

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

September 15, 2005

STATE CLAIM NUMBER: M120372

NAME OF CLAIMANT: Clara C. Kindel

MAILING ADDRESS: 22835 N.E. Albertson Road
Gaston, Oregon 97119

IDENTIFICATION OF PROPERTY: Township 2S, Range 3W, Section 20
Tax Lot 1000
Yamhill County

OTHER CONTACT INFORMATION: Stephen Kindel
711 N. 4th Street
Carlton, Oregon 97111

OTHER INTEREST IN PROPERTY: Robert Roe
22830 N.E. Albertson Road
Gaston, Oregon 97119

L.A. Water Co-op
23055 N.E. Albertson Road
Gaston, Oregon 97119

DATE RECEIVED BY DAS: March 29, 2005

180-DAY DEADLINE: September 25, 2005

I. CLAIM

The claimant, Clara Kindel, seeks compensation in the amount of \$376,000 for 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 partition her property containing approximately 56.57 acres into three parcels, and to establish one single-family dwelling on each parcel. The property is located at 22835 N.E. Albertson 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 subject property to allow her to partition it to create three additional parcels for residential use: the applicable provisions of Statewide Planning Goal 3, ORS 215.263, 215.283, 215.284, 215.780 and OAR 660, division 33, enacted after June 10, 1974. These laws will not apply to the claimant's use of the property only to the extent necessary to allow Ms. Kindel a use of the subject property permitted at the time she acquired the property on June 10, 1974. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On May 16, 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, one written comment was received in response to the 10-day notice.

The comment notes that the notification and request for comments received is insufficient to determine the validity of the claim or whether the use requested by the owner was allowed by the laws and regulations in effect at the time the applicant acquired the property. The comment has been considered by the department in preparing this report.

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 29, 2005, for processing under OAR 125, division 145. The claim identifies Yamhill County's Exclusive Farm Use (EFU) zoning and state laws that restrict the division of the property and the establishment of a dwelling on each lot or parcel created 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 claims 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

Clara C. Kindel acquired an interest in the subject property on June 10, 1974, as documented by a Sales Contract included in the claim. A copy of a current Yamhill County property Tax Statement confirms that she is a current owner of the property.

Conclusions

The claimant, Clara C. Kindel, is an “owner” of the subject property as that term is defined by Section 11(C) of Ballot Measure 37. Ms. Kindel acquired an ownership interest in the property on June 10, 1974.

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 the 1976 Yamhill County zoning ordinance (# 83) “prohibits sale/use of low quality farm land . . . as owners had planned at purchase.”

The claim is based, in part, on Yamhill County’s EF-40/EFU Zone and the applicable provisions of state law that require such zoning. The claimant’s property is zoned EFU as required by Statewide Planning Goal 3 in accord with OAR 660, division 33, because the claimant’s property

is “Agricultural Land” as defined by Goal 3.¹ Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU. Land that is zoned EFU also is subject to restrictions based on certain provisions of ORS 215. Current land use regulations, particularly ORS 215.263, 215.284, 215.780, along with Goal 3 and OAR 660 division 33, do not allow the subject property to be divided into parcels less than 80 acres and establish standards for farm or non-farm dwellings.

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, HB 3661). ORS 215.263 contains standards for the creation of new parcels for farm uses, non-farm uses and dwellings allowed in an EFU zone; and became effective on October 5, 1973. ORS 215.263 (effective October 5, 1973) was amended in 2001 by HB 3326 to provide new standards for the creation of new parcels for non-farm dwellings as well as the non-farm dwellings themselves.

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

The claimant, Clara C. Kindel, acquired the property on June 10, 1974, when it was zoned Agriculture (A) by Yamhill County. Under the A zone, single-family dwellings were permitted and there was a 2 ½-acre minimum parcel size for the creation of new lots or parcels. However, during the period between October 5, 1973, when Senate Bill 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) in accordance with the “Interim” land use 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); *State Housing Council v. Lake Oswego*, 48 Or App 525 (1981) (Land use planning responsibility is not defined in ORS 197). The Supreme Court has interpreted that term as including annexation approvals, subdivision approvals and *partition approvals*” (emphasis added). The use proposed here is to partition land and to establish a dwelling on each parcel. If the claimant had sought to create that use in 1974, the use would have been subject to the Interim Planning Goals at ORS 215.515. (See endnote ¹.)

¹ The claimant’s property is “Agricultural Land” because it contains predominantly NRCS (Natural Resources Conservation Service) Class I-IV Soils (See Soil Survey of Yamhill County, soil sheets 8-9, January 1974) and www.websoilsurvey.nrcs.usda.gov.

One of the Interim Goals is directly applicable to this claim is: “(d) to conserve prime farm lands for the production of crops,” (ORS 215.515, 1973 edition). Soil types are a determinant of prime farm land. None of the soils on this parcel are rated as “prime” by the Natural Resource Conservation Service (NRCS) (see footnote #1).

Further, the Yamhill County A (Agriculture) zone was a qualified farm-use zone under ORS 215.203 (1973 edition). As a result, single-family farm dwellings were permitted on new and existing parcels for the owner, operator or employee required to carry out farming on the property. In addition, non-farm dwellings also were allowed, but only upon a determination by the county that each dwelling would meet certain standards.

The applicable statutory standards for the approval of a farm dwelling on land zoned for farm use in 1974 are found in ORS 215.213(1) (e) (1973 edition). That statute authorized counties to permit the establishment of certain uses . . . in any area zoned . . . for farm use: . . . “[t]he dwellings and other buildings *customarily provided in conjunction with farm use*, referred to in paragraph (a) of subsection (2) of ORS 215.203.”²

The applicable statutory standards for the approval of a non-farm dwelling on land zoned for farm use in 1974 are found in ORS 215.213(3) (1973 edition). Non-farm dwellings could only be approved where the dwelling was compatible with farm uses, consistent with the intent of ORS 215.243, did not interfere seriously with accepted farming practices on adjacent lands, did not materially alter the stability of the land use pattern for the area, and was situated on land generally unsuitable for production of farm crops and livestock ORS 215.213 (3) (1975 edition).³

At the time Ms. Kindel acquired an ownership interest in the property in 1974, ORS 215.263 (1973 edition) also established requirements for land divisions in an exclusive farm use zone. That statute required a county to find that any division be consistent with the legislative policy set forth at ORS 215.243 (1973 edition). That policy generally provides that agricultural land should be maintained in large blocks, and that the amount of land used for non-farm uses be minimized.

Statewide Planning Goal 3 was not adopted until 1975 and did not apply when the claimant acquired the subject property.

No information has been provided showing that partitioning the property to create three parcels, and to establish a dwelling on each parcel complies with the Interim Planning Goals set forth in ORS 215.515 (1973 edition) or with the policy at ORS 215.243, or that the approval of dwellings on any of these new parcels will meet either the standard for farm dwellings or non-farm dwellings as required under ORS 215 in effect at the time the claimant acquired the property in 1974. Whether or not the proposed parcels will meet the statutory standards that were in effect

² Review and approval of a “dwelling customarily provided in conjunction with farm use” under ORS 215 is a land use decision that requires notice and an opportunity for a public hearing regardless of the terms of a local ordinance (see *Doughton v. Douglas County*, 88 Or App 198 (1987)).

³ When determining whether land is “generally unsuitable for the production of farm crops and livestock” under ORS 215.213(3), the entire parcel or tract must be evaluated rather than a portion thereof. *Smith v. Clackamas County*, 313 Or 519 (1992).

in 1974, or new dwellings on any new parcels will be “customarily provided in conjunction with farm use” or not in conjunction with farm use under ORS 215, can only be determined upon a local land use application submitted to implement this claim under Measure 37.⁴

Conclusions

Lot size and dwelling standards established by Statewide Planning Goal 3, amendments to ORS 215, and OAR 660, division 33, adopted since the claimant acquired the property in 1974, do not allow the division of the property into parcels less than 80 acres in size or allow the approval of dwellings as may have been possible when she acquired it. However, it is unclear whether the claimant’s requested level of development complies with the standards in effect when Ms. Kindel acquired the property on June 10, 1974.

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 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 of the subject property has been reduced by \$376,000, as a result of land use laws enacted after it was acquired by Ms. Kindel in 1974. The claimant has provided information regarding the value of the property based on what is allowed under current land use regulations as compared with the assumed value if the 56.57 acres is partitioned to create two additional parcels for residential use. The comparative market analysis states: “Based upon the above analysis and the supporting materials in this report, I conclude that the house and acreage as it is today is worth around \$400,000. If two parcels were divided, the value

⁴ *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) *affirmed without opinion*, 70 Or App 179 (September 14, 1984) and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33 (1988). Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use (*Matteo v. Polk County*, 14 Or LUBA 67, 73 (1985)).

would increase to \$676,000. This is allowing for the house and remaining 39 acres and the \$160,000 each for the two parcels.”⁵ However, there is no appraisal or other substantiating documentation to substantiate the claimed values either with or without state land use regulations.

Conclusions

As explained in Section V.(1) of this report, Clara C. Kindel is the current owner of the subject property under Section (11) of Measure 37. Ms. Kindel acquired the property on June 10, 1974. Thus, under Ballot Measure 37, the claimant is 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 enacted since 1974 may restrict the ability to divide off two lots for residential use. The claim states that current laws reduce the value of the property by \$376,000. However, without an appraisal or a more detailed analysis of the information submitted, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, including the comparative market analysis, 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 EF-40 zone and the related provisions of state law that have restricted use of the property and reduced its fair market value, including Statewide Planning Goal 3, (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33. With the exception of those provisions of ORS 215.203, 215.213 and 215.263(1973 edition), and ORS 215.515 (Interim Goals) (1973 edition), these laws were adopted after Ms. Kindel acquired an ownership interest in the property. Those laws in effect when the claimant acquired the property are exempt from Measure 37, under subsection 3(E) of the Measure. The remaining state laws were enacted after the claimant acquired the property in 1974.

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

⁵ The reduction in value based on the figures provided is actually \$276,000 and not the \$376,000 submitted in the state’s claim form (\$676,000 - \$400,000 = \$276,000). The claimant submitted this adjusted amount with a claim to Yamhill County (See Yamhill County staff report dated February 14, 2005 (Exhibit A to Board Order 05-161, dated March 9, 2005).

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 claimant's use of the property, and for the most part these laws are not exempt under Section 3(E) of Measure 37. Provisions of ORS 215 in effect when the claimant 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 claimant acquired the property are also exempt under Section 3(E) of Measure 37, and will continue to apply to the claimant's use of the property. 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 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 she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her 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 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 in this report, laws enforced by the Commission or the department, do not allow the partition of the property for residential use. Specifically, Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33, restrict division of the 56.57 acres to create two additional parcels for residential use. These restrictions may reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$376,000. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, no appraisal or other substantiating documentation was submitted and it is not possible to substantiate the specific dollar amount the claimant's demands for compensation. Nevertheless, the department acknowledges that state land use laws 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 just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow Clara Kindel to use the subject property for a use permitted at the time she acquired the property on June 10, 1974.

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 Clara C. Kindel's partition of the property into three parcels, or to the establishment of a dwelling on each parcel: the applicable provisions of Statewide Planning Goal 3, ORS 215.263, ORS 215.283, 215.284, ORS 215.780, and OAR 660, division 33, enacted after June 10, 1974. These land use regulations will not apply to the claimant's use of the property only to the extent necessary to allow the claimant to carry out a use permitted at the time she acquired the property.
2. The action by the State of Oregon provides the state's authorization to Clara Kindel to use the property subject to the standards in effect on June 10, 1974. On that date, the property was subject to the Interim Planning Goals set forth in ORS 215.515, and to the standards in ORS 215.213 for dwellings and in ORS 215.263 for land divisions (all 1973 edition).
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 her 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 31, 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.)