

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation
September 2, 2005**

STATE CLAIM NUMBER: M120128

NAME OF CLAIMANT: Bernard L. Diefenderfer

MAILING ADDRESS: P.O. Box 249
Sheridan, Oregon 97378

PROPERTY IDENTIFICATION: Township 5S, Range 6W,
Parts of Sections 28, 29, 32 and 33
Tax Lot 100
Yamhill County

DATE RECEIVED BY DAS: March 14, 2005

180-DAY DEADLINE: September 10, 2005

I. SUMMARY OF CLAIM

The claimant, Bernard L. Diefenderfer, seeks compensation in the amount of \$2,736,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of private real property. The claimant desires compensation or the right to divide his 185-acre property into three parcels of approximately 20-acres each and three parcels of approximately 40-acres each, with a dwelling on each parcel; and one five-acre parcel on which his existing home and buildings are located. The property is located at 22400 Pittman Road, Sheridan, 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 laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimant to allow him to divide his 185-acre property into three parcels of approximately 20-acres each and three parcels of approximately 40-acres each, with a dwelling on each parcel; and one five-acre parcel on which his existing home and buildings are located: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), OAR 660, Division 33, and ORS 215.263, 215.284 and 215.780. These laws will not apply to the claimant only to the extent necessary to allow him a use permitted when he acquired the property in August, 1991. (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, one written comment was received in response to the 10-day notice.

The 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 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 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 14, 2005, for processing under OAR 125, Division 145. The claim identifies "HB 3661 and all laws and rules in effect applying to HB 3661" as 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 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 claim was submitted by Bernard Diefenderfer. A Warranty Deed dated August 22, 1991, is included with the claim and conveys the property from J. Elaine Sheets to "Bernard L. Diefenderfer and Judith E. Diefenderfer, Trustees of the Diefenderfer Family Revocable Trust dated May 14, 1990." Transfer of the subject property does not constitute a change in ownership for purposes of reviewing this Measure 37 claim. A Yamhill County Measure 37 claim submitted by the claimant for this property dated February 3, 2005, verified the claimant's continued ownership of the property

Conclusions

The claimant, Bernard Diefenderfer, is an "owner" of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of August 22, 1991.

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 states that “HB 3661 (11-04-93) and all laws and rules in effect applying to HB 3661 changed minimum lot size to 80-acres (12-29-1993) new zoning per LCDC” as the state law that restricts the 185-acre property so that it cannot be subdivided three parcels of approximately 20-acres each and three parcels of approximately 40-acres each, with a dwelling on each parcel; and one five-acre parcel on which his existing home and buildings are located.

The claim is based, in part, on Yamhill County’s current Exclusive Farm Use (EFU-80) and the applicable provisions of state law that require such 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. 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 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 215.283(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.)

The claimant acquired the subject property on August 21, 1991. On August 21, 1991, the subject property was zoned EF-40 and AF-20 by Yamhill County (Ordinance No. 468 adopted August 17, 1988). The EF-40 zone is an acknowledged EFU zone under Statewide Goal 3 (Agricultural Lands), and the AF-20 zone is an acknowledged mixed farm/forest zone under Statewide Goal 4 (Forest Lands). Both zones are subject to the applicable provisions of ORS 215 and OAR 660, Divisions 5 and 6, for EFU and mixed agriculture/forest zones in effect at that time.¹

Under the Sections of Yamhill County Ordinances 402.09(B) and 403.09(B), newly created parcels had to be a “minimum of 40/20-acres or that size which is appropriate for the continuation

¹ The Yamhill County comprehensive plan and land use regulations were acknowledged by Commission (Order issued on June 12, 1980).

of the existing Commercial Agricultural Enterprise in the area, whichever is greater, consistent with the requirements of OAR 660-05-015 and 660-05-020.” For non-farm dwellings, the Yamhill County standard was at least two and one-half-acres in size. Farm and non-farm dwellings were allowed subject to the applicable provisions required for EFU zones under ORS 215 and OAR 660, Division 5, in effect at that time. (See Sections 402.02(D), 402.03(A), 403.02(D) and 403.03(A) (Yamhill County Ordinance No. 468 adopted August 17, 1988).)²

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, Division 33, were all enacted after Mr. Diefenderfer acquired subject property in August, 1991, and do not allow the division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by Mr. Diefenderfer in 1991. In 1991, the property was subject to the requirements of the County’s EF-40 and AF-20 zones, which were adopted pursuant to the provisions of Goals 3 and 4, ORS 215 and OAR 660, Divisions 5 and 6, then in effect.

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 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 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 \$2,736,000 as the reduction in the property’s fair market value, as a result of regulations that restrict the use of his property. This estimate is based on the claimant’s desire to divide his 185-acre property into three parcels of approximately 20-acres each and three parcels of approximately 40-acres each, with a dwelling on each parcel, and one five-acre parcel on which his existing home and buildings are located.

The claim also includes a “Development and Land Costs” sheet based on several real estate listings for comparable properties. The claim calculates the value of the property if developed

² Statutory requirements continue to apply and insofar as the state and local provisions are materially the same in substance, the applicable rules must be interpreted and applied by the County in making its decisions. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

into 7 parcels with dwellings as requested by the claimant. The claim does not include an appraisal or other substantiating documentation.

Conclusions

As explained in Section V. (1) of this report, the current owner is Mr. Bernard Diefenderfer who acquired the property on August 21, 1991. Under Ballot Measure 37, Mr. Diefenderfer 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, land use laws adopted since 1991 restrict the claimant's use of the subject property.

Without an appraisal or other substantiating 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. 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 Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, Division 33, which Yamhill County has implemented through its EF-80 zone, and which restrict the use of the property relative to what would have been allowed in 1991 when the claimant acquired the property. With the exception of provisions of ORS 215, OAR 660, and Statewide Planning Goal 3 in effect on August 21, 1991, none of these laws appear to be exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimant acquired the property.

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 claimant's use of the property, and for the most part these laws are not exempt under Section 3(E) of Measure 37. Provisions of ORS 215, OAR 660, and Goal 3 in effect when the claimant acquired the property in 1991 are exempt under Section 3 (E) of the Measure and will continue to apply to the property.

Other laws in effect when the claimant acquired the property are also exempt under Section 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 he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his 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 after the claimant acquired the property restrict the division and development of the claimant's 185-acre property into three parcels of approximately 20-acres each and three parcels of approximately 40-acres each, with a dwelling on each parcel; and one five-acre parcel on which his existing home and buildings are located. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$2,736,000. 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 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 Mr. Bernard Diefenderfer to use the subject property for a use permitted at the time he acquired the property on August 21, 1991.

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. Diefenderfer's request to divide his 185-acre property into three parcels of approximately 20-acres each and three parcels of approximately 40-acres each, with a dwelling on each parcel; and one five-acre parcel on which his existing home and buildings are located: applicable provisions of Statewide Planning Goals 3, ORS 215.263, 215.284 and 215.780, and OAR 660, Division 33 enacted after August 21, 1991. These land use laws will not apply to Mr. Diefenderfer's use of his property only to the extent necessary to allow him a use permitted at the time he acquired the property on August 21, 1991.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property subject to the standards in effect on August 21, 1991. On that date, the property was subject to applicable provisions of Yamhill County's acknowledged EF-40 and AF-20 zoning districts in effect on August 21, 1991, and applicable provisions of ORS 215, OAR 660, Division 5, and Goal 3 then in effect, as described in Section V.(2).
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 him 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 August 16, 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.