

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

In the Matter of Claim Number CL 07-68)
for Compensation Under Measure 37 Submitted by) Order No. 93-2007
Donna Tewksbury)

WHEREAS, on November 30, 2006, Columbia County received a claim under Measure 37 from Donna Tewksbury, (the "Claimant") related to a parcel of property near Dahlgren Road in Scappoose, Oregon, having Tax Account Number 4235-000-00302; and

WHEREAS, according to the information presented with the claim, the Claimant is the current owner of the parcel; and

WHEREAS, the Claimant most recently acquired an interest in the property on May 28, 1987; and

WHEREAS, the Claimant states that Columbia County Zoning Ordinance Sections 209, 210, 400, 407.1 and Columbia County Subdivision and Partitioning Ordinance Section 205(b).1 restricts the use of the property and reduces its value; and

WHEREAS, the cited regulations were enacted prior to the 1987 acquisition date for the Claimant;

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 Number CL 07-68, dated April 6, 2007, which is attached hereto as Attachment 1 and is incorporated herein by this reference.
2. The Board of County Commissioners finds that the Claimant is neither entitled to compensation under Measure 37, nor waiver of County regulations in lieu thereof.
3. The Board of County Commissioners denies Claim Number CL 0-68.

Dated this 25th day of April, 2007.

Approved as to form

By: Sarah Hanson
Assistant County Counsel

BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

By: Rita Bernhard
Rita Bernhard, Chair

By: Anthony Hyde
Anthony Hyde, Commissioner

By: Joe Corsiglia
Joe Corsiglia, Commissioner

Order No. 93-2007

COLUMBIA COUNTY LAND DEVELOPMENT SERVICES

Measure 37 Claim

Staff Report

DATE: April 6, 2007
FILE NUMBER: CL 07-68
CLAIMANT/OWNER: Donna M. Tewksbury
PO Box 260
Scappoose, OR 97056

**CLAIMANT'S
REPRESENTATIVE:** David J. Petersen
Tonkon Torp LLP
888 SW 5th Ave., Ste. 1600
Portland OR 97204

SUBJECT PROPERTY

PROPERTY LOCATION: NW 1/4 Sec. 35 T4N R2W
TAX ACCOUNT NUMBER: 4235-000-00302
ZONING: Forest Agriculture (FA-19)
SIZE: 26.4 acres
REQUEST: To subdivide the parcel into five-acre lots and construct dwellings thereon.
CLAIM RECEIVED: November 30, 2006
180 DAY DEADLINE: February 8, 2007
NOTICE: March 22, 2007
As of the date of this report, no comments have been received. A request for public hearing by the Claimant was received on April 5, 2007.

I. BACKGROUND: The subject parcel is an improved 26.4 acre parcel Northwest of Scappoose-Vernonia Highway and West of Dahlgren Rd.

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:** Claimant submitted a Measure 37 Report issued by Tigor Title dated November 27, 2006. The report shows that the property is vested in Donna M. Tewksbury in fee simple.

2. **Date of Acquisition:** Graham Tewksbury and Donna Tewksbury, husband and wife, acquired 34.94 acres, including the subject property, from Fred Bernet and Mary Ellen Bernet on August 16, 1977 (Deed recorded at Book 213, page 330). Two separate tax lots were thereafter excluded from the original 34.94 acre tax lot, including tax lot number 4235-000-00303, a 5.1 portion which includes a dwelling. Through a divorce decree dated March 26, 1985, Graham C.K. Tewksbury received the 26.4 acre portion of the property and Donna M. Tewksbury received the 5.1 acre portion of the property having tax lot number 4235-000-00303. On May 28, 1987, Graham C.K. Tewksbury conveyed to Donna M. Tewksbury the 26.4 acre portion of the subject property. (Bargain and Sale Deed recorded at Book 269, page 661 of Columbia County records.)

Regulations are exempt from Measure 37 if 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. ORS § 197.352(3)(E). "Family member" is defined to include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family members or the owner of the property. ORS § 197.352(11)(A.). A former husband is not a family member within the meaning of the statute. Claimant, therefore, acquired the balance of the subject property on May 28, 1987, from a non-family member. Because Claimant did not have an interest in the property from 1985-1987, her date of acquisition is May 28, 1987 for purposes of Measure 37.

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

In 1977, the property was zoned A-2 (Agriculture-Residential District) which established a five acre minimum lot size for residential development. The property was zoned FA-19 in August 1984, and that zoning has remained on the property to date. The zoning on the remaining 26.4 acres of the subject property was FA-19 at the time of Claimant's acquisition in 1987.

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

The FA-19 zoning designation was applied to the subject property in 1984, before Claimant's acquisition date for the 26.4 acre portion of the property. Claimant alleges that the FA-19 zoning designation prevents the claimant from dividing her property into five acre parcels and constructing dwellings on the resulting lots. Claimant refers to any subdivision or zoning regulations enacted after her acquisition of the property which

“prohibit or restrict subdivision of the property into five-acre lots and the construction of legal dwellings on those lots”. She specifically cites the following regulations as restricting use and reducing the fair market value of the subject property:

Columbia County Subdivision and Partitioning Ordinance Section 205(b).

All of Columbia County Zoning Ordinance Section 400, specifically Sections 402.3, 403, 404.13, 405, 406, 407, and 409 and any other ordinances/regulations that prevent the development of the division of the property into 5-acre lots for residential uses.

D. CLAIMANT'S ELIGIBILITY FOR FURTHER REVIEW

Claimant acquired an interest in the property for purposes of Measure 37 in 1987, after the 1984 zoning ordinance was enacted. Therefore, Claimant is not eligible for waiver of the cited regulation under Measure 37.

E. STATEMENT AS TO HOW THE REGULATIONS RESTRICT USE

Claimant states that she cannot divide her property as proposed due to the County's aforementioned land use regulations. Staff concedes that at least some of those provisions can be read and applied to “restrict” the use of Claimants' property within the meaning of Measure 37. However, most of the cited regulations do not restrict the use of the property or reduce its value. The requested use of the property is residential development on five acre parcels. CCZO Section 407.1 imposes a 19 acre minimum lot size in the FA-19 zone which restricts the use of the property by prohibiting the subdivision into lots less than 19 acres. However, none of the other cited provisions restrict the use of the property.

The Subdivision and Partitioning Ordinance was most recently adopted in 1990, so Claimant may be eligible for compensation or waiver of section 205(B). However, that section simply references compliance with the CCZO, so that Ordinance may be analyzed along with CCZO, and does not in and of itself restrict the use of the property.

Section 209 of the Zoning Ordinance requires development in accordance with the provisions established for the zoning district, and does not in and of itself restrict the use of the property. Section 210 requires compliance with the minimum lot size provisions of the applicable zone, in this case, Section 407.1 of the FA-19 zoning regulations. This provision may be read to restrict the division of the subject property as proposed.

Section 400 of the Zoning Ordinance sets forth the zoning regulations for FA-19 zoned property. However, with the exception of Section 407.1, imposing the 19 acre minimum lot size, the regulations don't restrict the use of the property for residential development. Section 401 describes the general purpose of the FA-19 zone and does not restrict or prohibit the use of the property. Sections 402, specifically Section 402.3, resource related dwellings, and 403 describe the permitted uses in the FA-19 zone. These provisions do not restrict or prohibit the proposed subdivision for single family dwellings because non-resource dwellings are allowed in the FA-19 zone as a conditional use and other types of dwellings are allowed as permitted uses. CCZO Sections 404, specifically Section 404.13, non-resource dwellings, 405 and 406 do not restrict or prohibit the proposed subdivision for development of single family dwellings because single family dwellings are allowed as conditional uses. During the hearing process on the proposed conditional use dwellings, conditions may be imposed that may restrict or prohibit the use. Some of those conditions may be exempt from waiver under Measure 37. However, the County cannot determine whether conditions will qualify for waiver under Measure 37 until the County knows what they are. CCZO Section 407.1 prohibits a division of land in the FA-19 zone below 19 acres. Staff concedes that this minimum lot size regulation restricts and prohibits the use of the property. However, the County does not have any information that the remaining standards set forth in Section 407 cannot be met and thereby restrict the use of the property. Section 409 describes the review process for partitions. The review process does not restrict or prohibit the use of the property. It is merely a process. These standards are applied during the conditional use process and might have the effect of prohibiting or restricting the use of the property if a person could not meet the standards and therefore was denied a

conditional use permit. However, the County does not have any information that would indicate that the Claimant can't meet the fire siting standards. Furthermore, even if there was such information in the record, the fire siting standards for roads and dwellings are exempt from waiver under section 3B of the Measure for public health and safety reasons.

F. EVIDENCE OF REDUCED FAIR MARKET VALUE

1. Value of the Property As Regulated.

The assessor's estimated real property value of the land only is \$142,100.

2. Value of Property Not Subject To Cited Regulations.

Claimant has provided a Comparative Market Analysis prepared by Windermere/SHRE on 11/21/2006. The Analysis indicated that it was challenging to prepare a market analysis due to a limited number of comparative listings and properties sold within the past 12 months, and the fact that the subject property is unimproved acreage. The analysis concluded that if the parcel were buildable, the 26.32 acres would be worth \$450,000.

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

The documentation in the file reflects a reduction of \$307,900.

G. COMPENSATION DEMANDED

Claimant's claim is in the amount of \$800,000, per page 1 of Claimant's Measure 37 claim form.

(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 26.4 acre portion of the property qualifies for the exclusions listed in Subsection (E).

Staff notes that other siting standards, including 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. Wetlands are subject to federal and state regulations and are not subject to waiver by the county. Further development will be subject to regulations that protect public health and safety.

(4) Just compensation under subsection (1) of this act shall be due the owner of the property if 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.

Staff finds that the Claimant is not entitled to just compensation under subsection (1), due to the intervening owner of the property by a non-family member. Therefore, Claimant is not entitled to waiver in lieu thereof.

(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 parcel standards of the FA-19 zone which were enacted prior to the effective date of Measure 37 on December 2, 2004. The subject Claim was filed on November 30, 2006, which is within two years of the effective date of Measure 37. Claimant’s claim was timely filed.

(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.

Should the Board determine that the Claimant has demonstrated that she is entitled to compensation under Measure 37, the Board may pay compensation in the amount of the reduction in fair market value caused by said regulation or in lieu of compensation, modify, remove, or not apply the challenged regulations. However, staff concludes that Claimant is not entitled to compensation or waiver under Measure 37.

iii. STAFF RECOMMENDATION:

Staff concludes that the Claimant has not met the threshold requirements for proving a Measure 37 claim.

In order to meet the requirements of Measure 37 for a valid claim the cited land use regulations must be found to restrict use, reduce fair market value, and not be one of the land use regulations exempted from Measure 37. County zoning standards are identified by CCZO Section, Subdivision and Partitioning Ordinance provisions are identified by CCSPO Article Number.

The regulations identified in the following table have been specifically included in the claim and are summarily analyzed:

LAND USE CRITERION	DESCRIPTION	RESTRICTS USE?	REDUCES VALUE?	EXEMPT?
CCZO 209	Development permits required for dwellings in resource zones	No	No	Yes
CCZO 210	Land divisions must conform to minimum lot size standards in the applicable zone	No	No	Yes

CCZO 400	FA-19 Zoning Regulations (except 407.1)	No	No	Yes
CCZO 407.1	FA-19 Zoning Minimum Lot Size	Yes	Yes	Yes
CCSPO 205(b)	Requires land divisions to comply with applicable provisions of the County Zoning Ordinance or other County Ordinances.		No	No Yes

Based on the findings in the Staff report, Staff recommends that the Claim be denied.

LEGAL DESCRIPTION

Beginning at a point on the South line of the Northeast quarter of the Northwest quarter which is South $87^{\circ}55'19''$ East 287.20 feet from the Southwest corner of said Northeast quarter of the Northwest quarter of Section 35, Township 4 North, Range 2 West, Willamette Meridian, Columbia County, Oregon, said point being the Southwest corner of the Ethel Landye tract as described in Deed Book 242 at page 182, Deed Records of Columbia County, Oregon; thence North $2^{\circ}20'24''$ East along the West line of said Landye tract a distance of 672.62 feet to the most Northerly corner thereof; thence along the Northerly line of said Landye tract South $67^{\circ}58'53''$ East a distance of 332.04 feet; thence South $87^{\circ}55'19''$ East a distance of 10.36 feet to an interior angle corner of Graham Tewksbury and Donna Tewksbury tract as described in Deed Book 213 at page 330; thence South $87^{\circ}55'19''$ East along the South line of said Tewksbury tract a distance of 1198.49 feet, to the East line of Parcel 1 of the Fred Bernet tract as described in Deed Book 175 at page 643; thence North $2^{\circ}20'24''$ East along said East line a distance of 60.00 feet; thence North $87^{\circ}55'19''$ West a distance of 1198.49 feet; thence North $2^{\circ}20'24''$ East a distance of 730.00 feet to the North line of said Section 35; thence North $88^{\circ}03'00''$ West along said North line a distance of 1280.65 feet to the Northwest corner of the Northeast quarter of the Northwest quarter of the Northwest quarter of said Section 35; thence South $1^{\circ}41'48''$ West a distance of 672.53 feet to the Southwest corner of said Northeast quarter of the Northwest quarter of the Northwest quarter; thence South $87^{\circ}55'26''$ East a distance of 329.17 feet to the Southeast corner of the West half of said Northeast quarter of the Northwest quarter of the Northwest quarter, said point being the Northwest corner of the Parcel as described in Exhibit "A", Deed Book 258 at page 227; thence along the Northerly line of said parcel as described in Exhibit "A", Deed Book 258 at page 227, South $87^{\circ}47'45''$ East a distance of 231.66 feet; thence South $1^{\circ}49'31''$ West a distance of 215.98 feet; thence South $87^{\circ}47'46''$ East a distance of 136.00 feet to the most Easterly Northeast corner of said parcel as described in Exhibit "A", Deed Book 258 at page 227; thence South $1^{\circ}41'48''$ West along the East line of said Parcel as described in Exhibit "A" Deed Book 258 at page 227 a distance of 458.00 feet to the South line of said Northeast quarter of the Northwest quarter; thence South $87^{\circ}55'19''$ East along said South line of the Northeast quarter of the Northwest quarter a distance of 247.20 feet to the point of beginning.

Together with a 60 foot road easement more particularly described as follows:
Beginning at a point which is South $87^{\circ}55'19''$ East 1808.69 feet and North $2^{\circ}20'24''$ East 619.34 feet from the Southwest corner of the Northeast quarter of the Northwest quarter of Section 35, Township 4 North, Range 2 West, Willamette Meridian, Columbia County, Oregon, said point being on the East line of Parcel 1 of the Fred Bernet tract as described in Deed Book 175 at page 643; thence North $87^{\circ}55'19''$ West a distance of 1198.49 feet; thence South $2^{\circ}20'24''$ West a distance of 60.00 feet; thence South $87^{\circ}55'19''$ East a distance of 1198.49 feet; thence North $2^{\circ}20'24''$ East a distance of 60.00 feet to the point of beginning.

Together with a non-exclusive right of way and easement, described as follows:
A 60 foot road easement being 30 feet on either side of the following described center line:

Beginning at a point which is South $87^{\circ}40'22''$ East 527.34 feet from the center of Section 35, Township 4 North, Range 2 West, Willamette Meridian, Columbia County, Oregon; thence North $0^{\circ}58'48''$ East a distance of 1352.45 feet; thence North $2^{\circ}20'24''$ East a distance of 619.34 feet to the end of said easement

Together with a 60 foot road easement being 30 feet on either side of following described center line:

Beginning at a point which is South $87^{\circ}40'22''$ East 527.34 feet and North $0^{\circ}58'48''$ East 1352.45 feet from the said center of Section 35; thence North $87^{\circ}55'19''$ West a distance of 495.15 feet to the Southeast corner of the Northeast quarter of the Northwest quarter of said Section 35; thence North $87^{\circ}55'19''$ West along the South line of said Northeast quarter of the Northwest quarter a distance of 1313.54 feet to the Southwest corner of the Northeast quarter of the Northwest quarter of said Section 35.