone adopted to comply with Statewide Goal 4 (Forest Lands) and the implementing provisions of OAR 660-006-0050 and OAR 660-006-0055 (effective February 5, 1990) and subsequently amended on March 1, 1994 to comply with the provisions of HB 3661 (Chapter 792, Or Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Statewide Goals 3 and 4 are allowed except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993. No information was provided to the department regarding the predominant use of the property on January 1, 1993. Depending on the predominant use on January 1, 1993, the property will be subject to either the requirements for dwellings applicable under exclusive farm use zoning required by Statewide Goal 3 and OAR 660, Division 33 or forest zone provisions required by Statewide Goal 4 and OAR 660, Division 006. This includes the dwelling standards asserted by the claimant as restricting the use of the property. However, no analysis of whether any of the tax lots can be approved for a dwelling under the applicable farm or forest provisions has been provided.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones which implement the 80-acre minimum lot size specified in ORS 215.780. Under OAR 660-006-055, the claimants' property cannot be divided into parcels smaller than 80 acres as may have been possible under the county zones applied in 1952. However, no analysis of whether any of the tax lots can be divided for non-farm dwellings under ORS 215.263(4)(b) has been provided.

Conclusions

The current provisions applicable to lands zoned AF-40 under OAR 660-006-0050 and 0055 relating to land divisions and dwelling standards adopted since the claimants family acquired the property in 1952, restrict the use of the property relative to uses allowed when claimants' family acquired the property in 1952. Under these current provisions, the claimants are restricted from further dividing or developing their property as they could have when their family acquired it. Additional land use regulations in ORS 215 and OAR 660, Divisions 6 and 33 cited by the claimants were adopted after the family acquired the property and also restrict the use of the property relative to the uses allowed when they acquired it.

The claimants' family acquired the subject property in 1952, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules.

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 the fair market value for the subject property has been reduced by \$400,000 as a result of land use laws enacted after the claimants' family acquired the property in 1950.

The claimants have provided information regarding the value of the property based on information about recent sales of similar properties provided by the Yamhill County Assessors Office. Documentation in the claim indicates a value of \$100,000 for each 10-acre lot was calculated based on sales information from properties of similar size.

There is no certified appraisal accompanying the claim materials to substantiate the claimed values, either before or with state land use regulations that affect it. The Yamhill County claim contains a sworn affidavit from the county assessor that the property value arrived at for purposes of assessing loss of fair market value is reasonable.

Conclusions

As explained in section V. (1) of this report, Gary and Patty Kenner are the current owners of the subject property as of July 1, 1967. The claimants' family acquired the property in 1952. Thus, under Ballot Measure 37, the Kenners 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' family acquired the property restrict division of the subject property and development of residential dwellings. The claim asserts the reduction in value to be \$400,000. However, without an appraisal or other substantiating 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 identifies the County's Agriculture/Forest zone as restricting the use of the subject property relative to what would have been allowed in 1952 when the property was first acquired. To the extent these laws were enacted after the claimants' family acquired the property in 1952, these laws do not appear to be exempt under Section 3(E) of Ballot Measure 37.

While not directly raised by the claimants, the department notes that ORS 215.730 and OAR 660, Division 6 include standards for siting dwellings in forest zones. These 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...” To the extent they may be applicable under OAR 660-006-0050, the department finds that siting standards for dwellings in forest zones under 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 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 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 farm land apply to the claimants' use of the property, and these laws are not exempt under section 3(E) of Measure 37.

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 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. 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 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 in this report, laws enforced by the Commission or the department prohibit the division of the subject property into approximately 10-acre parcels and the development of residential dwellings on each parcel. The claim asserts these restrictions reduce the fair market value of the subject property by \$400,000. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property,

no certified appraisal or other substantiating documentation was submitted and it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, the department acknowledges that state land use laws 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 just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow Gary and Patty Kenner to use the subject property for a use permitted at the time they acquired the property on July 1, 1967. On that date, the property was not zoned by Yamhill County.¹

Conclusions

Based on the record, 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 the Kenners' division of their 40-acre property into approximately 10-acre parcels and development of a residential dwelling on each resulting parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), the provisions required in Agriculture/Forest zones under OAR 660-006-050 and 055 and the provisions of ORS 215.780. These land use regulations will not apply to the Kenners' use of their property only to the extent necessary to allow the claimants to a use permitted at the time they acquired the property on July 1, 1967.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property subject to the standards in effect on July 1, 1967.
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

¹ According to the County's Measure 37 claim (Docket Number M37-36-05, dated June 22, 2005), the property will be subject to the County's 1959 land division ordinance in effect in 1967.

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 26, 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.