

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

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

August 15, 2005

STATE CLAIM NUMBER: M119893

NAME OF CLAIMANTS: Lyle V. Kindred
17968 Southwest 106th Avenue
Tualatin, Oregon 97062

Gayle D. Kindred
8430 – 15th Place SE, #16
Everett, Washington 98205

Lynn J. Kindred
1223 West 9th Street
Coquille, Oregon 97423

IDENTIFICATION OF PROPERTY: Township 4S, Range 4W, Section 32
Tax Lot 1301
Yamhill County

DATE RECEIVED BY DAS: February 23, 2005

180-DAY DEADLINE: August 22, 2005

I. CLAIM

Lyle Kindred, Gayle Kindred and Lynn Kindred, the claimants, seek compensation in the amount of \$125,000 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 partition their property containing approximately five acres into two 2.5-acre parcels and to construct a single-family dwelling on each parcel. The property is located on the north side of Durham Lane near McMinnville in Yamhill County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that 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 claimants to allow them to divide and develop their property for residential use:

Statewide Planning Goal 3 and applicable provisions of ORS 215 and OAR 660, division 33, to the extent necessary to allow Lyle, Gayle and Lynn Kindred a use of the subject property permitted at the time they acquired it on November 11, 1993. The department acknowledges that the relief recommended in this draft order will not allow the claimants to use the property in the manner they indicate they would like. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 3, 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 were received in response to a 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

The claim was submitted to DAS on February 23, 2005, for processing under OAR 125, division 145. The claim identifies Section 402 of the Yamhill County Code, as required under OAR 660, division 33, and ORS 215, as restricting the use of the property. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulations adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

On May 17, 1943, William Wesley Kindred acquired the subject property by Warranty Deed. William Wesley Kindred is a “family member” as to the claimants, as that term is defined under Section 11(A) of Measure 37. (See Deed documents included in the department’s claim file.) The claim also includes a title report dated August 7, 2000, as verification of continuous ownership by the Kindred family. A deed dated January 9, 2001, was recorded to create a separate tax lot for the property that is the subject of this claim. It appears that this deed did not create a legal parcel under applicable Yamhill County ordinances.

The claim includes documents demonstrating the transfer of an ownership interest in the property to Lyle, Gayle, and Lynn Kindred from Hazel Kindred on December 24, 1993 (see memorandum of land sale contract).

Conclusions

A “family member” of the claimants, William Kindred, acquired an interest in the property in 1943 and the property has remained in family ownership since that date. Lyle Kindred, Gayle Kindred and Lynn Kindred are the current owners of the property. They acquired an interest in the property on December 12, 1993, as the vendees under a land sale contract. They are “owners” of the subject property as that term is defined by Section 3(C) of Measure 37.

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 claimants’ 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 claimants or a family member acquired the property.

Findings of Fact

Regarding Yamhill County Code Section 402, the claim states that county zoning:

Limits the minimum lot size to 80 acres and that the property “must generate \$80,000 gross annual farm income to build a home.”

The claim also indicates the claimants’ intent to divide the five-acres into two 2.5-acre residential building parcels. The current 5-acre parcel is vacant farmland with no dwellings.

The claim is based, in part, on Yamhill County's current Exclusive Farm Use (EF-80) Zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Goal 3 in accord with OAR 660, division 33, and ORS 215 because the claimants' property is "Agricultural Land" as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly applicable provisions of ORS 215, including 215.263, 215.284 and 215.780, and OAR 660, division 33, as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80-acres and establish standards for allowing the existing or any proposed 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). ORS 215.263 (1993 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and implements the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(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 claimants' family acquired the subject property in 1943. At that time, Statewide Planning Goal 3, the statutory requirements in ORS 215 and the administrative rules were not in effect.

Conclusions

Minimum lot size and dwelling standards established under the applicable provisions of Statewide Planning Goal 3, OAR 660, division 33, and ORS 215, were adopted after the claimants' family acquired the property. When the claimants' family initially acquired the subject parcel in 1943, none of the land use regulations described above were in effect. The laws described above were enacted after the claimants' family first acquired the property and restrict the use of the property relative to uses allowed when a family member acquired the property on May 17, 1943.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the use(s) 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 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 asserts that the property value has been reduced by current regulations limiting the minimum parcel size to 80-acres and by the \$80,000 income test, which precludes the subject parcel from development for residential use. The claim appears to assert a combined reduction in fair market value of \$245,000. The claim asserts a reduction in value of \$120,000 due to Yamhill County Code Section 402, which limits the minimum parcel size to 80 acres, thereby precluding further division of the five-acre parcel. The claim also asserts a reduction in value of \$125,000 due to Yamhill County Code Section 402.03(A), which requires a minimum of \$80,000 annual farm income prior to approval of a dwelling in conjunction with the farm use generating the income. The \$80,000 income test thereby precludes further division of the five-acre parcel.

The claimants’ 5-acre property, if divided into two 2.5-acre parcels, would yield two new parcels. The claimants estimate two parcels to be valued at \$140,000 each, compared to a single parcel valued at \$160,000. The claim includes a list of similarly sized lots recently sold near the subject property as evidence to support the claimants’ estimate of reduction in value. The resulting reduction in value is therefore estimated to be \$120,000.

The claimants’ 5-acre property, valued as a buildable lot is estimated in the claim to be worth \$160,000. The property, valued as a farm parcel is estimated to be worth \$25,000. The resulting reduction in value is therefore estimated to be \$125,000.

The claim does not include a formal appraisal or other analyses to explain the calculation of reduction in value or to support the claimants’ estimates.

Conclusions

As explained in section V.(1) of this report, the current owners, Lyle, Gayle and Lynn Kindred, are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value.

Without an appraisal or other explanation based on the value of the desired development, 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 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

The claim generally identifies Yamhill County land use regulations, enacted subsequent to the claimants' family's acquisition of the property, which allegedly restrict the use of the parcel relative to what would have been allowed when the claimants' family acquired the property.

Conclusions

It appears that the general statutory, goal and rule restrictions on dividing the subject property and developing it for residential purposes apply to the claimants' use of the property and that none of these laws were in effect before the claimants' family acquired the property. As a result, these laws are not exempt under Section 3(E) of Measure 37. Laws in effect when the claimants acquired the property in 1993 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 the 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. 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 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. 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 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 owners to carry out a use of the property allowed at the time the present owners acquired the property. The Commission has by rule 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, including those laws that preclude land division and the development of dwellings, reduce the fair market value of the subject property to some extent. The claim asserts the reduction to be either \$120,000 or \$125,000 based on the claimants' estimates and on the estimated values of similar properties. Without an appraisal or other substantiating documentation, it is not possible for the department to determine the amount of reduction in value. 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 compensation, Measure 37 authorizes the department to modify, remove or not apply land use regulations to allow Lyle Kindred, Gayle Kindred, and Lynn Kindred to use the subject property for a use permitted at the time they acquired the parcel. The claimants acquired an interest in the property from their family on December 24, 1993.

At the time the claimants acquired an interest in the property it was zoned EFU by Yamhill County, and subject to the lot size and dwelling standards in ORS 215 and OAR 660, division 33, as required under Statewide Planning Goal 3 (1993 edition).

Current land use regulations, particularly ORS 215.263, 215.283, 215.284, 215.705 and 215.780, and OAR 660, division 33, as applied by Goal 3, generally do not allow the subject property to be divided into parcels smaller than 80-acres and establish standards for farm and non-farm dwellings on them. ORS 215.705 and 215.780 established an 80-acre minimum lot size for the creation of new lots or parcels in EFU zones, but allowed for the approval of lots smaller than 80 acres subject to approval by the Commission.¹ These laws became effective November 4, 1993 (chapter 792, Oregon Laws 1993). ORS 215.263 (land divisions), 215.283 (uses allowed on EFU zoned land (and its predecessor ORS 215.213)), and 215.284 (non-farm dwellings) first became effective in 1973.

Statewide Planning Goal 3 generally requires Agricultural Land to be used for farm uses. As noted above, Goal 3 became effective on January 25, 1975. The administrative rules implementing Goal 3 that restrict residential development of EFU land are OAR 660-033-0135 (applicable to farm dwellings), which 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), and OAR 660-033-0130(4) (applicable to non-farm dwellings), which 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.)

¹ Minimum lots sizes less than 80-acres were approved by LCDC under ORS 215.780(2)(a) (see Order 94-Remand 931 dated June 20, 1994).

The County's EF-80 zone establishes a minimum lot size of 80 acres prior to a land division in the zone and requires that before a dwelling can be allowed on any farm parcel, the owner must demonstrate that the parcel can generate at least \$80,000 of annual farm income. Because the claimants have not demonstrated compliance with the income test, it is not clear that the County would permit the proposed division and dwellings.

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 Lyle, Gayle and Lynn Kindred's division of the property into two parcels and the establishment of a single-family dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands); ORS 215; and OAR 660, division 33, that took effect on or after December 24, 1993. The department acknowledges that the relief provided will not allow the claimants to use the property in the manner described in their claim.
2. The action by the State of Oregon provides the state's authorization to the claimants to partition the property and to establish a single-family dwelling on each lot created, subject to those standards in effect when they acquired their interest in the property. The provisions of Goal 3, ORS 215, and OAR 660, division 33, that were in effect on December 24, 1993, include ORS 215.263, 215.283, 215.284, 215.705 and 215.780 (generally requiring a minimum parcel size of 80 acres). The standards for a non-farm dwelling on that date included ORS 215.284(1) (1993 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 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 any of 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 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 excepted under section (3) of the measure.
5. Without limiting the generality of the foregoing terms and conditions, in order for any of 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 any of 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 July 26, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.