

**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: M119639

NAMES OF CLAIMANTS: Kenneth and Dawn Dutton

MAILING ADDRESS: 13520 SE 362nd Avenue
Boring, Oregon 97009

PROPERTY IDENTIFICATION: Township 2S, Range 4E, Section 28C,
Tax Lot 2400
Clackamas County

DATE RECEIVED BY DAS: March 22, 2005

180-DAY DEADLINE: September 18, 2005

I. SUMMARY OF CLAIM

The claimants, Kenneth and Dawn Dutton, seek compensation in the amount of \$918,530 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 their 15.78-acre property into one-acre lots and to develop a dwelling on each lot. The property is located outside of Boring, at Township 2S, Range 4E, Section 28C, Tax Lot 2400 in Clackamas 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 Kenneth and Dawn Dutton's division of the 15.78-acre property into one-acre lots, and to the development of a dwelling on each lot: Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215.263, 215.284 and 215.780, and applicable provisions of OAR 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow them a use of the property permitted at the time they acquired it in 1974. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 2, 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, nine 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 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 to pay compensation for instead of waiving a state law. (See comment letters in the department's claim file.)

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 Statewide Planning Goal 3 and OAR 660, division 33 and ORS 215, as laws that restrict the use of the property and are 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, Kenneth and Dawn Dutton, acquired the subject property on July 31, 1974, as reflected by a Warranty Deed included with the claim. A 2004-2005 Clackamas County property Tax Statement indicates that Kenneth and Dawn Dutton are the current owners of the subject property.

Conclusions

The claimants, Kenneth and Dawn Dutton, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of July 31, 1974.

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 is based, in part, on Clackamas County’s current Exclusive Farm Use (EFU) 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. The property’s soil types qualify the property as high-value farmland.

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 parcels 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.)

Statewide Planning Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses and also became effective on January 25, 1975.

The claimants acquired the property on July 31, 1974, after the adoption of SB 100 (Chapter 80, Oregon Laws 1973, effective October 5, 1973) but before the adoption of the Statewide Planning Goals effective January 25, 1975. As such, ORS 197.175(1) and 197.280 (1973 edition) required, in addition to any local plan or zoning provisions, the application of interim land use goals set forth in ORS 215.515 (1973 edition) to the preparation, revision, adoption or implementation of any comprehensive plan prior to the effective date of the Statewide Planning Goals (see *Petersen v. Klamath Falls*, 279 Or 249 (1977)).¹

No information has been provided to establish whether the one-acre development requested by the claimants complies with the Interim Planning Goals set forth in ORS 215.515 (1973 edition) in effect at the time the claimants acquired the property in 1974.

Conclusions

Lot size and dwelling standards established by Statewide Planning Goal 3, amendments to ORS 215, and OAR 660, division 33, all adopted since Kenneth and Dawn Dutton acquired the property in 1974, do not allow the division of the property into parcels less than 80-acres in size or allow the approval of dwellings as may have been possible when they acquired it. However, it is not clear whether the claimants' requested level of development complies with the standards in effect when they acquired the property on July 31, 1974.

¹The "interim" land use goals are set forth in ORS 215.515(a) to (j) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state," and (j) "To ensure that development of properties within the state is commensurate with the character and the physical limitations of the land." (ORS 215.515, 1973 edition).

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 \$918,530 as the reduction in the property's fair market value as a result of restrictions imposed after the claimants acquired the property. This estimate is based on the claimants' compilation of the market value of similar properties in the area. The claim also includes a Tax Statement indicating the current real market value of the subject property with improvements to be \$231,470.

Conclusions

As explained in Section V. (1) of this report, the current owners are Kenneth and Dawn Dutton who acquired the property on July 31, 1974. Under Ballot Measure 37, the claimants 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, land use regulations adopted since 1974 limit the ability of the claimants to divide the property for residential development.

Without an appraisal and without knowing the extent of development that would have been permitted when the claimants acquired the property, 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 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 state regulations on which the claim is based include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its EFU zone. With the exception of provisions of ORS 215, including the interim land use goals set forth in ORS 215.515 (1973 edition) in effect on July 31, 1974, these laws are not exempt under Section 3(E) of Ballot Measure 37. Provisions of ORS 215 enacted before July 31, 1974, are exempt under Section 3(E) of the Measure.

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 apply to the claimants' use of the property, and these laws are not exempt under Section 3(E) of Measure 37 to the extent they were enacted after the claimants acquired the property in 1974. Provisions of ORS 215 in effect when the claimants acquired the property in 1974 are exempt under Section 3(E) of the Measure and will continue to apply to the property.

Laws in effect when the claimants 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 claimants' division and development of the subject property into the one-acre lots with dwellings. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$918,530. However, because the claim does not provide an appraisal for how the specified restrictions reduce the fair market value of the property and because it is not clear what level of development would have been allowed when the claimants acquired 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 Kenneth and Dawn Dutton to use the subject property for a use permitted at the time they acquired the property on July 31, 1974. As explained in Section V. (2) of this report, when Mr. and Ms. Dutton acquired the property, it was subject to ORS 215, including compliance with the interim land use goals set forth in ORS 215.515 (1973 edition).

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 Kenneth and Dawn Duttons' division and development of the property: applicable provisions of Statewide Planning Goals 3 and 14, ORS 215.263, 215.780, and 215.284, and OAR 660, division 33, enacted after July 31, 1974. These land use regulations will not apply to Mr. and Ms. Duttons' use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on July 31, 1974.

2. The action by the State of Oregon provides the state's authorization to Kenneth and Dawn Dutton to use the property subject to the standards in effect on June 31, 1974. On that date, the property was subject to the provisions of ORS 215 then in effect, including the Interim Planning Goals set forth in ORS 215.515 (1973 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 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 19, 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.