

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation
August 1, 2005

STATE CLAIM NUMBER: M119677

NAME OF CLAIMANTS: Lori P. Bernards and Thomas J. Bernards

MAILING ADDRESS: P.O. Box 1118
McMinnville, Oregon 97128

IDENTIFICATION OF PROPERTY: Township 3S, Range 5W, Section 10
Tax Lot 200, 202 and 203
Yamhill County

DATE RECEIVED BY DAS: February 9, 2005

180-DAY DEADLINE: August 8, 2005

I. CLAIM

The claimants, Lori P. Bernards and Thomas J. Bernards, seek compensation in the amount of \$1,920,000 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 claimants desire compensation or the right to divide their 232.32 acre property into twelve lots of approximately 20-acres each and to build a home on each lot. The property is located at 14280 Northwest Old Moores Valley 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 laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimants to allow them to divide and develop their property for residential use: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands), OAR 660 division 6 or 33 and ORS 215.263, 215.284 and 215.780, in effect on the date the claimants acquired their respective interests. These laws will not apply to the claimants only to the extent necessary to allow Lori Bernards a use of the property allowed at the time she acquired an interest in it in June 1992; and to allow Tom Bernards a use of Tax Lot 202 allowed at the time he acquired an interest in it in March, 1998. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On February 25, 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. Comments relevant to Measure 37 criteria are addressed in the appropriate sections of this report. Because no funds have been made available for payment of compensation, comments regarding the possible impact of the proposed or intended development of the claimants' property are not relevant to the evaluation and determination of the claimants' Ballot Measure 37 claim. (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 9, 2005 for processing under OAR 125, division 145. The claim identifies Yamhill County's December 29, 1993 EF-80 zoning, which was enacted in compliance with Statewide Planning Goal 3, as the restriction on the use of the property that is 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 was 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 to “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 June 16 and 18, 1992 claimant Lori Bernards, then known as Lori P. Wirth, acquired a partial interest in three tax lots that constitute the subject property through deeds that settled the estate of her father, Walter Wirth¹. Specifically, the subject property includes lots described by the Yamhill County Tax Assessor as Township 3S, Range 5W, Section 10, Tax Lots 200, 202, and 203. Mr. Wirth had acquired an interest in these tax lots on September 25, 1941. Claimant Thomas Bernards acquired an interest in Tax Lot 202 on March 31, 1998, when Lori’s mother, Dorothy Wirth, conveyed her partial interest in Tax Lot 202 to Thomas and Lori Bernards. Through transfers of partial interests from various family members since 1992, Lori Bernards is currently the sole owner of Tax Lots 200 and 203; and Lori Bernards and Thomas Bernards are the sole owners of Tax Lot 202.

Comments Received

One comment states that the claimants acquired the property on August 30, 1990. As stated above, the claim file currently documents Lori Bernards’ ownership interest as of June, 1992, and Thomas Bernards’ ownership interest as of March, 1998.

Conclusions

Lori P. Bernards is an “owner” of the 232.32-acre property, as that term is defined in Section 11(C) of Ballot Measure 37, since June 16 and 18, 1992. Thomas Bernards is an “owner” of a portion of the subject property, Tax Lot 202, as that term is defined in Section 11(C) of Ballot Measure 37, since March 31, 1998. The claim also establishes ownership by the claimants’ family since September 25, 1941.²

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 the 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 claimants or a family member acquired the property.

¹ The record does not indicate when Walter Wirth passed away. The claim states that his estate was distributed on August 30, 1990, but, there are no substantiating documents in the claim file.

² Claimants told department staff by telephone that Traugott Wirth, Lori Bernards’ grandfather, acquired the property in the early 20th century, but the claim record contains no documentation of this acquisition.

Findings of Fact

The claim states that Yamhill County's December 29, 1993 zone change from AF-20 to EF-80 "puts acreage and dollar restrictions on building." Specific state regulations are not cited.

The subject property is 232.32-acres in three Tax Lots. There is no indication about whether the subject property is one or three legal lots or parcels. According to the Yamhill County planning department, part of the subject property is zoned EF-80 (Tax Lots 200 and 203) and part is zoned AF-80 (Tax Lot 202). The claim is based, in part, on the restrictions imposed by both the EF-80 and AF-80 zones. The Yamhill County EF-80 zone is an Exclusive Farm Use (EFU) zone under ORS 215, and the AF-80 zone is an Agriculture/Forest zone under Goal 4 and OAR 660-06-0050. Tax Lots 200 and 203 are zoned EF-80, as required by Goal 3 in accord with OAR 660, division 33 and ORS 215 because that portion of the claimants' property is "agricultural land" as defined by Goal 3.³ Tax Lot 202 is zoned AF-80 as required by Goal 4 and OAR 660-06-0050 because that portion of the claimants' property includes a mixture of agriculture and forest uses.

For land divisions, property in both zones is subject to ORS 215.780, which establishes an 80-acre minimum size for the creation of new lots or parcels in EFU and forest zones effective November 4, 1993 (chapter 792, Oregon Laws 1993)(OAR 660-06-0055 and 660-033-0100). For the EF-80 zone, ORS 215.263 (2003 edition) establishes additional standards for the creation of new parcels for non-farm uses and non-farm dwellings allowed in an EFU zone.

For uses and dwellings in the EF-80 zone, current land use regulations, particularly ORS 215.284 and OAR 660 division 33, as applied by Goal 3, establish standards for farm and non farm uses and dwellings. OAR 660-033-0135, which established minimum income standards to establish a dwelling on farmland, was adopted March 1, 1994.

For uses and dwellings in the AF-80 zone, under OAR 660-006-0050, all the uses permitted under Statewide Goals 3 and 4 are allowed. For dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993. No information was provided to the department regarding the predominant use of the property on January 1, 1993. Regardless, the property will be subject to either the requirements for dwellings applicable under EFU zoning required by OAR 660, division 33 or forest zone provisions required by Statewide Goal 4 and OAR 660, division 6.

Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands) (OAR 660-015-0000(3) & (4)) and the required provisions applicable to land zoned for EFU or for forest use under ORS 215 and OAR 660, divisions 06 and 033 restrict the zoning, use, and division of the subject property from what the claimants' family was permitted to do in 1941. None of these specified laws was in effect in 1941 when the claimants' family first acquired the property.

Conclusions

³ The claimant's property is "Agricultural Land" because it contains NRCS (Natural Resources Conservation Service) Class I-IV soil types.

Lot size and dwelling standards established by to Statewide Planning Goals 3 and 4, ORS 215, and OAR 660, divisions 6 and 33, adopted since the claimants' family first acquired the property in 1941, 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 in 1941. The County's EFU and mixed agriculture/forest zones are based on the standards required by Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33. Land use laws adopted since 1941 restrict the use of the property from what could have been done when the property was first acquired by the claimants' family in 1941.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that the current land use regulation(s) described in Section V. (2) of this report "has the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim estimates that the fair market value of the property has been reduced by \$1,920,000 due to land use regulations. This amount is based on an estimated value of \$40,000 for a 20-acre parcel as currently zoned, and an estimated value of \$200,000 for a 20-acre parcel if divided into twelve lots (\$200,000 minus \$40,000 equals \$160,000 reduction per lot, times 12 lots equals \$1,920,000 reduction for entire site).⁴ The claim contains no appraisal or other documentation to substantiate these amounts.⁵

⁴ Yamhill County Assessor records show real market values of \$325,943 for Tax Lot 200, \$144,220 for Tax Lot 202, and \$203,191 for Tax Lot 203, for a total of \$673,354.

⁵ The Planning Director's report and recommendation in the decision on Lori Bernards' Yamhill County Measure 37 claim includes an analysis of market value reduction based on discussion with the County Assessor, a certified appraiser. His opinion is that a maximum of nine, not twelve, additional lots could be created from the subject property. He also states that whether the site could actually be divided into 20-acre parcels, and whether those parcels could be developed with homes, depends on the outcome of application of the AF-20 zone standards in 1992:

"The combined total of these properties is 232.32-acres. This means that the maximum number of 20-acre lots that could be created is 11. In addition there are already two dwellings locate on the total acreage (Tax Lots 200 and 202). This means that, at most, nine other 20-acre sites could be created. Nine additional 20-acre dwelling sites equal a value of \$1,440,000. The difficulty in determining the value in this case is that approval of the Measure 37 claim does not automatically qualify the property for land divisions or dwellings. For example, the 1992 ordinance required newly created parcels in the AF-20 zone to be "... 20-acres or that size which is appropriate for the continuation of the existing commercial agricultural enterprise in the area, whichever is greater." If the parcel size which was appropriate for the continuation of the existing commercial agricultural enterprise in the area is found to be 30-acres, then they could only create parcel[s] of 30-acres in size. What a successful claim would do is allow the current property owner to apply for farm dwellings without having to comply with the \$80,000 gross sales requirement. However, because there would still be the process that was in place in 1992 to go through and criteria to be addressed, it is possible that the property still may not qualify for dwellings under the 1992 criteria, then there would be no loss of value and the property owner would not be entitled to compensation. If the property could qualify for 20-acre land divisions and nine dwellings under

Comments Received

One comment states that a maximum of eight new lots, not twelve as desired by the claimants, could be created from the subject property if regulations are “waived” and 20-acre parcels are possible. The department agrees with the commenter and the Yamhill County Board of Commissioners and Assessor that if the property could be divided into 20-acre parcels under the June 1992 standards, the maximum number of newly created lots would be fewer than twelve. The County, which would make the decision on any land divisions or permits for any dwellings on the subject property, found that maximum number to be nine. (See footnote 6.)

Conclusions

As explained in section V. (1) of this report, the claimants’ family has owned the property since September 25, 1941, and the current owners are Lori Bernards and Thomas Bernards, who acquired interest in the property in June, 1992, and March, 1998, respectively. Thus, under Ballot Measure 37, Lori and Thomas Bernards are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value.

The claim provides some evidence to demonstrate reduction in fair market value of the property due to restrictions relating to state and Yamhill County laws. Without an appraisal based on the value of property divided into 20-acre plus parcels, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, and the Yamhill County Assessor’s affidavit in Yamhill County’s decision on the county Measure 37 claim, 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

Statewide Planning Goals 3 and 4, and provisions of ORS 215 and OAR 660, divisions 6 and 33, regarding minimum lot size and establishment of dwellings in EFU and mixed agriculture/forest zones apply to this claim. These regulations were all enacted after the family’s acquisition in 1941 and are not exempt as to the claimants’ claim under Section (3)(E) of Ballot Measure 37.

To the extent they may be applicable under OAR 660-006-0050, the department finds that siting standards for dwellings in forest zones under ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under subsection (3) of Measure 37. These provisions include fire protection standards for dwellings and for surrounding forest lands. Section 3 (B) of

the 1992 criteria, the applicant would be entitled to compensation of \$1,440,000.” (See Exhibit B to Yamhill County Board Order 05-206 in the state claim file.)

Measure 37 specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes...”

Conclusions

Statewide Planning Goals 3 and 4, and applicable provisions of ORS 215, and OAR 660, divisions 6 and 33, apply to the claimants’ use of the property. With the exception of ORS 215.730, and those provisions of Goal 4 and its implementing rules in OAR 660, division 6, related to siting standards for dwellings, the provisions of these laws that govern land division and the establishment of dwellings generally would not come under any of the exemptions in Measure 37. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure, or because they are laws that are not covered by the Measure.

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 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

Based on the findings and conclusion set forth in this report, laws enforced by the Commission or the department restrict the division of the subject property into lots or parcels less than 80 acres for residential development. The claimants cannot create the desired residential lots or parcels from the subject property. The laws enforced by the department reduce the fair market value of the property to some extent. The claim asserts this amount to be \$1,920,000. However, because the claim does not include an appraisal or other substantiating documentation, a specific amount of compensation cannot be determined. Nevertheless, the department acknowledges that the laws on which the claim is based 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 Lori Bernards to use the subject property for a use allowed at the time she acquired her interest in the property in June, 1992; and to allow Thomas Bernards to use Tax Lot 202 for a use allowed at the time he acquired his interest in that portion of the property in March, 1998.

With regard to Lori Bernards’ interest in the property, in June, 1992, the subject property was zoned AF-20 by Yamhill County, (Ordinance No. 468 adopted August 17, 1988) an acknowledged EFU zone under Statewide Goal 3 (Agricultural Lands) and the applicable

provisions of ORS 215 and OAR 660, division 5 (1986 edition repealed August 7, 1993).⁶ Under Section 403.09(B) of County Ordinance No. 468, newly created parcels had to be a “minimum of 20-acres or that size which is appropriate for the continuation 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” or for non-farm dwellings, 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 403.02(D) and 403.03(A) (Ordinance No. 468 adopted August 17, 1988).)

With regard to Thomas Bernards’ interest in Tax Lot 202, on March 31, 1998, the subject property was zoned AF-80 by Yamhill County, (Ordinance No. 643 adopted March 19, 1998) an acknowledged mixed agriculture/forest zone under Statewide Goal 4 (Forest Lands) and the applicable provisions of ORS 215 and OAR 660 division 6 for mixed agriculture/forest zones. These provisions are essentially the same as those in effect today. The current state regulations on property division and the establishment of dwellings in mixed agriculture/forest zones were all adopted prior to March 31, 1998, and will continue to apply to Mr. Bernards’ interest in the subject property.

Comments Received

One commenter states that on August 30, 1990, the Yamhill County zoning standards for the subject property required a minimum lot or parcel size of “40 (20)-acres or that size which is necessary to maintain the commercial agricultural enterprise in the area.” The commenter states:

“The County’s numerical minimum lot sizes, 20 and 40-acres, were never acknowledged by the state to comply with the state wide planning goals. In the time period that the Bernards acquired the property, the Department of Land Conservation and Development was routinely and successfully appealing Yamhill County partition approvals in resource zones to the Land Use Board of Appeals, because they were not of sufficient size to maintain the commercial agricultural enterprise in the area. Thus, as a matter of law, at the time of acquisition, the current owner could not legally divide the three Tax Lots absent a demonstration that the resulting lot were of a size sufficient to comply with Goal 3. It is therefore not clear that at the time of acquisition the current owners were entitled to land divisions that they are not entitled to now.”

The department substantially concurs with the comments submitted by this commenter. (See findings of fact in Section VI of this report.)

Conclusions

Based on the record, the department recommends that the claim be approved, subject to the following terms:

⁶ The Yamhill County comprehensive plan and land use regulations were acknowledged by LCDC (Order issued on June 12, 1980).

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Lori Bernards' division of the property (Tax Lots 200, 202 and 203) or to establishment of a single family dwelling on each parcel created: the applicable provisions of Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands), either OAR 660, division 6 or 33, and ORS 215.263, 215.284 and 215.780, that were enacted after June, 1992.

In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Thomas Bernards' division of Tax Lot 202 of the subject property or to establishment of a single family dwelling on that parcel: the applicable provisions of Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands), either OAR 660 division 6 or 33, and ORS 215.263, 215.284 and 215.780 that were enacted after March 31, 1998.

These land use regulations will not apply to the claimants' use of the property only to the extent necessary for each claimant to carry out a use permitted at the time they each acquired their respective interests in the property. The department acknowledges that the relief recommended in this report will not allow Thomas Bernards to use the property in a manner set forth in this claim.

2. The action of the State of Oregon provides the state's authorization to Lori Bernards to use the property subject to the laws in effect when she acquired her interest in the property (Tax Lots 200, 202 and 203) in June, 1992; and to Thomas Bernards to use Tax Lot 202 subject to the laws in effect when he acquired his interest in that portion of the property on March 31, 1998. (See description of the standards that applied in the "findings of fact" for this section of the report).

The claimants also continue to be subject to ORS 215.730 and those provisions of Goal 4 and its implementing rules (OAR 660 division 6) related to siting standards for dwellings for the protection of public health and safety and to any other laws that are exempt under Section 3(E) of Measure 37.

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 final 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 215.412 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 claimants under the terms of the final order will remain subject to the following laws: (a) those laws not specified in (1) above; (2) 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 Yamhill County or any other public jurisdiction that enforces land use regulations applicable to the property. Nothing in the final order will relieve the claimants from the necessity of obtaining a decision under Measure 37 from local public entities that have 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 July 7, 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.