

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

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

September 2, 2005

STATE CLAIM NUMBER: M120130

NAME OF CLAIMANT: Glenn Kindred

MAILING ADDRESS: 10200 Southwest Durham Lane
McMinnville, Oregon 97128

PROPERTY IDENTIFICATION: Township 4S, Range 4W, Section 32,
Tax Lot 1300
Yamhill County

OTHER INTEREST IN PROPERTY: Jeri M. Kindred
140 Northeast Third Street
McMinnville, Oregon 97128

DATE RECEIVED BY DAS: March 14, 2005

180-DAY DEADLINE: September 10, 2005

I. SUMMARY OF CLAIM

The claimant, Glenn Kindred, seeks compensation in the amount of \$430,000 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 subdivide the 9.7-acre property into five parcels and to construct a single-family dwelling on each parcel. The property is located at 10200 Southwest Durham Lane, near McMinnville 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 the claim is valid. 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 Mr. Kindred's division of the property into five parcels and to the development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands) ORS 215.263, 215.284 and 215.780, and OAR 660, division 33. These laws will not

apply to Mr. Kindred only to the extent necessary to allow the claimant a use permitted at the time he acquired the subject property on September 10, 2001. The department acknowledges that the relief recommended in this report will not allow the claimant to use the property in the manner requested in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 24, 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, 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 14, 2005, for processing under OAR 125, division 145. The claim identifies Section 402 of the Yamhill County Code as restricting the use of the property. 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 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. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

On May 17, 1943, William Wesley Kindred acquired the subject property by Warranty Deed. William Wesley Kindred is a “family member” as to the claimants, as that term is defined under Section 11(A) of Measure 37. (See Deed documents included in the department’s claim file.) The claim also includes a title report dated August 7, 2000, as verification of continuous ownership by the Kindred family. The claimant, Glenn Kindred, and Jeri M. Kindred acquired the subject property on September 10, 2001, as reflected by a Warranty Deed included with the claim. Although Jeri Kindred is listed as an owner of the subject property, the current record indicates that Ms. Kindred is not a claimant for purposes of this Measure 37 claim.

This claim pertains to a 9.7 portion of a 14.7-acre parcel originally acquired by the claimant’s family in 1943. A deed dated January 9, 2001 was recorded to create two separate tax lots of 9.7 acres and five acres, from the original 14.7-acre parcel. That five acre portion of the parcel is not owned by the claimant and is not the subject of this claim. It appears; however, that the January 9, 2001 deed did not create a legal parcel under applicable Yamhill County ordinances.

Conclusions

A “family member” of the claimant, William Kindred, acquired an interest in the property in 1943 and the property has remained in family ownership since that date. The claimant, Glenn Kindred, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of September 10, 2001.

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

Regarding Yamhill County Code Section 402, the claim states that county zoning limits the minimum lot size to 80-acres and that the property “must generate \$80,000 gross annual farm income to build a home.” The claim also indicates the claimant’s intent to divide the 9.7 acres into five parcels with a dwelling on each parcel created. The 9.7-acre parcel is currently vacant farmland with no dwellings.

The claim is based on Yamhill County's current Exclusive Farm Use (EFU) Zone and the limits the zone places on the subject property. The claimant's property is zoned EFU as required by Goal 3 in accord with OAR 660, division 33 and ORS 215 because the claimants' property is "Agricultural Land" as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.213, 215.263, and 215.780, and OAR 660, division 33 as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80-acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (1993 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994 and implements the statutory standard for a primary dwelling in an EFU zone under ORS 215.283.

OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993 and was amended to comply with ORS 215.284(4) on March 1, 1994. Subsequent amendments to comply with HB 3326, (chapter 704, Oregon Laws 2001, and effective January 1, 2002) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.).

When the claimant's family first acquired the property in the 1943, Statewide Planning Goal 3, the statutory requirements in ORS chapter 215 and the administrative rules were not in effect.

Conclusions

Minimum lot size and dwelling standards established under the applicable provisions of Statewide Planning Goal 3, OAR 660, division 33, and ORS chapter 215, were adopted after the claimant's family acquired the property. These laws restrict the use of the property from what could have been done when the property was acquired by the claimant's family in the 1943.

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 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 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 land use regulation 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 includes an informal estimate of \$430,000, based on a list of comparable properties supplied by the claimant, as the property’s fair market value in the absence of current regulations. No appraisal or other documentation has been included to substantiate this claim.

Conclusions

As explained in section V. (1) of this report, the claimant, Glenn Kindred, is the current owner who acquired the property on September 10, 2001. Under Ballot Measure 37, Glenn Kindred is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value.

Without a certified appraisal or other documentation based on the value of the property developed as desired, it is not possible to substantiate the specific dollar amount the claimant demands 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 Yamhill County’s EFU zone and the related provisions of state law that have restricted use of the property and reduced its fair market value. These are Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33. All of the specific state land use regulations on which the claim is based were enacted in after the claimant’s family acquired the property in 1943, and restrict the use of the property in a manner that likely reduces its fair market value. None of the laws identified in the claim are exempt, under Section 3(E) of Ballot Measure 37, which exempts laws enacted after the claimant’s family acquired the property.

Conclusions

It appears that the general statutory, goal and rule restrictions on dividing the subject property and developing it for residential purposes apply to the claimant’s use of the property and that

none of these laws were in effect before the claimants' family acquired the property. As a result, these laws are not exempt under Section 3(E) of Measure 37. Laws in effect when the claimant's family acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the property.

There may 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 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. The claimant should be aware that the less information he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his 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 in order to allow the present owner to carry out a use of the property permitted at the time the current 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 restrict the division of the subject property into five parcels, for residential development. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$430,000. However, because the claim does not provide an appraisal or other substantiating documentation 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, Ballot Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Mr. Glenn Kindred to use the subject property for a use permitted at the time he acquired the property on September 10, 2001.

At the time the claimant acquired an interest in the property it was zoned EFU by Yamhill County, and subject to the current lot size and dwelling standards in ORS chapter 215 and OAR 660, division 33, as required under Statewide Planning Goal 3, as described above in Section V (2) of this report.

Conclusion

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 Mr. Kindred's division and development of the subject property into five parcels with a residential dwelling on each: applicable provisions of Statewide Planning Goal 3, ORS 215.263, 215.284 and 215.780, and OAR 660, division 33, enacted after September 10, 2001. The department acknowledges that the recommendation in this report will not allow Mr. Kindred to use the property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property subject to the standards in effect when the claimant acquired the subject property on September 10, 2001. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3, ORS chapter 215, and ORS 660, division 33, then in effect.
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 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 claimant to use the property, it may be necessary for him 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 3, 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.