

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

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

August 23, 2005

STATE CLAIM NUMBER: M120001

NAME OF CLAIMANT: The Barbara Morgan Charitable Remainder Unitrust, Barbara R. Morgan¹, Trustee

MAILING ADDRESS: 25449 Summit Prairie Road
Prairie City, Oregon 97869

PROPERTY IDENTIFICATION: Township 13S, Range 34E
Sections 24 and 25
Tax Lot 4102
Grant County

Township 13S, Range 35E
Sections 19 and 30
Tax Lot 400
Grant County

DATE RECEIVED BY DAS: March 3, 2005

180-DAY DEADLINE: August 30, 2005

I. SUMMARY OF CLAIM

The claimant, The Barbara Morgan Charitable Remainder Unitrust, Barbara R. Morgan, Trustee, seeks compensation in the amount of \$3,308,074 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 divide the 718.21-acre² property into 47 lots or parcels, and to develop it with a 40-acre commercial destination recreation resort, 45 five-acre lots for residential development, and a 463-acre common area. The property is located on both sides of Reynolds Creek Road southeast of Prairie City and adjacent to the Malheur National Forest in Grant County, Oregon. (See claim.)

¹ Also known as Barbara Reigh Morgan and Barbara Rae Morgan.

² The claim states total acreage as 728-acres. According to the Grant County Tax Assessment Map, the subject property totals 718.21-acres.

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 that, in lieu of just 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 Barbara R. Morgan Charitable Remainder Unitrust's division of the property for residential and resort development: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), Goal 4 (Forest Lands), ORS 215, and OAR 660, divisions 6 and 33, enacted after the claimant acquired the property on June 3, 2003. These laws will not apply to the claimant only to the extent necessary to allow The Barbara R. Morgan Charitable Remainder Unitrust a use of the property permitted at the time it acquired the property on June 3, 2003. The department acknowledges that the relief recommended in this report will not allow The Barbara R. Morgan Charitable Remainder Unitrust to use the property in the manner set forth in this claim. (See the complete recommendation in Section VI. of this report.)³

III. COMMENTS ON THE CLAIM

On March 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, two written comments, evidence or information were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects that 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 for which to pay compensation instead of waiving a state law.

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

³ The applicant's lawyer asked the State to amend this claim to add Barbara A. Morgan as an individual claimant. Barbara Morgan acquired ownership of the property as a trustee on January 17, 2005. Because no state laws enforced by the department or the Commission restrict her use of the subject property relative to when she acquired it, the fair market value of the property has not been reduced due to state regulation, and her claim as an individual would be denied.

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 3, 2005 for processing under OAR 125, division 145. The claim identifies ORS 215 and indirectly identifies Statewide Planning Goals 3 and 4 and OAR 660, divisions 6 and 33, as the laws that restrict the use of the property as the basis for this 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 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.” The definition of “family member” in Ballot Measure 37, Section 11(A), includes “daughter, mother, father . . . an estate of any of the foregoing family members . . . or a legal entity owned by any one or combination of these family members or the owner of the property.”

Findings of Fact

The claimant, The Barbara R. Morgan Charitable Remainder Unitrust, acquired the subject property on June 3, 2003, when Barbara R. Morgan conveyed the subject property by deed to the trust. By its terms, the trust agreement is irrevocable.

Barbara Morgan acquired her interest in the property from her parents, W. Ray Morgan⁴ and Genevieve Duncan Morgan, under the terms of a testamentary trust executed by her father on July 9, 1958. Barbara Morgan’s parents, Ray and Genevieve Duncan Morgan, acquired both parcels of land by deed on April 19, 1960 and May 31, 1963.

Conclusions

⁴ Also known as William Raphael Morgan.

The claimant, The Barbara R. Morgan Charitable Remainder Unitrust, is an “owner” of the subject property as that term is defined by Section 11(C) of Ballot Measure 37 as of June 3, 2003.⁵ W. Ray Morgan, Genevieve D. Morgan, and Barbara R. Morgan are “family members” of the claimant as that term is defined by Section 11(A) of Ballot Measure 37.

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 generally cites ORS 215 as the laws that in 1973 “created restrictions to the property through the creation of zoning rules that limited the size of parcels that could be split from the original parcel.”

The claim is based, in part, on Grant County’s current Multiple Use Range, Exclusive Farm Use, and Primary Forest zones and the applicable provisions of state law that require such zoning. These zones apply to both Farm and Forest Lands, which are subject to Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands), and their implementing statutes and rules.

The zoning on the portion of claimant’s property that is EFU and Multiple Use Range is required by Goal 3 in accordance with OAR 660, division 33, and ORS 215 because this portion of the claimant’s property is “Agricultural Land” as defined by Goal 3.⁶ 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, 215.284, 215.780, and OAR 660, division 33, as applied by Goal 3, do not allow the relevant portion of the subject property to be divided into parcels smaller than 80-acres and establish standards for allowing the existing or any proposed parcel(s) to have farm or non-farm dwellings on them.

⁵ An attorney for the claimant submitted a letter on June 30, 2005, stating that at the time Ms. Morgan “had trust papers prepared and recorded a deed to the unfunded trust, she did not intend to waive or give up her continuing interest in the Ranch property that was the subject of the trust” and that the trust continues Barbara Morgan’s interest as beneficiary and trustee. However, notwithstanding any intent, or the assertion that the trust is “unfunded”, the claimant is the trust and not Ms. Morgan. Further, the claim represents that the Trust is the owner of the property and is signed by Ms. Morgan as “trustee of the Barbara R. Morgan Charitable Remainder Unitrust, Sole owner of the property,” and the attorney’s letter acknowledges that the property has been deeded to the trust. Ms. Morgan transferred her individual interest in the property when she deeded the property to the irrevocable trust on June 3, 2003, and Ms. Morgan’s interest in the trust property commenced upon the transfer of the property to that irrevocable trust.

⁶ The claimant’s property consists of Class VI and VII soils. See Soil Survey of Grant County, Oregon, Central Part, USDA Soil Conservation Service, February 1981, Sheet #28 and pp. 37-38.

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) established 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 interpreted 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, 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.)

ORS 215.283 lists uses allowed in EFU zones, which includes some commercial uses.

The zoning on the portion of the claimant's property that is Primary Forest is required by Goal 4 in accordance with ORS 215 and OAR 660, division 6.

Goal 4 and the required provisions applicable to land zoned for forest use in ORS 215 and OAR 660, division 6, restrict the zoning, use, and division of the relevant portion of the subject property. Goal 4 became effective on January 25, 1975 and required Forest Land as defined by the Goal to be zoned pursuant to the relevant provisions of ORS 215, most of which became effective in 1963, and the provisions of ORS 527 (Forest Practices). OAR 660, division 6, which implemented Goal 4 requirements for Forest Land, became effective February 5, 1990. ORS 215.780, which established an 80-acre minimum size for the creation of new parcels or lots in a farm or forest zone, became effective November 4, 1993 (792, Oregon Laws 1993).

When the claimant's family acquired the property on April 19, 1960 and May 31, 1963, it was not subject to any zoning by Grant County. State land use planning laws related to the use and division of Farm and Forest Lands were not in place when the claimant's family acquired the property in 1960 and 1963.

Conclusions

The zoning requirements and minimum lot size and dwelling standards established by Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands)), and provisions applicable to Agricultural and Forest Lands in ORS 215 and OAR 660, divisions 6 and 33, were all enacted after the Morgan family acquired ownership of the subject property on April 19, 1960, and May 31, 1963, and do not allow the division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the Morgan family in 1960 and 1963.

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 land use regulations 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 estimates that the fair market value of the subject property has been reduced by \$3,308,074 as a result of land use laws, based on the following amounts and calculation:

\$ 2,250,000 for 45 new 5-acre lots @ \$50,000 each @ \$10,000 per-acre
+ 1,000,000 for new 40-acre lot for a destination resort @ \$25,000 per-acre
+ 1,250,000 for new 463-acre common use tract @ \$2,760 per-acre
= 4,500,000 estimated market value without land use restrictions ⁷
-- 153,926 estimated current market value with restrictions per County Assessor ⁸
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= \$ 3,308,074 estimated reduction in value due to restrictions.

These totals are based on an appraisal included with the claim.

Conclusions

As explained in section V. (1) of this report, The Barbara R. Morgan Charitable Remainder Unitrust is the current owner of the subject property as of June 3, 2003 under section (11) of Measure 37, and the Morgan family acquired ownership of the property in 1960 and 1963. Under Ballot Measure 37, The Barbara R. Morgan Charitable Remainder Unitrust is due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value.

⁷ A February, 2005 appraisal by Larry Aamold, Sr., an Oregon Certified Appraiser, states that the market value of the subject 718.21-acre “following waiver of current EFU, Primary Forest Zone, and MUR zoning would be (1) \$3,462,000 if it remained “unimproved timbered ranch tract,” and (2) \$4,500,000 if divided into smaller lots or parcels for development in the manner that the claimant proposes.

⁸ The claim states that \$153,926 is the County-determined real market value. Based on department staff’s telephone conversation with the Grant County Tax Collector’s office on July 1, 2005, the real market value of Tax Lot 4102 is \$218,880, and the real market value of Tax Lot 400 is \$4,200, a total of \$223,080. There is an approximately \$69,160 discrepancy between the County’s actual real market value estimate for the subject property, and the amount the claim alleges is the County’s value, based on how the property is identified. The claim identifies two Tax Lots as the subject property: Tax Lot 400, Sections 19 and 30, T13S, R35E; and Tax Lot 4102, Sections 24 and 25, T13S, R34E. The claim lists two County property tax accounts for these two Tax Lots: R39446 and R2704. Account #R2704 is for Tax Lot 400. Account # R39446 is for only part of Tax Lot 4102, which is a split account. Account # R39446 is for 320-acres with a value of \$149,720. The other part of Tax Lot 4102 is covered by Account # R39445, 120-acres with a value of \$69,160.

Based on the submitted information, including a certified appraisal, 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 Goals 3 and 4, ORS 215, and OAR 660, divisions 6 and 33, as the state laws that have restricted use of the property and reduced its fair market value. These regulations were enacted after the claimant's family acquired the property in 1960 and 1963, and therefore are not exempt under section 3(E) of Measure 37, which exempts laws enacted after the acquisition of the property by the claimant's family. The siting requirements of ORS 215.730, Goal 4, and its implementing rules related to dwelling siting standards based on health and safety will continue to apply to the property under Section 3(B).

Conclusions

It appears that the general statutory, goal and rule restrictions on the division, residential and resort development, and use of farm and Forest 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's family acquired the property in 1960 and 1963 are exempt under Section 3(E) of the Measure and will continue to apply to the property. The siting requirements of ORS 215.730, Goal 4, and its implementing rules related to dwelling siting standards based on health and safety will also continue to apply under Section 3(B). 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 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 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 set forth in this report, laws enforced by the Commission or the department restrict the division of the subject property into lots or parcels, and the use of the property for residential and resort purposes. The claimant cannot create the desired 47 lots, 45 with dwellings on them, one with a destination resort, and one for common use, because laws enacted after the claimant's family acquired the property prohibit such division and development. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$3,308,074. Based on the record for this claim, the department acknowledges that the laws on which the claim is based 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 compensation, Ballot Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow The Barbara R. Morgan Charitable Remainder Unitrust to use the subject property for a use permitted at the time it acquired the property on June 3, 2003.

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 Barbara R. Morgan Charitable Remainder Unitrust's division of its property or to the establishment of one or more dwellings or a destination resort on lots created: applicable provisions of Statewide Planning Goals 3 and 4, ORS 215, and OAR 660, divisions 6 and 33, enacted after June 3, 2003. These land use regulations will not apply to The Barbara R. Morgan Charitable Remainder Unitrust's use of its property only to the extent necessary to allow the claimant a use permitted at the time it acquired the property on June 3, 2003. The department acknowledges that the relief recommended in this report will not allow The Barbara R. Morgan Charitable Remainder Unitrust to use the property in the manner set forth in this claim.
2. The action by the State of Oregon provides the state's authorization to the claimant to use its property subject to the standards in effect on June 3, 2003.

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 final 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 it to obtain a decision under Measure 37 from Grant County or other jurisdiction 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 July 28, 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.