

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation
August 26, 2005**

STATE CLAIM NUMBER: M120085

NAME OF CLAIMANT: B. E. Weiler Exemption Trust,
Janice W. Kennedy, Trustee

MAILING ADDRESS: 1917 Southeast Washougal River Road
Washougal, Washington 98671

OTHER CONTACT INFORMATION: E. Sean Donohue, Attorney at law
Donahue & Associates
1 Southwest Columbia Street, Suite 1625
Portland, Oregon 97258

PROPERTY IDENTIFICATION: Township 3S, Range 2E, Section 21,
Tax Lot 200
Clackamas County

DATE RECEIVED BY DAS: March 10, 2005

180-DAY DEADLINE: September 6, 2005

I. SUMMARY OF CLAIM

The claimant, B. E. Weiler Exemption Trust, Janice W. Kennedy, Trustee, seeks compensation in the amount of \$5,175,000 for a 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 82.71-acre property into twenty (20) parcels of approximately two- (2)- to five- (5) acres each and to develop a dwelling on each parcel. The property is located at 21318 South State Highway 213¹, southeast of Oregon City, in Clackamas County. (See claim.)

¹ This address is based on the legal description attached to the August 2, 2004 deed conveying the property to the claimant. A January 4, 2005, Clackamas County Public Records Research Request shows the address as 21418 South Highway 213. See copies in the department's claim file.

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 this 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 Janice W. Kennedy, Trustee of the B. E. Weiler Exemption Trust's division of the subject property into twenty approximately two- to five-acre parcels and to the development of a dwelling on each parcel: Statewide Planning Goal 14 and OAR 660-004-0040. These laws will not apply to the claimant only to the extent necessary to allow Janice W. Kennedy, Trustee of the B. E. Weiler Exemption Trust, a use of the subject property permitted at the time she acquired it on August 2, 2004. The department acknowledges that the relief recommended in this report will not allow the B. E. Weiler Exemption Trust, Janice W. Kenendy, Trustee, to use the property in the manner set forth in this claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On April 8, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, one written comment, evidence or information was received in response to the 10-day notice. This comment does 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 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 letter 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 10, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's FF-10 and R-20 zoning and OAR 660-004-0040(8)(e) as the laws that restrict the use of the 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 regulation 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 of 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

Claimant B. E. Weiler Exemption Trust, Janice W. Kennedy, Trustee, acquired the subject property by deed on August 2, 2004, from Janice W. Kennedy as Trustee of the Weiler Living Trust.² Transfer of the subject property to the Exemption Trust was an irrevocable conveyance and created a new ownership. On May 19, 1994, B. E. Weiler³ and Lois L. Weiler, Janice Kennedy's parents, created the revocable Weiler Living Trust and conveyed the subject property to themselves as Trustees of this trust. Mr. and Ms. Weiler had first acquired the subject property by deed on May 11, 1960. On December 14, 1973, the Weilers conveyed the property by deed to their son, John B. Weiler. On December 30 1975, John Weiler conveyed the property by deed back to his parents.

A February 2, 2005, Lot Book Service reports that the last Deed of record is held by Janice W. Kennedy, Trustee of the B. E. Weiler Exemption Trust. (See copy of report in the department 's claim file.)

² B. E. and Lois Weiler were the original trustees of the Weiler Living Trust. The trust agreement permitted the surviving trustee to appoint a co-trustee or successor trustee upon the death of one of the original trustees. B. E. Weiler passed away on December 31, 2002, leaving Lois Weiler as the sole trustee of the Weiler Living Trust. On August 18, 2003, Lois Weiler "resigned as trustee" of the Weiler Living Trust and "consented to the appointment" of her daughter, Janice Kennedy, as successor trustee. See copies of trust documents in the department's claim file.

³ Also known as Bernhardt E. Weiler.

Conclusions

The claimant, the B. E. Weiler Exemption Trust, Janice W. Kennedy Trustee, is an “owner” of the subject property as that term is defined in Subsection 11(C) of Ballot Measure 37, as of August 2, 2004. B. E. Weiler, Lois Weiler, and the Weiler Living Trust are “family members” as that term is defined in Section 11(A) of Measure 37, because B. E. and Lois Weiler, trustors and trustees of the Weiler Living Trust, transferred the subject property to the revocable Weiler Living Trust, which in turn transferred the property to the claimant, the B. E. Weiler Exemption Trust. The Weiler family has owned the property since May 11, 1960.

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 states:

“At the time the property was acquired on May 11, 1960, it was unzoned. All uses of the property were permitted. The original zoning, R-20, was adopted December 14, 1967, and restricted the development of the property to four (4) home sites. On June 19, 1980, the property was zoned FF-10 (Farm-Forest 10-acres). This zoning expanded the R-20 development restrictions to nine (9) home sites. On October 4, 2000, OAR 660-004-0040(8)(e) was adopted. This Rule restricted the development of the Property to four (4) home sites.”

The property has been zoned Farm-Forest 10-Acre (FF-10) by Clackamas County since June 19, 1980. This rural-residential zone permits one detached single family dwelling on a lot at least 10-acres in size.⁴ The subject property is 82.71-acres in size and could be divided into approximately eight (8) lots in the FF-10 zone, subject to the requirements of OAR 660-004-0040.

Statewide Planning Goal 14 (Urbanization) was effective January 25, 1975, and required that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use.⁵ In 2000, as a result of a 1986 Oregon Supreme Court decision,⁶ the Commission amended Goal 14 and adopted

⁴ Clackamas County Zoning Ordinance, Chapter 310, Section 310.03A and B.

⁵ Prior to 2000, Goal 14 was held to prohibit residential development outside UGBs at densities of one to five-acres per lot or parcel. (*See DLCD v. Klamath County*, 38 Or LUBA 769 (2000)).

⁶ *1000 Friends v. LCDC (Curry County)*, 301 Or App 447 (1986).

OAR 660-004-0040 *Application of Goal 14 (Urbanization) to Rural Residential Areas*, which was effective October 4, 2000. The rule provides that after October 4, 2000, an exception to Goal 14 is required to create a lot or parcel in a rural residential zone that is smaller than the county's minimum lot size standard. For rural residential land within one mile of the Portland metropolitan area urban growth boundary (UGB), that minimum lot size is 20-acres (OAR 660-004-0040(8)(e)). This standard applies to the subject property because it is located within one mile of the UGB, and the standard does not allow the subject 82.71-acre property to be divided without a Goal 14 exception. (See OAR 660-004-0040(7) and (8).)

Current land use regulations, particularly Goal 14 and OAR 660-004-0040, do not allow the subject property to be divided into lots or parcels smaller than 20-acres without a Goal 14 exception.

The claimant's family acquired the subject property in May 1960, prior to the imposition of local zoning, and prior to the adoption of the Statewide Planning Goals and their implementing regulations.

Conclusions

Lot size standards for rural residential lots or parcels established by Statewide Planning Goal 14 and OAR 660-004-0040 adopted since the claimant's family acquired the property in 1960 prohibit division of the property into smaller lots or parcels for residential development. Land use laws adopted since 1960 restrict the use of the property from what could have been done when the claimant's family acquired the property in 1960.

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 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 \$10,000 per-acre "based on current zoning that restricts this planned development," for a total value of \$827,100 for the subject 82.71-acre

parcel.⁷ The claim estimates that each of the twenty (20) desired lots “that would be planned to complement the adjacent golf club . . . would be worth at least \$300,000, based on comparable sale of similar parcels in the area,” for a total value of \$6,000,000. The claim estimates that the fair market value of the subject property has been reduced by the difference between these two values (\$5,172,900) plus \$2,100, for a total of \$5,175,000, as a result of land use laws enacted after the Weiler family acquired the property in 1960. There is no certified appraisal to substantiate the claimed values either before or with state land use regulations.

Conclusions

As explained in section V.(1) of this report, the current owner is the B. E. Weiler Exemption Trust, which acquired the subject property on August 2, 2004. The Weiler family acquired the property on May 11, 1960. Under Ballot Measure 37, the B. E. Weiler Exemption Trust 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’s family acquired the property in 1960 restrict the division of the subject property.

Without an appraisal based on the value of twenty lots of approximately two- to five-acres each in size, or other explanation, it is not possible to substantiate the specific dollar amount that 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 is based on Clackamas County’s FF-10 zone and related provisions of state law, Statewide Planning Goal 14 and OAR 660-004-00040, which restrict the use of the property relative to what would have been allowed in 1960 when the Weiler family acquired the property. None of these laws appear to be exempt under Section 3(E) of Ballot Measure 37.

Conclusions

Goal 14 and its implementing rules at OAR 660-004-0040 were enacted after the claimant’s family acquired the subject property and, as a result, are not exempt under Section 3(E) of the Measure.

⁷ The Clackamas County Assessor estimates the current real market value for both land and improvements to be \$985,723. Also see Western American Property Research Lot Book Service report. (Documents are in the department’s claim file.)

Laws in effect when the claimant's family 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.

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. 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 claimant should be aware that the less information provided to the department in the 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 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 in this report, laws enforced by the Commission or the department prohibit the division of the subject property into lots or parcels and their use for residential purposes. The claimant cannot create the desired two to five-acre lots out of the subject property or develop those lots for residential use because laws enacted after the claimant's family acquired the property prohibit lots that small. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$5,175,000. 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 just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow the B.E. Weiler Exemption Trust, Janice W. Kennedy Trustee, to use the subject property for a use permitted at the time the Trust acquired the property on August 2, 2004. On that date, the property was subject to the current

provisions of OAR 660-004-0040. Under OAR 660-004-0040(7) and (8), the property can be divided into parcels of 20-acres each without taking an exception to Goal 14.

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 Janice W. Kennedy, Trustee of the B.E. Weiler Exemption Trust's division of the property or to the establishment of a single family dwelling on each lot or parcel created: applicable provisions of Statewide Planning Goal 14 and OAR 660-004-0040 enacted after August 2, 2004. These land use regulations will not apply to Janice W. Kennedy, Trustee of the B.E. Weiler Exemption Trust's use of the property only to the extent necessary to allow the claimant a use permitted at the time it acquired the property on August 2, 2004. The department acknowledges that the relief recommended by this report will not allow the claimant to use the property in a manner set forth in this claim.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property subject to the standards in effect on August 2, 2004. On that date, the property was subject to applicable provisions of Statewide Planning Goal 14, and OAR 660, division 4.
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 215.402 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 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 the claimant to obtain a decision under Measure 37 from Clackamas County or other jurisdiction 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 Clackamas County or other 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 August 2, 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.