

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

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

September 12, 2005

STATE CLAIM NUMBER: M119637

NAMES OF CLAIMANTS: Gerald and Yvonne Kresal

MAILING ADDRESS: 18197 N.W. Pumpkin Ridge Road
North Plains, Oregon 97133

PROPERTY IDENTIFICATION: Township 2N, Range 3W, Section 14,
10-acre portion of Tax Lot 1001¹
Washington County

DATE RECEIVED BY DAS: March 22, 2005

180-DAY DEADLINE: September 18, 2005

I. SUMMARY OF CLAIM

The claimants, Gerald and Yvonne Kresal, seek compensation in the amount of \$50,000 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 divide the 10-acre property into three parcels and to establish single-family dwellings on two of the parcels. The property is located at 18197 Pumpkin Ridge Road approximately five miles north of the City of North Plains, in Washington 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. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to Mr. and Ms. Kresal's division of the subject property into three parcels, and to the establishment of residential dwellings on two parcels: Statewide Planning Goal 3 (Agricultural Lands) and the applicable provisions of ORS 215 and OAR 660, division

¹ The property subject to this claim includes 10 acres, which is the southern portion of tax lot 1001, and which was acquired by the claimants in 1973. The remaining 19.27 acres of tax lot 1001 were purchased at later dates and are not included with this claim.

33, enacted after March 1, 1973. These laws will not apply to the claimants use of the subject ten acres only to the extent necessary to allow Mr. and Ms. Kresal a use of the property permitted at the time they acquired it on March 1, 1973. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 24, 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, evidence or information were 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

This claim was submitted to DAS on March 22, 2005, for processing under OAR 125, division 145. The claim identifies Washington County's Agriculture and Forestry (AF-20) District and state laws (specifically ORS 215.780 and OAR 660, divisions 4 and 33) as laws that restrict the division of the subject 10 acres into three parcels and the establishment of single-family dwellings on two of the parcels 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. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimants, Gerald and Yvonne Kresal, acquired the subject 10 acres, which is the southernmost part of tax lot 1001, on March 1, 1973, by a Warranty Deed.² Recent Washington County tax records document that Gerald and Yvonne Kresal are current owners of the subject property. (See departments claim file.)

Mr. Kresal’s family has owned the property since March 7, 1957. (See deed the department’s claim file.)

Conclusions

The claimants, Gerald and Yvonne Kresal, are the “owners” of the subject property as that term is defined by Section 11(C) of Ballot Measure 37. Mr. and Ms. Kresal acquired the subject 10 acres on March 1, 1973.

Mr. Kresal’s family has owned the subject property since 1957.

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.

² The claim as originally submitted included all of tax lot 1001. On July 14 and 27, 2005, the claimants submitted letters to the state requesting that their original claim be amended to exclude the northern portion of tax lot 1001 (consisting of 19.27 acres) from their request for compensation or relief. On July 27, 2005, department staff contact with Mr. Kresal by telephone, who verified that only the southern 10 acres, purchased in 1973, will be included in the revised claim. The March 1, 1973, Warranty Deed conveys only the subject 10 acres to the claimant. The remaining 19.27 acres of tax lot 1001 that are not part of this claim were purchased by the claimants in 1986 and in 1994. Because in 1975 the subject 10 acres was the original tax lot 1001, the boundary of it is specifically delineated and identified on Washington County Assessor’s Map 2N 3 14 by a diagonal survey line (see department claim file).

Findings of Fact

The claim states that “Present AF-20 code does not allow partition of less than 20 acres to be parceled off and developed as building sites” and “[t]hese rules require parcel size and income level which this parcel cannot accommodate.”

The claim is based, in part, on Washington County’s current Agriculture and Forestry (AF-20) District and the applicable provisions of state law that require such zoning. The claimants’ property is zoned AF-20 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 3.³ 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 ORS 215.213, 215.263, 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 215.213.

OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993.

The Kresal family acquired the subject property on March 7, 1957. At that time, the Statewide Planning Goals and implementing statutes and rules had not been adopted.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned AF-20 in ORS 215 and OAR 660, division 33, were all enacted after the Kresal family acquired ownership of the subject 10 acres on March 7, 1957, and do not allow the division and residential development of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimants’ family in 1957.

³ The claimants’ property is “Agricultural Land” because it contains NRCS (Natural Resources Conservation Service) Class III Soils. Property located on Sheet #16. Soil map units 11C and 11D (Cornelius and Kinton) on page 19 (Soil Survey of Washington County, Oregon, July 1982).

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. 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 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 \$50,000 as the reduction in the property's fair market value, as a result of regulations enacted and enforced after the claimants' family acquired the property. This estimate is based on the claimants' estimate of property values in the area. No appraisal or other information was provided regarding the reduction in the fair market value.

Conclusions

As explained in Section V.(1) of this report, the current owners are Gerald and Yvonne Kresal who acquired the subject 10 acres on March 1, 1973. Under Ballot Measure 37, Mr. and Ms. Kresal are due compensation for land use regulations 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 claimants' family acquired the property restrict division of the subject 10 acres and the establishment of additional dwellings. The claimants estimate the reduction in value due to the restrictions to be \$50,000.

Without an appraisal based on the value of the subject 10 acres if divided and approved with additional dwellings or other substantiating documentation, it is not possible to substantiate the 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 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 1973, when the subject 10 acres was acquired by the claimants. These provisions include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Washington County has implemented through its AF-20 District. 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 appears that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimants' use of the property, and for the most part these laws are not exempt under Section 3(E) of Measure 37.

Laws in effect when the claimants' family acquired the property 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 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 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 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 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 10 acres into three parcels, and the establishment of single-family dwellings on two of the new parcels. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$50,000. However, because the claim does not provide an appraisal or other specific documentation to establish 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 may have reduced the fair market value of the subject 10 acres 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 Mr. and Ms. Kresal to use the subject property for a use permitted at the time they acquired the subject 10 acres on March 1, 1973.

The claimants acquired the subject property prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. On the March 1, 1973, date of acquisition, the County's F-1 zoning applied to the subject property.⁴ The F-1 zone did not have a minimum lot size and allowed dwellings by right, but was adopted pursuant to the provisions of ORS 215, enacted in 1963.

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 Mr. and Ms. Kresal's, division of the subject 10 acres (consisting of the southern portion of tax lot 1001) into three parcels and to the establishment of single family dwellings on two of the parcels created: Statewide Planning Goal 3 and the applicable provisions of ORS 215 and OAR 660, division 33, enacted after March 1, 1973. These land use regulations will not apply to Mr. and Ms. Kresal's use of the subject 10 acres only to the extent necessary to allow the claimants a use permitted at the time they acquired the subject 10 acres on March 1, 1973.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their 10-acre property subject to the standards in effect on March 1, 1973. On that date, the property was subject to applicable provisions of ORS 215 then in effect.
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

⁴ Personal communication on August 1, 2005 between Jim Tice (Washington County) and Doug White (DLCD).

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 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 15, 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.