

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

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

September 16, 2005

STATE CLAIM NUMBER: M120293

NAMES OF CLAIMANTS: Marilyn Gragg
(Also Known As Marilyn Knott)
Jane Gragg, Trustee of the Robert L. Gragg
Revocable Living Trust

MAILING ADDRESS: 16915 Highway 126
Sisters, Oregon 97759

PROPERTY IDENTIFICATION: Township 15S, Range 10E, Section 12
Tax Lot 400
Deschutes County

OTHER CONTACT INFORMATION: Edward Fitch, Attorney at Law
Bryant, Emerson and Fitch
Post Office Box 457
Redmond, OR 97756

OTHER INTEREST IN PROPERTY: Jane Gragg
5235 Riddell Road
Monmouth, Oregon 97361

DATE RECEIVED BY DAS: March 24, 2005

180-DAY DEADLINE: September 20, 2005

I. SUMMARY OF CLAIM

The claimants, Marilyn Gragg and Jane Gragg, Trustee of the Robert L. Gragg Revocable Living Trust, seek compensation in the amount of \$3,000,000 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 claimants desire compensation or the right to subdivide the 80-acre property into 16 five-acre parcels. The property is located at 16915 Highway 126 near Sisters, in Deschutes 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 the claimants' subdivision of the subject property: Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33. These laws will not apply to claimant Marilyn Gragg, only to the extent necessary to allow a use of the property permitted at the time she acquired it on July 1, 1974. These laws will not apply to claimant Jane Gragg, Trustee of the Robert L. Gragg Revocable Living Trust, only to the extent necessary to allow her a use of the property permitted at the time she acquired an interest in the property on March 16, 1994. The department acknowledges that the relief to which Jane Gragg is entitled under Measure 37 will not allow her to use the property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On April 11, 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, one written letter with comments, was received in response to the 10-day notice.

The comments are relevant to when the claimants became the present owner of the property and whether the laws that are the basis for the claim are exempt under Section 3 of Measure 37. Specifically, the letter asserts the proposed subdivision affects public health and safety because the property will not support septic systems at the density the claimants are proposing. The comments have been considered by the department in preparing this report. (See 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 24, 2005, for processing under OAR 125, division 145. The claim indirectly identifies Statewide Planning Goal 3 and OAR 660-015-000(3), 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

The claimant, Marilyn Gragg, acquired the subject property on July 1, 1974, as reflected by a contract of sale to Marilyn Gragg and Robert Gragg, submitted by the claimant’s attorney in response to the department’s request for ownership verification. The claim also includes a fulfillment deed, dated April 22, 1986. According to a Bargain and Sale Deed, included with the claim, Robert Gragg’s interest in the property was conveyed to Jane K. Gragg, as trustee of the Robert L. Gragg Revocable Living Trust, on March 16, 1994.

A copy of a Title Report dated February 25, 2005, indicates that Marilyn Gragg and Jane Gragg, Trustee of the Robert L. Gragg Revocable Living Trust, are the current owners of the subject property. The Deschutes County Assessor’s Office confirms that the current owners of the property are Marilyn Gragg and Jane Gragg, Trustee of the Robert L. Gragg Revocable Living Trust.

Conclusions

The claimants, Marilyn Gragg and Jane Gragg, Trustee of the Robert L. Gragg Revocable Living Trust, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. Marilyn Gragg acquired the subject property on July 1, 1974, and Jane Gragg, Trustee of the Robert L. Gragg Revocable Living Trust, acquired an interest in the subject property on March 16, 1994. Marilyn Gragg is a family member to Jane Gragg.

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

The claim states that the restrictions that are the basis of the claim include, “All ordinances and regulations restricting the ability of claimant to subdivide property.”

The claim is based on Deschutes County’s current Exclusive Farm Use (EFU) Zone and the applicable provisions of state law that require such zoning. The claimants’ property is zoned EFU as required by Statewide Planning 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 215.263 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.

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 (2003 edition) establishes standards for the creation of new parcels for farm and non-farm uses and dwellings allowed in an EFU zone.

Marilyn Gragg acquired the subject property on July 1, 1974. At that time the property was zoned Agriculture (A-1) by the County. The A-1 zone had a five-acre minimum lot size and allowed dwellings by right, and was adopted pursuant to the provisions of ORS 215, enacted in 1963. However, during the period between October 5, 1973, when SB 100 became effective, and January 25, 1975, when the Statewide Planning Goals became effective, ORS 197.175(1) and 197.280 (1973 edition) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities (including implementation of their

comprehensive plan, and approval of subdivisions and partitions) in accordance with the Interim Planning Goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); see also, *Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the Goals); and *State Housing Council v. Lake Oswego*, 48 Or App 525 (1981). As a result, if the claimant, Marilyn Gragg had sought to divide the subject property when she acquired it on July 1, 1974, as a matter of law the use would have been subject to the Interim Planning Goals at ORS 215.515. (See endnote¹.)

There is no indication in this claim whether the requested division of the subject property would have been allowed under the standards in effect when Marilyn Gragg acquired the property.

Conclusions

The current zoning requirements and minimum lot size standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted after Marilyn Gragg acquired the subject property on July 1, 1974, and do not allow the division of the property. In 1974, the property was subject to compliance with the Interim Planning Goals. It is not clear whether or to what extent the requested property complies with the Interim Goal standards that applied to the subject property in 1974. However, because under current regulations the requested development is prohibited, whereas it is possible that some division of the property may have been allowed when Marilyn Gragg acquired the property in 1974, it is more likely than not that regulations enacted after Marilyn Gragg acquired the property restrict the use of the property relative to the uses allowed when she acquired it.

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 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 \$3,000,000 as the property's reduction in fair market value, as a result of current regulations. No information was provided as to how this estimate was determined.

Conclusions

As explained in Section V.(1) of this report, the current owners are Marilyn Gragg who acquired the property on July 1, 1974, and Jane Gragg, Trustee of the Robert L. Gragg Revocable Living Trust, who acquired an interest in the property on March 16, 1994. Under Ballot Measure 37, Marilyn Gragg and Jane Gragg, as a family member of Marilyn Gragg, are due compensation for land use regulations 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

Without an appraisal or other documentation, and without verification of whether or to what extent the requested property division would have been allowed under the standards in effect on July 1, 1974, 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 enacted or 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 includes a general reference to any state land use regulations that restrict the use of the property relative to what would have been allowed in 1974 when Marilyn Gragg acquired the property. These provisions include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Deschutes County has implemented through its EFU zone. These laws are not exempt under Section 3(E) of Ballot Measure 37, to the extent they were enacted after July 1, 1974. Provisions of ORS 215 enacted before July 1, 1974, including those provisions in ORS 215 that require compliance with the Interim Planning Goals, are exempt under Section 3(E) of the Measure.

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 the division of agricultural land apply to the claimants' use of the property, and these laws are not exempt under Section 3(E) of Measure 37 to the extent they were enacted after July 1, 1974. Provisions of ORS 215 in effect when the claimant, Marilyn Gragg, acquired the property in 1974 are exempt under Section 3(E) of the Measure and will continue to apply to the property.

Other laws in effect when the claimants 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. In some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37, including laws enacted for the protection of public health and safety, which are exempt under Section 3(B).

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 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 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. The claim asserts that laws enforced by the Commission or department reduce the fair market value of the subject property by \$3,000,000. However, because the claim does not provide an appraisal or other documentation to establish how the specified restrictions reduce the fair market value of the property, and without verification of whether or to what extent the requested property division would have been allowed under the standards in effect on July 1, 1974, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that it is more likely than not that the laws on which the claim is based 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 Marilyn Gragg to use the subject property for a use permitted at the time she acquired the property on July 1, 1974, and to allow Jane Gragg, Trustee of the Robert L. Gragg Revocable Living Trust, to use the subject property for a use

permitted at the time she acquired an interest in the property on March 16, 1994. In general, the current laws that restrict the division of the subject property, including Goal 3 and provisions of ORS 215 and OAR 660, division 33, were in effect prior to March 16, 1994, when Jane Gragg, Trustee of the Robert L. Gragg Revocable Living Trust, acquired the property.

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 the claimants' division of the 80-acre property: applicable provisions of Statewide Planning Goal 3, ORS 215.263 and 215.780 and OAR 660, division 33. These land use regulations will not apply to Marilyn Gragg's use of her property only to the extent necessary to allow her a use permitted at the time she acquired the property on July 1, 1974. These land use regulations will not apply to Jane Gragg's use of the property only to the extent necessary to allow her a use permitted at the time she acquired an interest in the property on March 16, 1994. The department acknowledges that the relief to which Jane Gragg is entitled under Measure 37 will not allow her 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 Marilyn Gragg to use the property subject to the standards in effect on July, 1974. On that date, the property was subject to applicable provisions ORS 215, including compliance with the Statewide Interim Goals and ORS 215 then in effect. The action by the State of Oregon provides the state's authorization to Jane Gragg to use her property subject to the standards in effect on March 16, 1994. On that date, the property was generally subject to the provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33, currently 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 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 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 August 25, 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.

ⁱ The "Interim" land use Goals are set forth in ORS 215.515(a) to (j) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state," and (j) "To ensure that development of properties within the state is commensurate with the character and the physical limitations of the land." (ORS 215.515, 1973 edition.)