

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation  
August 9 2005**

**STATE CLAIM NUMBER:** M119803

**NAME OF CLAIMANT:** Louise Bernards

**MAILING ADDRESS:** 449 South Fourth Street  
Hillsboro, Oregon 97123

**PROPERTY IDENTIFICATION:** Township 1N, Range 3W, Section 29  
Tax Lot 1300  
Washington County

**OTHER CONTACT INFORMATION:** Dale Bernards  
8360 Southwest Crestwood Lane  
Portland, Oregon 97225

**OTHER INTEREST IN PROPERTY:** Merlin Bernards  
3473 Southeast Alder  
Hillsboro, Oregon 97123

Wilma Sawyer  
2919 Southwest Bucharist Court  
Portland, Oregon 97225

Gloria Flagler  
8340 Darley Road SE  
Aumsville, Oregon 97325

**DATE RECEIVED BY DAS:** February 16, 2005

**180-DAY DEADLINE:** August 15, 2005

**I. SUMMARY OF CLAIM**

The claimant, Ms. Louise Bernards, seeks compensation in the amount of \$9,500,000 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 subdivide the 54.08 acre property into 20,000 square foot lots and to develop a dwelling on each

lot. The property is located at Township 1N, Range 3W, Section 29, and Tax Lot 1300 in Washington County. (See claim.)

## **II. SUMMARY OF STAFF RECOMMENDATION**

Based on the preliminary 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 Ms. Bernard's division of the property for residential development: Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215.213 and 215.780, and applicable provisions of OAR 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow Ms. Bernard a use of the property permitted at the time she acquired it in 1965. (See the complete recommendation in Section VI. of this report.)

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

### **Comments Received**

On March 2, 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, no written comments, evidence or information were received in response to the 10-day notice.

## **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 16, 2005, for processing under OAR 125, division 145. The claim indirectly identifies Goal 3 and OAR 660-015-000(3), 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 claimant, Louise Bernards, acquired the subject property on October 12, 1965, as reflected by a warranty deed included with the claim. A copy of a title report dated January 19, 2005, indicates that Louise Bernards is the current owner of the subject property.

### **Conclusions**

The claimant, Ms. Louise Bernards, is an “owner” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of October 12, 1965.

### **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 “The property is zoned EFU and is too small to farm effectively.” Additional information submitted by the claimant’s representative indicates that state laws have restricted the property so that it cannot be subdivided into 20,000 square foot lots.

The claim is based 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 currently 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 215.213, 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 215.213.

OAR 660-033-0130(4) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993.

Statewide Planning Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses and also became effective on January 25, 1975.

The claimant acquired the subject property on October 12, 1965, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. The County's F-1 zoning applied to the subject property in 1965. The F-1 zone did not have a minimum lot size and allowed dwellings by right, but was adopted pursuant to the provisions of ORS 215, enacted in 1963.

## **Conclusions**

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) (OAR 660-015-0000(3)) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted after Louise Bernards acquired ownership of the subject property in October 1965, 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 Louise Bernards in 1965. In 1965, the property was subject to the requirements of the County's F-1 zone, which were adopted pursuant to the provisions of ORS 215 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(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 a 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 \$9,500,000 as the property’s fair market value, in the absence of current regulations. This estimate is based on the claimant’s estimate of the market value of 20,000 square foot lots in the area, less cost.

The claim also includes a title report estimating the current real market value of the subject property with improvements to be approximately \$297,440.

#### **Conclusions**

As explained in section V.(1) of this report, the current owner is Louise Bernards who acquired the property on October 12, 1965. Under Ballot Measure 37, Louise Bernards is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value.

Without an appraisal based on the value of 20,000 square foot lots or other explanation, 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 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 includes a general reference to any state land use regulations that restrict the use of the property relative to what would have been allowed in 1965 when the property was acquired by Louise Bernards. These provisions include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Washington County has implemented through its EFU zone. With the exception of provisions of ORS 215 in effect on October 12, 1965, none of these laws appear to be exempt under Section 3(E) of Ballot Measure 37. Provisions of what is now ORS 215 adopted before October 12, 1965 are exempt under Section 3 (E) of the Measure.

## **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 in effect when the claimant acquired the property in 1965 are exempt under section 3 (E) of the measure and will continue to apply to the property.

Laws in effect when the claimant acquired the property are 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 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. Claimants should be aware that the less information they have provided 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 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 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 restrict the division of the subject property into parcels or lots, and the use of the property for residential purposes. The claimant cannot create the desired 20,000 square foot lots out of the subject property, or develop those lots for residential use because laws enacted after the claimant acquired the property prohibit lot sizes that small. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$9,500,000. 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 compensation, Ballot Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Ms. Louise Bernards to use the subject property for a use permitted at the time she acquired the property on October 12, 1965.

### **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 Ms. Bernards' division of the 54.08 acre property or to the establishment of a single family dwelling on each lot created: applicable provisions of Statewide Planning Goals 3 and 14, ORS 215.213 and 215.780, and OAR 660, division 33, enacted after October 12, 1965. These land use regulations will not apply to Ms. Bernards' use of their property only to the extent necessary to allow the claimant a use permitted at the time she acquired the property on October 12, 1965.
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 October 12, 1965. On that date, the property was subject to applicable provisions of ORS 215 then in effect.
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 her 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 13, 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.