

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

June 28, 2005

STATE CLAIM NUMBER: M120433

NAME OF CLAIMANT: August C. Kautz

MAILING ADDRESS: P.O. Box 2018
Oregon City, OR 97045

IDENTIFICATION OF PROPERTY: 14565 S Kirk Road
Township 3S, Range 2E, Section 28
Tax lot 1200
Clackamas County

OTHER CONTACT INFORMATION: Hans N. Kautz
Power of Attorney for August Kautz
P.O. Box 2018
Oregon City, OR 97045

DATE RECEIVED BY DAS: January 3, 2005

180-DAY DEADLINE: July 2, 2005

I. CLAIM

August C. Kautz, the Claimant, seeks compensation in the amount of \$2,940,000 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 claimant desires compensation or the right to subdivide the subject 46.82-acre property into one- and two-acre dwelling sites. (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. Department staff recommends that, in lieu of compensation, the requirements of certain applicable state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, specifically Statewide Planning Goal 3 (Agricultural Lands), applicable provisions of ORS 215 and OAR 660, Division 33, not

apply to the subject property to allow Mr. Kautz to divide the property and establish one or more dwellings to the extent that those uses were permitted at the time he acquired the property that is the subject of this claim. As a result, Mr. Kautz's use of the property will be subject to those specified laws in effect on October 14, 1954. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On April 14, 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, there were two written comments, evidence or information received in response to the 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 January 3, 2005, for processing under OAR 125, Division 145. The claim cites Clackamas County EFU zoning, as authorized by ORS 215.203 and in accord with OAR 660-033-0100, implemented on January 25, 1975, 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.

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

A staff report provided by Clackamas County states that the deed records for the property show that August Kautz acquired an interest in the property in 1954. (See Clackamas County staff report dated March 23, 2005 in the department’s claim file.) Additional materials submitted by the applicant include a Real Estate Contract Agreement conveying the property to August C. Kautz on October 14, 1954.

A statement from the Clackamas County Assessor indicates that the property remains under the ownership of August C. and Margarete C. Kautz as of 2004-2005 property tax records. The claim includes a death certificate confirming the death of Margarete Kautz on January 31, 1999.

Conclusions

Based on information provided by the county and the claimant, August Kautz first acquired the subject property in 1954 and has continuously remained an “owner” of the subject property as that term is defined in Section 11(c) of Ballot 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 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 identifies the County’s original RA-1 zone as limiting the use of the property. The claim further cites the state’s EFU twenty-acre minimum parcel size requirement and the subsequently adopted EFU eighty-acre minimum parcel size requirement as restricting the use of his property.

OAR 660-015-0000(3) and the provisions of ORS 215.780 preclude subdivision of the property into parcels smaller than 80 acres, and therefore restrict the claimant’s use of the property.

The claimant's property is "agricultural land" as defined under Statewide Planning Goal 3, Goal 3, OAR 660-015-0000(3) and the provisions applicable to land zoned for exclusive farm use under ORS 215 and OAR 660-033-0090, including ORS 215.780, restrict the zoning, use and division of the subject properties. Goal 3 became effective on January 25, 1975, and required agricultural land, as defined by the Goal, to be zoned EFU pursuant to ORS 215. (See citations to statutory and rule history under OAR 660-015-0000(3).) ORS 215.780 became effective on November 4, 1993 (Chapter 792, Or Laws 1993).

Conclusions

The minimum lot size requirements and standards for farm and non-farm dwellings established by Statewide Planning Goal 3, OAR 660, Division 33, and the applicable portions of ORS 215 were adopted after the claimant acquired the subject property in 1954 and restrict the use of the property relative to the uses allowed when the property was acquired in 1954. Current state standards for minimum parcels sizes established in compliance with OAR 660-033-0100 and ORS 215.780 do not permit division of the subject parcel into lots smaller than 80 acres. OAR 660-033-0135, ORS 215.283-284 and ORS 215.700-710 also preclude the placement of additional farm and non-farm dwellings on the property.

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 includes a tax statement for the 2004-2005 tax year, which indicates an assessed Real Market Value of approximately \$650,000 for the subject property. The claim states that the property value has been reduced by \$2,940,000. Additional explanations provided in the claim estimate the value of an improved 1-acre parcel between \$94,802 and \$112,909, and the value of an unimproved lot at \$70,000. Assuming the claimant could develop 45 lots, the claim estimates the value of the lots would be approximately \$3,150,000. The claim does not include a formal appraisal or other market analysis to support estimates of reduction in value.

Conclusions

As explained in section V.(1) of this report, the current owner is August Kautz who acquired the property in 1954. Thus, under Ballot Measure 37, Mr. Kautz is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Mr. Kautz estimates the loss in value at \$2,940,000. The claim does not include an appraisal or any other analysis of the reduction in value due to specific land use laws. Without an appraisal, it is not possible

to substantiate the specific dollar amount of the claimant's 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 laws 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 of Fact

The claim includes a list of state and county land use regulations, and states that they were enacted subsequent to acquisition of the property in 1954, and restrict the use relative to what would have been allowed in 1954 when the claimant acquired the property.

Conclusions

Without a specific proposed use 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 dividing the subject property apply to the owner's anticipated use of the property, and for the most part, these laws would not come under any of the exemptions in Measure 37. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure or because they are laws that are not covered by the Measure to begin with.

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 owner to carry out a use of the property allowed at the time the present owner 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 restrict the subdivision of, and approval of dwellings on, the subject property. The laws enforced by the Commission or department reduce the fair market value of the property to some extent. The claim asserts this amount to be \$2,940,000. However because the claim does not provide a 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 current record for this claim, the department acknowledges that the laws on which the claim is based more likely than not 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 one or more land use regulations to allow Mr. Kautz to use the subject property for a use permitted at the time he acquired the property on October 14, 1954.

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 August C. Kautz's division of the subject property into one- and two-acre lots or to the establishment of dwellings on those lots: the provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, Division 33, to the extent necessary to allow Mr. Kautz a use of the property permitted at the time he acquired the property in 1954.
2. The action by the State of Oregon provides the state's authorization to the claimant to divide the property into one- and two-acre lots, and to establish a dwelling on each lot, to the extent these uses were permitted on the date the claimant acquired the property in 1954, and to the extent that other laws not listed in (1) above do not restrict those uses.
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 215.412 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 claimant remains 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 him 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 draft report 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 June 10, 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.