

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

In the Matter of Claim No. CL 05-31 for)
Compensation under Measure 37 submitted)
by Francis D. Martin) Order No. 28-2006

WHEREAS, on June 24, 2005, Columbia County received claims under Measure 37 and Order No. 84-2004 from Francis D. Martin, Warren, Oregon, for property having Tax Account Number 4223-030-00100; and

WHEREAS, on October 14, 2005, the Circuit Court for Marion County declared Measure 37 unconstitutional in a decision entitled *McPherson v. State of Oregon*; and

WHEREAS, in light of the Marion County decision, the County and Claimants entered into a stipulated agreement on November 23, 2005 to toll the 180-day claim period pending review of the Marion County decision by the Oregon Supreme Court; and

WHEREAS, on March 7, 2006, the Oregon Supreme Court entered a judgment overturning the Marion County Circuit Court decision, and declaring Measure 37 constitutional; and

WHEREAS, pursuant to the November 23, 2005 stipulation, the deadline for a County decision on the claims is now April 4, 2006; and

WHEREAS, according to the information presented with the Claim, Mr. Martin has continuously owned an interest in the property since December 13, 1994, and is currently the sole fee owner of the property; and

WHEREAS, the subject parcel is zoned RR-5 with a minimum parcel size of five acres and has access to a community water system; and

WHEREAS, at the time Mr. Martin acquired the subject property, Columbia County Zoning Ordinance (CCZO) Section 603.4 permitted two-acre parcel sizes provided the property to be divided is served by a community water system (the "go below" provision); and

WHEREAS, Ordinance 98-4 was adopted in 1998, which repealed the "go below" provision; and

WHEREAS, Mr. Martin claims that the minimum lot size requirement for new land divisions adopted in 1998 has restricted the use of his property and has reduced the value of the property by \$140,000; and

WHEREAS, other evidence submitted by Louis Bote asserts that there is no loss in value by the five-acre minimum parcel size requirement; and

WHEREAS, Mr. Martin seeks to divide the property into two approximately two-acre parcels; and

WHEREAS, pursuant to Measure 37, in lieu of compensation the Board may opt to not apply (hereinafter referred to as "waive" or "waiver") any land use regulation that restricts the use of the Claimants' property and reduces the fair market value of the property to allow a use which was allowed at the time the Claimants acquired the property;

NOW, THEREFORE, it is hereby ordered as follows:

1. The Board of County Commissioners adopts the findings of fact set forth in the Staff Report for Claim Numbers CL 05-29 through CL 05-31, dated March 31, 2006, which is attached hereto as Attachment 1, and is incorporated herein by this reference.
2. The Board of County Commissioners concludes that claimant has established that the minimum parcel size regulation has resulted in a diminution in value of his property. In lieu of compensation, the County waives CCZO 604.2 to the extent necessary to allow the Claimants to divide the property into two two-acre parcels.
3. This waiver is subject to the following limitations:
 - A. This waiver does not affect any land use regulations promulgated by the State of Oregon. If the use allowed herein remains prohibited by a State of Oregon land use regulation, the County will not approve an application for land division, other required land use permits or building permits for development of the property until the State has modified, amended or agreed not to apply any prohibitive regulation, or the prohibitive regulations are otherwise deemed not to apply pursuant to the provisions of Measure 37.
 - B. In approving this waiver, the County is relying on the accuracy, veracity, and completeness of information provided by the Claimants. If it is later determined that Claimants are not entitled to relief under Measure 37 due to the presentation of inaccurate information, or the omission of relevant information, the County may revoke this waiver.
 - C. Except as expressly waived herein, Claimants are required to meet all local laws, rules and regulations, including but not limited to laws, rules and regulations related to subdivision and partitioning, dwellings in the forest zone, and the building code.

D. This waiver is personal to the Claimants, does not run with the land, and is not transferable except as may otherwise be required by law.

E. By developing the parcel in reliance on this waiver, Claimants do so at their own risk and expense. The County makes no representations about the legal effect of this waiver on the sale of lots resulting from any land division, on the rights of future land owners, or on any other person or property of any sort. By accepting this waiver, and developing the property in reliance thereof, Claimants agree to indemnify and hold the County harmless from and against any claims arising out of the division of property, the sale or development thereof, or any other claim arising from or related to this waiver.

4. This Order shall be recorded in the Columbia County Deed Records, referencing Tax Parcel Number 4223-030-00100 without cost.

Dated this 5th day of April, 2006.

BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

Approved as to form

By: John K. Hyatt
County Counsel

By: Joe Corsiglia
Joe Corsiglia, Chair

By: Rita M. Bernhard
Rita Bernhard, Commissioner

By: Anthony Hyde
Anthony Hyde, Commissioner

After recording please return to:
Board of County Commissioners
230 Strand, Room 331
St. Helens, Oregon 97051

COLUMBIA COUNTY LAND DEVELOPMENT SERVICES

Measure 37 Claim

Staff Report

DATE: March 31, 2006

FILE NUMBERS: CL 05-29 CL 05-30
CL 05-30A CL 05-31

CLAIMANT/OWNER: Francis D. Martin
56661 Turley Road
Warren, OR 97053

CLAIMANT'S REPRESENTATIVE: Betty Karsten
51637 SW Old Portland Road
Scappoose, OR 97056

SUBJECT PROPERTY

PROPERTY LOCATION: 56431 Turley Road (CL 05-31)
56661 Turley Road (CL 05-29 and CL 05-30)
No address/west of 56661 Turley Rd. (CL 05-30A)
Warren, OR 97053

TAX ACCOUNT NUMBERS: AND CURRENT ZONING	CL 05-29	4223-020-00700	RR-5(Rural Residential)
	CL 05-30	4223-020-00800	RR-5(Rural Residential)
	CL 05-30A	4223-030-00300	RR-5(Rural Residential)
	CL 05-31	4223-030-00100	RR-5(Rural Residential)

SIZE:

CL 05-29	6.40 acres
CL 05-30	12.05 acres
CL 05-30A	10.76 acres
CL 05-31	5.09 acres
Totaling: 34.3 acres +/-	

REQUEST: To divide the above named tax lots into two acre lots/parcels

CLAIMS RECEIVED: June 24, 2005

REVISED 180 DAY DEADLINE: April 4, 2006

NOTICE OF RECEIPT OF CLAIM: Mailed March 13, 2006.
As of March 31, 2006, no requests for hearing have been filed.
Louis Bote, 32633 Church Road, Warren, OR 97053 submitted written
comments challenging claimant's estimation of loss in value.

I. BACKGROUND:

Claimant acquired interest in four tax lots from family members in three separate transactions. Tax lot 700 (CL 05-29) was acquired by claimant and his wife as tenants by the entireties by warranty deed on April 11, 1958. Claimant's wife died in 1997, and by operation of law, all title and interest in that property vested in claimant alone. Claimant's mother acquired an interest in tax lots 800 and 300 (CL 05-30 and CL 05-30B) in 1958. Those same tax lots were acquired by claimant and his wife by bargain and sale deed on January 28, 1977, subject to a life estate in favor of claimant's mother. Claimant's mother died in December 1978 and title in the property vested in claimant and his wife after that. Claimant acquired tax lot 100 (CL 05-31) on December 13, 1994 from Gerald Martin, his brother. Gerald Martin acquired interest in tax lot 100 on March 30, 1964. Tax lot 700 is developed with a dwelling.

II. APPLICABLE CRITERIA AND STAFF FINDINGS:

MEASURE 37

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this act.

A. PROPERTY OWNER AND OWNERSHIP INTERESTS:

1. Current Ownership: According to a title report prepared by Ticor Title on June 21, 2005, claimant holds fee simple title to all five tax lots, subject to reservations of rights in road and access easements.

2. Dates of Acquisition:

Tax lot 700 (CL 05-29)	Claimant: April 1, 1958	
Tax lots 800 and 300 (CL 05-30 and CL 05-30A)	Mother: 1958	Claimant: January 28, 1977
Tax Lot 100 (CL 05-31)	Brother: 1964	Claimant: December 13, 1994

B. LAND USE REGULATIONS IN EFFECT AT THE TIME OF ACQUISITION

The county had no local land use regulations until the early 1970s. According to information in the staff file, all of the property included in the claims was designated A-2 in the South County Zoning Ordinance in 1973. The A2 zoning designation established a five acre minimum parcel size for single family dwellings. In 1984, the county zoned the property RR-5. The RR-5 zoning designation permitted dwellings on parcels as small as two acres, providing the properties were served by a community water system. The subject property has access to community water. That two-acre parcel size provision was repealed in 1998 (Ordinance No. 98-4).

C. LAND USE REGULATION(S) APPLICABLE TO SUBJECT PROPERTY ALLEGED TO HAVE REDUCED FAIR MARKET VALUE/EFFECTIVE DATES/CLAIMANT ELIGIBILITY

The claimant alleges the five acre minimum parcel size for lots 100, 300, 700, and 800 reduces the fair market value of his property. He asserts that if he were to subdivide the property into lots with a two-acre density, he could realize a greater return than the division and sale of the property into five-acre home sites (lots 100, 300, 700, 800 and 38 acre homesites (lot 400)). Claimant seeks a waiver of the A2, RR-5 five acre minimum parcel size provisions.

D. CLAIMANT'S ELIGIBILITY FOR FURTHER REVIEW

Claimant appears to satisfy the prima facie eligibility requirements for tax lots 700 and 100. With respect to tax lots 800 and 300, the A2 zoning in place in 1977, the date of acquisition for claimant, did not provide for a two-acre minimum parcel size. Therefore, unless the board of commissioners concludes that claimant's right to a waiver relates back to the date claimant's mother acquired the property (1958) it does not appear that those tax lots are eligible for a waiver.

E. STATEMENT AS TO HOW THE REGULATIONS RESTRICT USE

Claimant states that as a result of the application of the A2 and post-1998 RR-5 zoning regulations, he cannot subdivide his property to create two-acre lots. With respect to tax lots 700 and 100, staff concedes that the applicable minimum parcel size requirements can be read and applied to "restrict" the use of those tax lots within the meaning of Measure 37.

F. EVIDENCE OF REDUCED FAIR MARKET VALUE

1. Value of the Property as Regulated.

The claimant sets out two separate valuations, one based on dividing each tax lot into smaller parcels and the other based on a subdivision created by combining tax lots 800, 300, 400 and 100. Claimant alleges that if tax lots are subject to the five-acre minimum parcel size requirement, he would realize \$160,000 per five acre parcel.

Scenario 1.

Tax Lot 700: \$160,000 (one 6.40-acre parcel)

Tax Lot 800: \$320,000 (12.05 acres/2)

Tax Lot 300: \$320,000 (10.76 acres/2)

Tax Lot 100: \$160,000 (one 5.09-acre parcel)

This scenario results in a current value of \$960,000 for all four tax lots if they are considered separately.

Scenario 2.

Assuming that the entire subject property is divided into eight lots (39.69/5), the total current value alleged is \$1,120,000.

2. Value of Property Not Subject To Cited Regulations.

The claimant asserts that the value of a two-acre lot is \$150,000. Therefore, the following estimated values are asserted in the valuation portion of the claim.

Tax Lot 700: \$460,000 (6.40 acres/3)(\$10K allowance for septic)

Tax Lot 800: \$900,000 (12.05 acres/6)

Tax Lot 300: \$750,000 (10.76 acres/5)

Tax Lot 100: \$300,000 (5.09 acres/2)

This scenario results in an estimated value of \$2,400,000 (16 parcels x \$150,000).

NOTE 1: This scenario includes a \$10,000 additional value for the septic system located on Tax Lot 700. Since the septic system and dwelling exist on the property, it seems appropriate to add \$10,000 to the existing value as well. However, it may be that there is an additional septic evaluation/installation on Tax Lot 700 that this figure accounts for, and without additional information/explanation, staff concludes that it is appropriate to err on the conservative side and exclude it from the estimate of current value of tax lot 700.

3. Loss of value indicated in the submitted documents is:

The written documentation in support of the claims appears to allege a total reduction in value ranging from \$1,130,000 to \$1,280,000.

Louis Bote submitted written testimony challenging these estimates, arguing that in the Warren area, RR-5 zoned property does not suffer a reduction in per acre price when looking at the market segment that includes 2 and 5 acre lots. According to Mr. Bote, the average per acre property value, whether two or five acres, is approximately \$50,000 per acre. Therefore, Mr. Bote argues, claimant has not demonstrated that the five-acre minimum parcel size requirement has reduced the value of claimant's property.

The evidence submitted by the claimant includes sales information for two acre and five acre parcels over a six year period (approximately 1999 through 2005.) Based on 2004-05 sales data supplied by the claimant, undeveloped 2 acre lots sell for between \$139,000 and 150,000. The information also includes sales data for three five-acre parcels. One undeveloped five acre parcel in the Warren area had a pending sales price of \$160,000 in mid-2005. According to the claimant, the other two parcels are developed with dwellings and, accordingly, do not provide an adequate comparison for valuation purposes.

Based on the evidence in the record, staff does not believe that the claimant has provided adequate evidence to demonstrate a loss in value. However, if the Board of County Commissioners concludes that the claimant's evidence is more credible than Mr. Bote's evidence, the Board could reach the conclusion that the property is more valuable if it is divided into two-acre residential parcels than if it is divided into five-acre residential parcels.

G. COMPENSATION DEMANDED

CL 05-29 (Tax lot 700)	\$300,000
CL 05-31 (Tax lot 100)	\$140,000
CL 05-30A (Tax lot 300)	\$430,000
CL 05-30 (Tax lot 800)	\$580,000

- (3) Subsection (1) of this act shall not apply to land use regulations:**
- (A) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this act;**
 - (B) Restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;**
 - (C) To the extent the land use regulation is required to comply with federal law;**
 - (D) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or**
 - (E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.**

The 5 acre-minimum parcel size standards for the A2 and RR-5 zone do not fall under any of these exceptions.

Staff notes that other siting standards, fire suppression requirements, access requirements and requirements for adequate domestic water and subsurface sewage, continue to apply as they are exempt from compensation or waiver under Subsection 3(b), above.

- 1) Just compensation under subsection (1) of this act shall be due the owner of the property the land use regulation continues to be enforced against the property 180 days after the**

owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.

Should the Board determine that the that the Claimants have demonstrated a reduction in fair market value of the property due to the cited regulations, the Board may pay compensation in the amount of the reduction in fair market value caused by said regulation.

(5) For claims arising from land use regulations enacted prior to the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the effective date of this act, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after the effective date of this act, written demand for compensation under subsection (4) shall be made 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.

The subject claim arises from the minimum lot size of 1977 and 1998 zoning regulations which were enacted prior to the effective date of Measure 37 on December 2, 2004. The subject claims were filed on June 24, 2005, which is within two years of the effective date of Measure 37.

(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this act, in lieu of payment of just compensation under this act, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

If the Board concludes that claimant has a reduced property value by virtue of the five-acre minimum parcel size requirement, it appears that the claimant has adequately demonstrated that he may receive a waiver in lieu of compensation for tax lots 700 and 100 because the five-acre minimum parcel size requirements were imposed after he acquired those tax lots.

With respect to tax lots 800 and 300, a close reading of Measure 37 leads to the conclusion that the waiver provisions do not relate back to the date the owner's relatives acquired their interests. Accordingly, the Board may either deny the request for a waiver of the minimum parcel size provisions and pay the compensation that has been proved, or deny the claim with respect to those tax lots, as claimant acquired those tax lots when they were subject to a five-acre minimum parcel size. In the alternative, the Board may interpret the provisions of Measure 37 to allow for waiver of regulations based on claims of diminution in value that relate back to when the claimant's relatives acquired the property.

III. STAFF RECOMMENDATION:

Based on the above evidence, staff concludes that the claimant meets the threshold requirements for demonstrating eligibility for Measure 37 compensation and/or waiver.

The following table summarizes staff findings concerning the land use regulations cited by the Claimant as a basis for his claim. In order to meet the requirements of Measure 37, the cited land use regulation must be

found to restrict use, reduce fair market value, and not be one of the land use regulations exempted from Measure 37. The highlighted regulations below may meet these requirements of a valid Measure 37 claim with respect to tax lots 700 and 100:

LAND USE CRITERION	DESCRIPTION	RESTRICTS USE?	REDUCES VALUE?	EXEMPT?
A2 Zoning (1973 Ordinance)	Establishing 5-acre minimum parcel size	Yes	Maybe	No
Ordinance 98-4	Eliminated 2-acre "go-below" standard for property zoned RR-5	Yes	Maybe	No

With respect to Tax lots 800 and 300, the claimant may have established a claim for compensation pursuant to Section 3(e), but has not established a claim for a waiver under Section 8.

Staff recommends that the Board determine whether there has been a diminution in value in the property as claimed, and then decide whether to compensate the claimant or to waive the development requirements for any/all of the tax lots.