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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation
August 4, 2005

STATE CLAIM NUMBER:	M119739
NAME OF CLAIMANT:	Marla J. Robison [1]
MAILING ADDRESS:	12300 Northeast Parrett Mountain Road Newberg, Oregon 97132
IDENTIFICATION OF PROPERTY:	Township 3S, Range 2W, Section 13 Tax Lot 2500 Yamhill County
DATE RECEIVED BY DAS:	February 14, 2005
180-DAY DEADLINE:	August 13, 2005

I. CLAIM

Marla J. Robison, the claimant, seeks compensation in the amount of $3,546,000 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 divide the property into 18 lots of 2.5-acres each and develop each new lot with a dwelling. The property is located at 12300 Northeast Parrett Mountain Road in Yamhill County. (See the 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 the claimant to allow her to divide the subject property for residential development: provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215.263, 215.284 and 215.780, and OAR 660, division 33. These laws will not apply to the claimant's use of the property only to the extent necessary to allow Ms. Robison a use of the property permitted at the

[1] Also known as Marla June Kimball and Marla J. Kimball Robison.

time she acquired the subject property on May 26, 1972. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

On March 1, 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, 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 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 February 14, 2005 for processing under OAR 125, division 145. The claim includes a list of land use regulations (see claim), all of which were enacted prior to December 2, 2004, the effective date of Measure 37. (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

On May 26, 1972, claimant Marla Robison, then known as Marla Kimball, and her former husband, Richard D. Kimball, acquired the subject property, then known as Tax Lots 2400 and 2500. The Kimballs' June 25, 1990 Divorce Decree and May 29, 1996 amended judgment, awarded 8.05-acres of Tax Lot 2400 to Richard Kimball, and awarded the remaining 31-acres of Tax Lot 2400, and all of Tax Lot 2500 (16.7 acres) to the claimant. The 47.7-acre property awarded to claimant was combined for tax purposes as Tax Lot 2500. Richard Kimballs' eight-acres became Tax Lot 2401.

A Northwest Title Company Lot Book Service shows Marla June Kimball as the current owner of the property.

Conclusion

The claimant, Marla J. Robison, is an "owner," of the subject property, as that term is defined under Section 11(C) of Ballot Measure 37, as of May 26, 1972.

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 cites ORS 215.283, ORS 215.284, ORS 215.296, and ORS 215.780; OAR 660-033-0020, OAR 660-033-0030, OAR 660-033-0100, OAR 660-033-0120, OAR 660-033-0130, and OAR 660-033-0135 as the laws that restrict her use of the subject property and prevent her from dividing and developing it into 18, 2.5-acre home sites.

The claim is based on the applicable provisions of state law, which Yamhill County has implemented through the EFU zoning. The claimant's property is zoned EFU as required by 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.[2] 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 subject property to be divided into parcels smaller than 80 acres and establish standards for allowing the existing or any proposed lots on 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).[3] 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, 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.)

When the claimant acquired the subject property in 1972, Statewide Planning Goal 3 and implementing statutes and administrative rules were not in effect, and the property was zoned A (Agriculture), a qualified exclusive farm use zone under ORS 215.203 and 215.213. Under the provisions of ORS 215.203 and 215.213 in effect when the claimant acquired the property, use of the claimant's property was limited to farm uses, as defined in ORS 215.203, and those non-farm uses allowed under the version of ORS 215.213 then in effect. These statutes allowed a dwelling only upon a showing that the dwelling would customarily be provided in conjunction with a farm use of the property in question.

Conclusions

Lot size and dwelling standards established by Statewide Planning Goal 3, amendments to ORS 215, and OAR 660, division 33, adopted since the claimant acquired the property in 1972, do not allow the division of the property into parcels smaller than 80 acres in size or allow the approval of dwellings as may have been possible in 1972. The County's EFU zone is based on the standards required by Goal 3, ORS 215 and OAR 660, division 33. Land use laws adopted since 1972, restrict the use of the property from what could have been done when the property was acquired by the claimant in 1972.

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[2] The claimant's property is "agricultural land because it contains NRCS (Natural Resources Conservation Service) Class III Soils.

[3] Pursuant to ORS 215.780(2), Yamhill County adopted a 40-acre minimum lot size, instead of an 80-acre minimum lot size, by demonstrating to the Commission that this standard would continue to meet the goals and ORS 215.243.

The ORS 215 requirements for Agricultural Lands that were adopted prior to 1972, applied to claimant's use of the subject property when she acquired it, because it was zoned A (Agriculture) by Yamhill County, a qualified exclusive farm use zone.

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. 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 permit 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 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 estimates that the property is worth $54,000 with current restrictions. The claim alleges a reduction in fair market value of $3,546,000 due to current land use regulations, by calculating the difference between 18 lots at $200,000 each ($3,600,000) and the current value of $54,000.[4] The $200,000 per potential lot is based on the listing prices for four properties sold in February 2005. The claim includes no appraisal to substantiate these amounts.

Conclusions

As explained in section V. (1) of this report, the current owner of the subject property is Marla Robison, who acquired the subject property in 1972. Thus, under Ballot Measure 37, Marla Robison is 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 claimant acquired the property restrict division of the subject property. The claim asserts the reduction in value due to the restrictions to be $3,546,000. However, without an appraisal or other documentation, 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] Ms. Robison's Measure 37 claim on the same property to Yamhill County estimated a reduction of $3,146,000, which the Yamhill County Assessor opined as reasonable (see Yamhill County Board Order 05-211, Exhibit B in the claim file).

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 listing of state laws that have restricted the use of the claimant's property and reduced its fair market value, include Statewide Planning Goal 3 and applicable provisions of ORS 215 and OAR 660, division 33. With the exception of provisions of ORS 215 in effect when the claimant acquired the property in 1972, none of these specified land use regulations appear to be exempt under Measure 37, subsection 3 (E). The provisions of ORS 215 enacted before 1972, are exempt under subsection 3 (E) Measure 37.

Conclusions

The general statutory and rule restrictions on minimum lot size, residential development and use of Agricultural Land apply to the claimant's use of the property, and for the most part these laws do not appear to come under any of the exemptions in subsection 3(E) of Measure 37. Provisions of ORS 215 in effect when the claimant acquired the property are exempt under Measure 37 Section 3(E) 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 because they were not 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 an owner of property 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. Claimant should be aware that the less information they provide 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 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 enacted or 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 a law to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, that 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 and development of the subject property and thus, the claimant cannot divide the property into 18, 2.5-acre parcels with dwellings. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the 47.7-acre property by $3,546,000. However, because the claim does not provide an appraisal or other substantiating documentation, 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 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 certain land use regulations to allow Ms. Robison to use the subject property for a use permitted at the time she acquired the property in 1972.

Conclusions

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 Ms. Robison's division of the subject property into 2.5 acre lots or parcels or to her establishment of a single family dwelling on each lot or parcel created: applicable provisions of Statewide Planning Goal 3, ORS 215.263, 215.284 and 215.780 and applicable provisions of OAR 660, division 33. These land use regulations will not apply to Ms. Robison's use of the property only to the extent necessary to allow her a use permitted at the time she acquired the property on May 26, 1972.

2. The action by the State of Oregon provides the state's authorization to the claimant to use her property subject to the standards in effect on May 26, 1972. The standards that apply to the property include ORS 215.203 and 215.213 (1971 ed.).

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 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 claimant 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 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 14, 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.