

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,  
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF  
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR )  
COMPENSATION UNDER ORS 197.352 )  
(BALLOT MEASURE 37) OF )  
Joni Kilty, CLAIMANT )

FINAL ORDER  
CLAIM NO. M 122041

Claimant: Joni Kilty (the Claimant)

Property: Township 2S, Range 2W, Section 15, Tax lot 3600, Washington County  
(the property)

Claim: The demand for compensation and any supporting information received  
from the Claimant by the State of Oregon (the Claim).

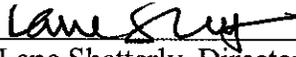
Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

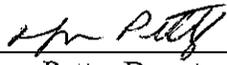
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR chapter 125, division 145, and ORS chapter 293.

FOR DLCD AND THE LAND  
CONSERVATION AND DEVELOPMENT  
COMMISSION:

  
Lane Shetterly, Director  
DLCD  
Dated this 3<sup>rd</sup> day of July, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
Dugan Petty, Deputy Administrator  
DAS, State Services Division  
Dated this 3<sup>rd</sup> day of July, 2006.

**NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF**

You are entitled, or may be entitled, to the following judicial remedies:

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352<sup>1</sup>, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

---

<sup>1</sup> By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**

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

July 3, 2006

**STATE CLAIM NUMBER:** M122041

**NAME OF CLAIMANT:** Joni Kilty

**MAILING ADDRESS:** 2930 Northeast Third Street  
Gresham, Oregon 97030

**PROPERTY IDENTIFICATION:** Township 2S, Range 2W, Section 15  
Tax lot 3600  
Washington County

**OTHER CONTACT INFORMATION:** Frank D. Walker  
P.O. Box 7170  
Salem, Oregon 97303

**OTHER INTEREST IN PROPERTY:** James Kilty

**DATE RECEIVED BY DAS:** August 24, 2005

**180-DAY DEADLINE:** July 9, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimant, Joni Kilty, seeks compensation in the amount of \$1,450,000 for the reduction in fair market value as a result of 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 52.20-acre property into ten five-acre parcels and to develop a dwelling on each parcel. The subject property is located at the geographical coordinates listed above, 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 not valid because the claimant's desire to divide the 52.20-acre property into ten five-acre parcels and to develop a dwelling on each parcel was prohibited under the laws in effect when the claimant's family acquired the property in 1995. (See the complete recommendation in Section VI of this report.)

---

<sup>1</sup> This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of the *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On September 26, 2005, pursuant to Oregon Administrative Rules (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, three 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 under ORS 197.352. Comments concerning the effects a use of the property may have on surrounding areas are generally 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 waive a state law. (See the comment letters in the department's claim file.)

### **IV. TIMELINESS OF CLAIM**

#### **Requirement**

ORS 197.352(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 Measure 37 (December 2, 2004), or the date the public entity applies the land use regulation as an approval criterion 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 Measure 37 (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 criterion, whichever is later.

#### **Findings of Fact**

This claim was submitted to DAS on August 24, 2005, for processing under OAR 125, division 145. The claim identifies Washington County zoning codes and ordinances as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

#### **Conclusions**

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

## V. ANALYSIS OF CLAIM

### 1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

### Findings of Fact

The claimant, Joni Kilty, acquired an interest in the subject property from her mother, Carol Ann Edwards, on January 13, 2001, as reflected by a bargain and sale deed included with the claim. The claimant’s mother, Carol Ann Edwards, acquired an interest in the subject property from her father, claimant’s grandfather, Nels O. Anderson, on January 31, 1995, as evidenced by a personal representative’s deed included with the claim.<sup>2</sup> The Washington County Assessor’s Office confirms the claimant’s current ownership of the subject property.

### Conclusions

The claimant, Joni Kilty is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of January 13, 2001. The claimant’s mother, Carol Ann Edwards, is a “family member,” as defined by ORS 197.352(11)(A), who acquired an interest in the subject property on January 31, 1995.

### 2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) 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 indicates that the claimant desires to divide the 52.20-acre property into ten five-acre parcels and to develop a dwelling on each parcel and that current land use regulations prevent that desired use.

The claim is based, in part, on Washington County’s current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimant’s property is

---

<sup>2</sup> The claim asserts family ownership dating back prior to May 29, 1957, when the claimant’s grandfather, Nels O. Anderson, conveyed the subject property to Earl and Mary Christopherson. However, family ownership under ORS 197.352 would only date back to the date the claimant’s grandfather reacquired the subject property, unless the claimant also has a family relationship with Earl and Mary Christopherson. Because the claim does not contain documentation of a family relationship between claimant and Earl and Mary Christopherson or documentation of when Nels O. Anderson reacquired the property, the only family ownership date that can be confirmed is January 31, 1995, when the claimant’s mother acquired an interest in the property. Department staff contacted the claimant’s agent by telephone on March 7, 2006, to request additional documentation. No response was received prior to issuance of this report.

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.<sup>3</sup> 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, and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land in marginal lands counties into parcels less than 870 acres and establish standards for the development of dwellings on existing or any proposed parcel on that land..

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 in a marginal lands county 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 Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective January 1, 2002), which became effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and-135.)

The claimant's family acquired the subject property in 1995. At that time, the property was subject to the current zoning requirements, minimum lot size and dwelling standards, as described above.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3 and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted or adopted before claimant's family acquired the subject property on January 31, 1995. These land use regulations do not allow the desired division of the 52.20-acre property into ten five-acre parcels or the development of a dwelling on each parcel. Laws enacted or adopted since the claimant's family acquired the subject property in 1995 do not restrict the claimant's desired use of the property relative to when the claimant's family acquired it in 1995.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, ORS 197.352(1) requires that any land use regulation(s) (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."

---

<sup>3</sup> The claimant's property is "Agricultural Land" because it contains NRCS (Natural Resources Conservation Service) Soils.

### **Findings of Fact**

The claim includes an estimate of \$1,450,000 as the reduction in the subject property's fair market value due to current regulations. This amount is based on the assessment of title company data for similar properties in the county.

### **Conclusions**

As explained in Section V.(1) of this report, the claimant is Joni Kilty, whose family acquired the subject property on January 31, 1995. No state laws enacted or adopted since the claimant's family acquired the subject property restrict the use of the property relative to the uses allowed in 1995. Therefore, the fair market value of the subject property has not been reduced as a result of land use regulations enforced by the Commission or the department.

### **4. Exemptions Under Section 3 of Measure 37**

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

### **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Washington County has implemented through its current EFU zone. As set forth in Section V.(2) of this report, all of the state land use regulations restricting the claimant's desired use of the subject property were in effect when the claimant's family acquired the property in 1995.

### **Conclusions**

All of the state land use regulations that restrict the claimant's desired use of the subject property were in effect when the claimant's family acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant's family acquired the subject property.

## **VI. FORM OF RELIEF**

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict 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 present 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**

At the time the claimant's family acquired an interest in the subject property, it was zoned EFU by Washington County and subject to the current lot size and dwelling standards under Goal 3, ORS 215 and OAR 660, division 33, and as described above in Section V.(2) of this report.

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department do not restrict the claimant's desired use of the subject property relative to what was permitted when the claimant's family acquired it in 1995 and do not reduce the fair market value of the property. All state laws restricting the use of the subject property are exempt under ORS 197.352(3)(E).

### **Conclusions**

Based on the record and the foregoing findings and conclusions, the claimant has not established that she is entitled to relief under ORS 197.352(1), as a result of land use regulations enforced by the Commission or the department. Therefore, this claim is denied.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on June 16, 2006. 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.