

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

September 9, 2005

STATE CLAIM NUMBER: M120218

NAME OF CLAIMANT: Kuhl Company, LLC

MAILING ADDRESS: 445 Rosemont Road
West Linn, Oregon 97068

OTHER CONTACT INFORMATION: Jill Gelineau, Attorney at law
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Portland, Oregon 97204-3795

PROPERTY IDENTIFICATION: Township 2S, Range 1E, Section 15C
Tax Lot 200

Township 2S, Range 1E, Section 22B
Tax Lot 200
All in Clackamas County

OTHER INTEREST IN THE PROPERTY: Walter James Kuhl, Jr., Olive E. Kuhl

DATE RECEIVED BY DAS: March 18, 2005

180-DAY DEADLINE: September 14, 2005

I. SUMMARY OF CLAIM

The claimant, Kuhl Company, LLC, seeks compensation in the amount of \$2,100,000 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 claimant desires compensation or the right to divide the 28.96-acre property into approximately fourteen (14) lots of approximately two-acres each and develop each lot with a single-family residence and accessory structures. The property is located at 445 Rosemont Road, in the vicinity of the City of West Linn, in Clackamas 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 just 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 claimant to allow it to divide the subject property into 14 lots or parcels, and develop a dwelling on each lot or parcel: the applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, that took effect after February 11, 1998. These laws will not apply to the claimant's use of the subject property only to the extent necessary to allow the company a use of the subject property permitted at the time it was acquired on February 11, 1998. The department acknowledges that this relief will not allow the claimant to use the property in the manner described in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 25, 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 18, 2005, for processing under OAR 125, division 145. The claim identifies a long list of provisions in ORS 92 and 215, and OAR 660, divisions 1, 2, 4, 7, 8, 11, 12, 16, 18, 21, 22, 23, 31, and 33, as laws that restrict 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 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

Walter James Kuhl, Jr. and Olive E. Kuhl acquired ownership of the subject property by Deed on July 31, 1961. They conveyed the property to a Trust, with Walter James, Jr. and Olive E. Kuhl as trustees, on March 23, 1993. The property was conveyed to the Kuhl Company, LLC, on February 11, 1998, by a Warranty Deed from Walter James Kuhl, Jr. and Olive E. Kuhl. The current owner of the subject property is Kuhl Company, LLC. Kuhl Company, LLC acquired an interest in the property on February 11, 1998.

Neither Walter James Kuhl Jr., nor Olive E. Kuhl is a “family member” of the current owner, the Kuhl Company, LLC. The term “family member” in Measure 37 does not include a natural person who conveyed property to a legal entity. It does include a legal entity that conveys property to a natural person.

The claimant in this case, according to the claim form, is the Kuhl Company, LLC. On July 28, 2005, the claimant’s attorney submitted additional materials to the department asserting, among other things, that Olive E. Kuhl is a claimant in addition to the Kuhl Company, LLC. The claim

filed with the state clearly shows only the Kuhl Company, LLC as the claimant, and the letter accompanying the claim form states that the claimant's agents represent the Kuhl Company, LLC. If Walter James Kuhl, Jr. and/or Olive E. Kuhl believe they own an interest in the property and wish to file a separate claim, nothing in this report is intended to prevent them from doing so.

Conclusions

Based on the current record, the department concludes that the Kuhl Company, LLC owns an interest in the subject property, which it acquired on February 11, 1998. Walter James Kuhl, Jr. and Olive E. Kuhl are not "family members" of the Kuhl Company, LLC.

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 lists a large number of specific land use regulations as potentially restricting the use of the subject property for the use described in the claim. The following is the department's analysis of whether the listed land use regulations administered by the department or the Commission apply to the use of the property described by the claimant in a manner that restricts that use relative to the use allowed when the claimant acquired the property in 1998.

LCDC Rules and Statewide Land Use Planning Goals Listed in the Claim

OAR 660-001-0000 contains procedural rules that govern rulemaking by the Commission. It does not restrict the claimant's use of its property.

OAR 660-002-0005 is a statement of what other rules delegating authority from the Commission to the Director of the Department do. It does not restrict the claimant's use of its property.

OAR 660-004-0000 is a statement of purpose for the Commission's rules implementing Statewide Land Use Planning Goal 2. It does not restrict the claimant's use of its property.

OAR 660-004-0040 implements Statewide Planning Goal 14 as to residential development of rural residential areas. The rule only applies to land zoned rural residential. The subject property is not zoned rural residential and, as a result, this state law does not restrict the claimant's use of its property.

OAR 660-007-0000 is a statement of purpose for the Commission's rules relating to needed housing in the Portland metropolitan area. It does not restrict the claimant's use of its property.

OAR 660-008-0000 is a statement of purpose for the Commission's rules implementing Statewide Land Use Planning Goal 10. It does not restrict the claimant's use of its property.

OAR 660-011-0000 is a statement of purpose for the Commission's rules implementing Statewide Land Use Planning Goal 11. It does not restrict the claimant's use of its property.

OAR 660-011-005 to 0065 are rules implementing Statewide Planning Goal 11. These rules *may* restrict the use of the claimant's property, although most of the rules pertain to public facility planning by local governments. OAR 660-011-0060 generally prohibits the establishment of a sewer system or the extension of a sewer system on rural lands. The claimant's property is rural land, as that term is used in 660-011-0060, and the rule generally will require the claimant to serve any development of the property by septic system. OAR 660-011-0065 prohibits local land use regulations from allowing an increase in density based on the availability of service from a water system. No information has been provided to the department to show that either of these rules restrict the use of the subject property described by the claimant, or that they have any effect on the fair market value of the property. As a result, the department concludes that no rules in OAR 660, division 11, restrict the use of the property described in the claim. In addition, the department notes that although Goal 11 and its implementing rules were amended on July 28, 1998, many of the provisions currently in effect were already in effect when the claimant acquired the subject property.

OAR 660-012-0000 is a statement of purpose for the Commission's rules implementing Statewide Land Use Planning Goal 12. It does not restrict the claimant's use of its property.

OAR 660-012-0010 to 0060 are Commission rules implementing Statewide Land Use Planning Goal 12. These rules *may* restrict the use of the claimant's property, although most of the rules pertain to transportation planning by state and local governments. OAR 660-012-0060 applies to amendments to functional plans (Metro), acknowledged comprehensive plans, and land use regulations that significantly affect a transportation facility. This rule may apply to the subject property if the use will significantly affect a transportation facility. No information has been provided to the department to show that the use described in the claim will significantly affect a transportation facility. As a result, the department concludes that no rules in OAR 660, division 12, restrict the use of the property described in the claim, or affect its fair market value. In addition, the department notes that the Goal 12 implementing rules were already in effect when the claimant acquired the subject property.

Other than Statewide Land Use Planning Goal 3, no information has been provided to show that any of the other Goals at OAR 660-015-0000(1), (2), (5), (6), (7), and (10)-(14) (the enumerated Statewide Land Use Planning Goals) apply to the division of the property into 14 legal lots of approximately two-acres or parcels and the development of a single-family residence on each parcel. Statewide Land Use Planning Goal 3 was in effect when the claimant acquired the property. As a result, it does not restrict the use described in the claim, or affect the fair market value of the property.

OAR 660-016-0005 is a statement of purpose for certain of the Commission's rules implementing Statewide Land Use Planning Goal 5. It does not restrict the claimant's use of its property.

OAR 660-021-0000 is a statement of purpose for certain of the Commission's rules authorizing local governments to designate urban reserves. It does not restrict the claimant's use of its property.

OAR 660-022-0000 is a statement of purpose for certain of the Commission's rules authorizing counties to designate unincorporated communities. It does not restrict the claimant's use of its property.

OAR 660-023-0000 is statement of purpose for certain of the Commission's rules implementing Statewide Land Use Planning Goal 5. It does not restrict the claimant's use of its property.

OAR 660-031-0000 is a statement of purpose for certain of the Commission's rules implementing ORS 197.180. It does not restrict the claimant's use of its property.

OAR 660-033-0000 is statement of purpose for certain of the Commission's rules implementing Statewide Land Use Planning Goal 3. It does not restrict the claimant's use of its property.

OAR 660-033-0010 to 0150 are Commission rules implementing Statewide Land Use Planning Goal 3 and ORS 215. Certain of these rules may restrict the use of the claimant's property, as described in more detail below, although many of the rules pertain to other uses and most of the rules were already in effect when the claimant acquired the property in 1998.

Statutes Listed in the Claim

ORS 92.012 requires partitions to be done in accordance with ORS 92.010 to 92.190. ORS 92.025 prohibits the sale of a parcel until the final plat of the partition has been recorded. ORS 92.040 to 92.046 authorize cities and counties to adopt ordinances containing standards for the partitioning of property. ORS 92.100 sets technical requirements for partition and subdivision plats. All of these statutes may restrict the division of the claimant's property into legal parcels or lots. However, almost all of these statutes were in effect on February 11, 1998 when the claimant acquired the property and, as a result, they do not restrict the claimant's use or affect the fair market value of the property.

ORS 215.203 authorizes local governments to zone areas for exclusive farm use, and limits the use of land in such areas to farm use. This statute was in effect on February 11, 1998 when the claimant acquired the property. As a result the statutes do not restrict the claimant's use of its property or affect the fair market value of the property

ORS 215.209 requires the department to maintain a database. It does not restrict the claimant's use of the its land.

ORS 215.213 only applies to lands in counties that have designated marginal lands. It does not apply in Clackamas County.

ORS 215.215 governs the reestablishment of non-farm uses in exclusive farm use zones. It does not apply to the use described by the claimant, and the statute was already in effect when the claimant acquired the property. As a result, this statute does not restrict the claimant's use of its property or affect the fair market value of the property.

ORS 215.236 prohibits a local government from approving a non-farm dwelling on land zoned for exclusive farm use without disqualifying the property for special assessment, and assuring that the additional tax due has been paid. This statute does not restrict the use of real property

ORS 215.253 prevents governmental entities from restricting farm structures or farm practices. It does not restrict the use of real property described in the claim.

ORS 215.262 sets forth legislative findings concerning non-farm dwellings. It does not restrict the use of the real property described in the claim.

ORS 215.263 sets forth standards for land divisions of lands zoned for exclusive farm use. The primary limitation in that statute (ORS 215.263(4) (1997 ed.)) on the creation of new lots or parcels for non-farm dwellings was already in effect when the claimant acquired the subject property. However, some subsections of 215.263 do post-date 1998, and appear to restrict the use of the real property described by in the claim.

ORS 215.265 requires that land divisions from public parks or open-space record deed restrictions. It does not restrict the use of the real property described in the claim.

ORS 215.283 governs uses allowed on lands zoned for exclusive farm use and, as a result, may restrict the use described in the claim to the extent amendments to the statute since 1998 do so. ORS 215.284 governs the establishment of a non-farm dwelling in areas zoned for exclusive farm use, and as a result may restrict the use described in the claim to the extent that amendments to the statute since 1998 do so. ORS 215.293 requires a county to condition approval of a dwelling on recordation of a deed covenant prohibiting the owner of the property from undertaking a legal action alleging injury from farm or forest practices. This statute was already in effect in 1998, when the claimant acquired the property. ORS 215.296 sets forth certain additional standards for non-farm uses that are conditionally allowed on land zoned for exclusive farm use. This statute was already in effect in 1998, when the claimant acquired the property. Except for ORS 215.284, which is described in more detail below, these statutes do not restrict the claimant's use of its property, or affect its fair market value of the property.

ORS 215.316, 215.317, and 215.327 address marginal lands. Clackamas County did not designate marginal lands. As a result, these statutes do not apply to the claimant's use of its property.

Analysis

The claim is based on state laws that restrict the claimant's division of the property into 14 lots or parcels of approximately two-acres each and the development of a single-family residence on each lot or parcel. The claimant's property is zoned Exclusive Farm Use (EFU), as required by Statewide Planning Goal 3 (OAR 660-033-015-0000) in accord with OAR 660, division 33, and ORS 215 because the claimant's property is "Agricultural Land" as defined by Goal 3¹. Goal 3 became effective on January 25, 1975, following the passage of Senate Bill 100 in 1973.

Current land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660, division 33, as applied by Goal 3, do not allow the subject property to be divided into lots or parcels of less than 80-acres and establish standards for allowing the existing or any proposed parcel(s) 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). That requirement remains in effect in the current statute. ((ORS 215.780(1)(a).) ORS 215.263 (1997 edition) established standards for the creation of new lots or parcels for non-farm dwellings in an EFU zone, and allowed new lots or parcels for non-farm dwellings only if the dwellings were approved under ORS 215.284(3) or (4). ORS 215.284(4) (1997 edition) allowed a single lot or parcel to be created for a dwelling under certain specified conditions. These requirements remain in effect in the current statutes, with minor amendments in HB 3326 (Chapter 704, Oregon Laws 2001), which became effective May 22, 2002. As a result, except to the extent of amendments enacted after the claimant acquired the property in 1998, these statutes do not restrict the use of the real property described in the claim, nor do they reduce the fair market value of the property.

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. This rule generally mirrors the statutory requirements for non-farm dwellings. 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.) As a result, except to the extent of amendments enacted after the claimant acquired the property in 1998, this rule does not restrict the use of the real property described in the claim, nor does it reduce the fair market value of the property.

Conclusions

Only those provisions of ORS 215.263, 215.284, 215.780 and OAR 660-033-0130 adopted after February 11, 1998, restrict the use of the property described in the claim. Based on the record for this claim, none of the other laws listed in the claim restrict the use of the real property described in the claim.

¹ The subject property is "Agricultural Land" because it consists of Class III and IV soils. (See Soil Survey of Clackamas County Area, Oregon, USDA SCS, November 1985, Sheet #6 and pages 30-32, 68.)

3. Effect of Regulations on Fair Market Value

The subject property currently contains one dwelling. The claimant proposes to create 14 additional lots or parcels of approximately two-acres each and develop each lot with a single-family residence. The claim includes a limited appraisal, which states that it “does not contain sufficient information to be relied on by others.” The report also states that:

It is our understanding that the owner of this property desires to use it for subdivision to 15 lots for single-family residential development, including one lot for the existing house. We understand that this use is currently prohibited by the property’s current zoning and/or other land use regulations. However, this use would have been allowed under restrictions that existed when acquired by the owner or a qualified family member.

The assumption used in the appraisal report that the use (subdivision and development of 14 homes) would have been allowed when the property was acquired by the current owner, or a family member of the current owner, is incorrect. As noted earlier in this report, a natural person, such as Walter James Kuhl, Jr. and Olive E. Kuhl, who acquired ownership in 1961, cannot be a “family member” of a legal entity under the terms of Measure 37. And, at the time the current owner acquired the property in 1998, the use described in the claim (and on which the appraisal is based) already was not allowed.

Although the appraisal submitted is based on an incorrect assumption, the department agrees that there have been some changes to the laws described earlier in this claim since the date the property was acquired that may make it more difficult to divide the property and to establish one or more dwellings on it. The department is unable to determine how much of a reduction in fair market value may have occurred, but believes that it is more likely than not that some reduction has occurred.

Conclusions

Without an appraisal based on correct assumptions, or another explanation of the reduction in fair market value, it is not possible to substantiate the amount of reduction in fair market value that has occurred as a result of the laws on which the claim is based. It is clear that under current laws, the property cannot be divided and developed to the extent described in the claim and that this was already the case when the current owner acquired the property in 1998. However, it also appears that amendments to laws after 1998 may have further restricted the use described in the claim and, as a result, reduced the fair market value of the property. Therefore, 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 laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The claim identifies many state laws as restricting the use of the subject property relative to what would have been allowed in 1998 when the property was acquired. To the extent that the state laws were enacted before the Kuhl Company, LLC acquired the property in 1998, these laws are exempt under subsection 3(E) of Ballot Measure 37.

Certain of the laws listed by the claimant also may be exempt under subsections 3(B) (public health or safety) or 3(C) (required by federal law). Until there is a specific proposed use of the property, the department is unable to determine the application of these exemptions.

Conclusions

Those current laws, including the applicable provisions of the Statewide Land Use Planning Goals, OAR 660 and ORS 92 and 215, enacted prior to the claimant's acquisition of the property in 1998 are exempt. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure, or because they are laws that are not covered by the Measure.

There may be other laws that continue to apply to the claimant's use of the property because they were not 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 an owner of property 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 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. The claimant should be aware that the less information it provides to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to the claimant's 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

The claimant's ability to divide the property into 14 lots or parcels of approximately two-acres each and to develop a single-family dwelling on each lot or parcel is restricted to some extent by amendments to state laws enacted and enforced since the current owner acquired the property in 1998. These restrictions likely reduce the fair market value of the subject 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 one or more land use regulations to allow the claimant, Kuhl Company, LLC, to use the subject property for a use permitted at the time it acquired the property on February 11, 1998. The department acknowledges that at that time, the property could not be divided into 14 lots or parcels of approximately two-acres each and the development for single-family residential use.

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 Kuhl Company, LLC's use of the subject property by dividing the property into 14 lots or parcels of approximately two-acres each, and developing one single-family dwelling on each lot: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33, enacted since the claimant acquired the subject property on February 11, 1998.
2. The action by the State of Oregon provides the state's authorization to the Kuhl Company, LLC to use the property subject to those state land use regulations administered by the department or Commission that were in effect on February 11, 1998. Those standards include the provisions of ORS 215.780. As a result, any division of the property will likely require an exception to Statewide Land Use Planning Goal 3. The department acknowledges this relief will not allow the claimant to use the property as described in the claim.
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 215.412 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 remains subject to the following laws: (a) those laws not specified in the claim to the State of Oregon, dated December 20, 2004, or identified in this report; (b) any laws enacted or enforced by a public entity other than the Commission or department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempt 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 the claimant 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 24, 2005. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' 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.