

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

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

September 21, 2005

**STATE CLAIM NUMBER:** M120396

**NAME OF CLAIMANT:** Roberta Kennedy

**MAILING ADDRESS:** 23132 SE Bornstedt Road  
Sandy, Oregon 97055

**PROPERTY IDENTIFICATION:** Township 2S, Range 5E, Section 31B  
Tax Lot 400  
Clackamas County

**DATE RECEIVED BY DAS:** March 31, 2005

**180-DAY DEADLINE:** September 27, 2005

**I. CLAIM**

The claimant, Roberta Kennedy, seeks compensation in the amount of \$1,500,000 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 her approximately 23.31-acre<sup>1</sup> property into ten, 1.75-acre to 3-acre parcels and to develop each resulting parcel with a single-family residential dwelling. The property is located at 23132 SE Bornstedt Road, near Sandy, 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 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 her to divide her property into ten 1.75-acre to 3-acre plus parcels,

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<sup>1</sup> The original claim listed the subject parcel at 25.6 acres. This acreage did not match information on Clackamas County tax parcel maps, which showed the parcel to be 23.31-acres. In response to a request for clarification by staff, the claimant explained that the acreage should be listed at 23.3 acres because of the original 25.6-acres, one acre was given to the claimant's daughter and son-in-law in 1971 for a home site, and an additional two acres, more or less, was recently given to the daughter. According to the claimant, the 23.31-acre figure may include a portion of Bornstedt Road, and is the correct acreage as listed by the County.

and to develop each parcel with a single-family residential dwelling: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), Goal 14 (Urbanization), ORS 215.263, 215.284, and 215.780, and OAR 660, division 33. These laws will not apply to the claimant's use of the property only to the extent necessary to allow Roberta Kennedy a use of the subject property permitted at the time she acquired it on April 15, 1956. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS RECEIVED**

On May 3, 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 does not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law. (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 31, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's Exclusive Farm Use (EFU) Zone that restricts 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 regulation adopted prior to December 2, 2004, and is therefore timely filed.

## **V. ANALYSIS OF CLAIM**

### **1. Ownership**

Ballot Measure 37 provides for payment of compensation of relief from specific laws for “owners” as that term is defined in the Measure. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

### **Findings of Fact**

The claimant, Roberta Kennedy, acquired the subject property on April 15, 1956, by Land Sale Contract. (See Land Sale Contract and Fulfillment Deed dated March 11, 1971, in department’s claim file.) A current year Clackamas County Tax Assessor’s Tax Statement supplied by the claimant documents the claimant’s current ownership of the subject property. (See the department’s claim file.)

### **Conclusions**

The claimant, Roberta Kennedy, is the “owner” of the subject property as that term is defined in Section 11(C) of Ballot Measure 37, as of April 15, 1956.

### **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 claimant states that EFU zoning, which requires an 80-acre minimum lot size, prevents her from dividing and developing her 23.31-acre property for single-family residential development. The claim is based on Clackamas County’s Exclusive Farm Use (EFU) zoning district, and the applicable provisions of state law that require such zoning. The subject property is zoned EFU as required by Statewide Planning Goal 3 in accord with OAR 660, division 33, and ORS 215 because the claimant’s property is “Agricultural Land” as defined by Goal 3.<sup>2</sup> 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.

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<sup>2</sup> The claimant’s property is “Agricultural Land” because it contains NRCS (Natural Resources Conservation Service) Soils; Cazadero silty clay loam, 0 – 7% slopes, Class IIe.

Current state 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 parcels 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). Clackamas County implemented an 80-acre minimum lot size for its EFU zone (ORS 215.780(1)(a)) that was subsequently acknowledged by the Commission. ORS 215.263 (2003 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 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.)

Statewide Planning Goal 14 would likely apply to the division of the claimant's property into parcels less than two-acres in size. Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses and also became effective on January 25, 1975.

The claimant acquired the subject property in 1956, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules.

## **Conclusions**

Minimum lot size and dwelling standards established Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, adopted since the claimant acquired the property in 1956, 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 in 1956. Goal 14 generally requires rural lands to be used for rural uses. Therefore, land use laws adopted since 1956 restrict the use of the property from what could have been done when the property was acquired by the claimant in 1956.

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 for the subject property has been reduced by \$1,500,000 as a result of land use laws enacted after the claimant acquired the property in 1956.

The claimant has provided information regarding the value of the property based on information about the value of “true market values of the Sandy area within a few miles of my home.” The claimant calculates the difference or loss of fair market value for the 23.31-acre parcel, not further divisible, as opposed to divided into ten lots between 1.75-acres to 3-acres plus with single-family residential dwellings on each parcel, at \$1,500,000.

The claim includes no appraisal or other documentation to substantiate the alleged reduction in value.

#### **Conclusions**

As explained in Section V. (1) of this report, Roberta Kennedy is the current owner of the subject property as of April 15, 1956. Thus, under Ballot Measure 37, Roberta Kennedy 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 adopted since the claimant acquired the property restrict division of the subject property and development of residential dwellings. The claim asserts the reduction in value to be \$1,500,000. However, without an appraisal or other substantiating documentation, 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 Clackamas County’s EFU zone and the related provisions of state law that have restricted use of the property and reduced its fair market value, including Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), and applicable provisions of ORS 215 and OAR 660, division 33. The specific state land use regulations cited in the claim

were enacted after the claimant acquired the property in 1956. Therefore none of these specific laws is exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimant acquired the property.

### **Conclusions**

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimant's use of the property, and these laws are not exempt under Section 3(E) of Measure 37.

Laws in effect when the claimant acquired the property are exempt under Section 3(E) of Measure 37 and will continue to apply to 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. In some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under Section 3 of Measure 37 that are clearly applicable given the information provided to the department in the claim. The 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 present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

### **Findings of Fact**

Based on the findings and conclusions in this report, laws enforced by the Commission or the department prohibit the division of the subject property into ten 1.75-acres to 3-acre plus parcels and the development of a single-family dwellings on each parcel. The claim asserts these restrictions reduce the fair market value of the subject property by \$1,500,000. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, no certified appraisal or other substantiating documentation was submitted and it

is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, the department acknowledges that state land use laws have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow Roberta Kennedy to use the subject property for a use permitted at the time she acquired the property on April 15, 1956.

### **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 Roberta Kennedy's division of her 23.31-acre property into ten, 1.75-acre to 3-acre plus parcels or the development of a single-family dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215.263, 215.780 and 215.284; and OAR 660, division 33. These land use regulations will not apply to Roberta Kennedy's use of her property only to the extent necessary to allow the claimant to a use permitted at the time she acquired the property.
2. The action by the State of Oregon provides the state's authorization to the claimant to use her property subject to the standards in effect on April 15, 1956.
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 September 1, 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.