

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

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

September 6, 2005

STATE CLAIM NUMBER: M120088

NAME OF CLAIMANTS: Marilyn Knott and Omer Keith Cyrus, as
Successor Trustees of the Cyrus Loving
Trust

MAILING ADDRESS: 17155 Highway 126
Sisters, Oregon 97759

PROPERTY IDENTIFICATION: Township 15S, Range 10, Section 12,
Tax Lot 100
Deschutes County

OTHER CONTACT INFORMATION: Edward Fitch
Post Office Box 457
Redmond, Oregon 97756

DATE RECEIVED BY DAS: March 10, 2005

180-DAY DEADLINE: September 6, 2005

I. SUMMARY OF CLAIM

The claimants, Marilyn Knott and Keith Cyrus, seek compensation in the amount of \$5,000,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to subdivide the 116-acre property into five-acre lots and to establish a dwelling on each lot. The property is located at 17155 Highway 126, near the City of Sisters, in Deschutes County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid as to Marilyn Knott and Omer K. Cyrus, as successor trustees of the Cyrus Loving Trust. In lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, will not apply to Marilyn Knott's and Omer

K. Cyrus' division of the property into five-acre lots and the establishment of a dwelling on each lot: the applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215.283, 215.284 and 215.780, and OAR 660, division 33. These laws will not apply to Marilyn Knott and Omer K. Cyrus only to the extent necessary to allow them a use of tax lot 100 permitted at the time they acquired the property on December 27, 1995. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 17, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, one written comment was received in response to the 10-day notice.

The comments are relevant to whether the laws that are the basis for the claim are exempt under Section 3 of Measure 37. The department considered the comments 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 10, 2005, for processing under OAR 125, division 145. The claim identifies "All statewide planning goals and rules and County land regulations adopted since March of 1944 that restrict the ability of owner to subdivide and develop property" as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37 are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

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

ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

The claim identifies the claimant as “Successor Trustees to Willard H. Cyrus and F. Mae Cyrus, deceased, Trustees under the Cyrus Loving Trust, dated May 21, 1991.” The claim is signed by O. Keith Cyrus and Marilyn Knott.¹ A copy of a Title Report dated February 24, 2005, indicates that the Cyrus Loving Trust is the current owner of the subject property. The original trustors and trustees of the Cyrus Loving Trust, Willard and F. Mae Cyrus [created the revocable trust on May 21, 1991 and](#) transferred the subject property to the trust on the same date, as reflected by a Bargain and Sale Deed included with the claim. F. Mae Cyrus passed away on December 27, 1995 and Willard H. Cyrus passed away on December 30, 1995. Under the terms of the Cyrus Loving Trust, Marilyn Knott became a successor trustee upon the death of F. Mae Cyrus, and Omer Keith Cyrus became a successor trustee upon the death of Willard Cyrus. Based on the record for this claim, the department determines that Marilyn K. Knott, as a successor trustee, is a current owner of the property, and that she acquired her interest in the property on December 27, 1995. Based on the record for this claim, the department determines that Omer Keith Cyrus, as a successor trustee, is a current owner of the property, and that he acquired his interest in the property on December 30, 1995.

[Family ownership of the subject property begins in 1944 with acquisition by Omer and Hattie Cyrus, as reflected by a warranty deed included with the claim.](#)

Conclusion

Marilyn K. Knott and Omer Keith Cyrus, as successor trustees, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37. Marilyn Knott became an owner as of December 27, 1995, upon the death of F. Mae Cyrus. Omer Keith Cyrus became an owner as of December 30, 1995, upon the death of Willard Cyrus. Family ownership reportedly began in 1944.

¹ The Trust Agreement is ambiguous concerning who the successor trustees of the trust are. The department is relying on Marilyn Knott and Keith Cyrus’ signatures of the claim form to establish that they are the successor trustees of the Cyrus Loving Trust.

2. The Laws that are the Basis for this Claim

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a law must restrict the claimant's use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

Findings of Fact

The claim states a desire to "divide property into 22, five-acre parcels." Additional information submitted by the claimant's representative indicates that "all Statewide Planning Goals and County land use regulations adopted since March of 1944 have restricted the property" so that it cannot be subdivided and developed into five-acre lots.

The claim is based, in part, on Deschutes County's current Exclusive Farm Use (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 and ORS 215, because the claimant's 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.

According to information provided by Deschutes County, use of the property is also limited by application of the County's Surface Mining (SM) Zone, an overlay zone that restricts ability to divide the subject property or to establish dwellings. According to the County, the Surface Mining zone is intended, in part, to "protect the health and safety of the public and of residents of property adjoining surface mines..." Counties are authorized, but not required, to inventory and protect significant mineral and aggregate resource sites under provisions of Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and the provisions of OAR 660, division 23. The current Deschutes County Surface Mining Zone is located at Chapter 18.52 of the County development code. This zone does not allow an existing parcel to be reduced in size nor the creation of additional parcels through partition, subdivision, or otherwise (18.52.060).

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 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 (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.)

The claimant's family acquired tax lot 100 in 1944. At that time, there was no zoning on the property and the statewide planning goals and implementing statutes and regulations did not apply.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted after family members of current owner acquired ownership of tax lot 100 in 1944, and do not allow the division and development of the properties, thereby restricting the use of the property relative to the uses allowed when the property was acquired by them in 1944.

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 regulation described in Section V. (2) of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes an informal estimate of \$5,000,000 as the property's fair market value, in the absence of current regulations. This estimate is based on the claimant's estimate of the market value of five-acre lots in the area.

Conclusions

As explained in section V. (1) of this report, the current owner is The Cyrus Loving Trust. Family members of the Trust acquired the subject property in 1944. Under Ballot Measure 37, The Cyrus Loving Trust is due compensation for land use regulations that restrict its 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's family acquired the property restrict the division of the property and establishment of dwellings.

Without an appraisal based on the value of five-acre lots or other explanation, 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 enacted or enforced by the Commission or the department.

4. Exemptions under Section 3 of Measure 37

Ballot Measure 37 does not apply to certain land use regulations. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The claim includes a general reference to any state land use regulations that restrict the use of the property relative to what would have been allowed in 1944 when the property was acquired by Omer and Hattie Cyrus. These provisions include Statewide Planning Goal 3 (Agricultural Lands), Goal 5 (Natural Resources, Scenic and Historic Areas and Open Spaces) and applicable provisions of ORS 215 and OAR 660, divisions 33 and 23, which Deschutes County has implemented through its EFU zone and SM overlay zone. None of these laws appear to be exempt under subsection 3(E) of Ballot Measure 37.

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 and the surface mining overlay apply to the claimant's use of the property, and for the most part these laws are not exempt under subsection 3(E) of Measure 37.

Laws in effect when the claimant or a family member of the claimant (whichever was earlier) acquired the property are exempt under subsection 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. For example, if provisions of Goal 5 or the Goal 5 implementing rules apply to the claimant's use of the property, they may be exempt under Section 3(B) 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 that the claimant has identified. Similarly, this report only addresses the exemptions provided for under subsection (3)(E) 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 they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the property.

VI. FORM OF RELIEF

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the division of the subject property into parcels or lots, and the use of the property for residential purposes. The claimant cannot create the desired 5-acre lots out of the subject property, or develop those lots for residential use because laws enacted after the claimant acquired the property prohibit lot sizes that small. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$5,000,000. However, because the claim does not provide an appraisal or other specific explanation for how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, 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 land use regulations to allow Marilyn K. Knott and Omer Keith Cyrus, as trustees of the Cyrus Loving Trust, to use the subject property for a use permitted at the time they acquired it on December 27 (Marilyn) and December 30 (Keith), 1995.

Conclusion

Based on the record, the department approves the claim, subject to the following terms:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Marilyn K. Knott and Omer Keith Cyrus, as successor cotrustees of the Cyrus Loving Trust to allow them to divide the 116-acre property into five-acre lots and to establish a single family dwelling on each lot created: applicable provisions of ORS 215, Statewide Land Use

Planning Goal 3, and OAR 660, division 33 enacted after December 27, 1995. These land use regulations will not apply to Marilyn K. Knott and Omer Keith Cyrus, as cotrustees of the Cyrus Loving Trust, only to the extent necessary to allow them a use of the property permitted on December 27, 1995.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on December 27, 1995. On that date, the property was subject to applicable provisions of ORS chapter 215, Statewide Planning Goal 3 and OAR 660, division 33, then in effect, including the minimum lot size requirements in ORS 215.780, which require land zoned for exclusive farm use and not designated rangeland, of at least 80 acres. The department acknowledges that this relief will not allow the claimant the use described in the claim.

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 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 215.412 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under section (3) of the Measure.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the property, it may be necessary for them to obtain a decision under Measure 37 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under Measure 37 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 12, 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.