

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

June 8, 2005

STATE CLAIM NUMBER: M118966

NAME OF CLAIMANT: Charles Benton III

MAILING ADDRESS: 2005 Tucker Road
Hood River, Oregon 97031

IDENTIFICATION OF PROPERTY: 2005 Tucker Road
Township 2N Range 10E, Section 14
Tax lots 1000, 1100 and 1101
Hood River County

DATE RECEIVED BY DAS: December 14, 2004

180-DAY DEADLINE: June 11, 2005

I. CLAIM

Charles Benton III, the claimant, seeks compensation in the amount of \$12,751,760 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 divide the subject property into small rural lots with dwellings. The property is located at 2005 Tucker Road in Hood River County, Oregon. (See 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 certain state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, specifically Statewide Planning Goal 3 (Agricultural Lands), OAR 660-033-100 and the standards for the approval of farm and non farm dwellings under OAR 660, Division 33 not apply to the subject property to the extent necessary to allow Mr. Benton a use of the property permitted at the time he acquired it on July 27, 1977. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 14, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS), provided written notice to owners of surrounding properties. According to DAS, there were two written comments received in response to the 10-day notice. Comments received in response to specific requirements of Ballot Measure 37 are summarized below. (See letters in the department's claim file).

A letter from Heather Blaine-McCurdy, an owner of property adjacent to the land that is the subject of this claim and claim M119862, dated March 23, 2005, raises the following issues:

1. "The claimants have yet to provide adequate information regarding the property deeds, title reports, or identification of when various land use regulations went into effect. There is no evidence in either of their claims that demonstrates that 0.25 acre lots are feasible or would even be allowed from a public health and safety issue."
2. "Should the state determine that compensation is not available, and decide – in lieu of compensation – not to apply the land use regulations, such a waiver is limited to a use permitted at the time the current owner acquired the property."
3. "In addition, state statute governs this requested use" and because "ORS 215.780 establishes a minimum of 80-acres" section (8) of Measure 37 authorizes only the "governing body responsible for enacting the land use regulation" to not apply the regulation, neither the Department of Land Conservation and Development, nor the Land Conservation and Development Commission can waive this regulation. As a result, the claimant's 58-acre parcel may not be further divided unless and until ORS 215.780 is waived by the legislative branch of the State of Oregon."
4. "Should the Land Conservation and Development Commission decide to not apply certain land use regulations in lieu of compensation under Section (8) of Measure 37, such waiver is limited to allow the current owner to use the property for a use permitted at the time the owner acquired the property. Goal 3 was adopted prior to the date the current owner acquired the property. As a result, any 'waiver' of land use regulations must be consistent with the provisions of Goal 3."
5. "In addition, for the reasons discussed above [in the letter], I do not believe that the claimant could divide and develop his property for a residential subdivision of any scale at the time he acquired the property. Statewide Planning Goals 3 and 14 and other county zoning provisions prohibited urban development in farm zones and limited residential development to farmhouses (non-farm dwellings were only allowed on land generally unsuitable for agriculture, which this land is not)."

Response to Submitted Comments

The department concurs with comments 2 and 4 for the reasons set forth in Sections V. and VI. of this report and does not concur with comments 1, 3 and 5 for the following reasons:

Comment 1. For the reasons set forth in Section V. of this report, the department believes that there is adequate information on which to evaluate Mr. Benton's claim. It is not necessary at this time to determine whether "0.25 acre lots are feasible or would even be allowed from a public health and safety issue" in the evaluation of this claim. All that is necessary is a determination that a state law restricts the claimant's use of the property and that this restriction reduces the fair market value of the property to some extent.

Comment 3. OAR 660-002-0010(8) provides that the Director of the Department of Land Conservation and Development is to "carry out the responsibilities and exercise the authorities of the Commission and the Department in responding to claims under Chapter 1, Oregon Laws 2005 (2004 Ballot Measure 37), including "not applying the *statute(s)*, rule(s) or goal(s) that are the basis of the claim..." This rule language, prepared in consultation with the Oregon Department of Justice, reflects legal counsel's advice that Measure 37 authorizes a state agency that enforces state laws to not apply those laws in lieu of paying compensation on a valid claim.

Comment 5. Under Goal 3 and the county's acknowledged 20-acre minimum lot size under Goal 3, some division of the claimant's property is possible, and certain statutory standards under ORS Chapter 215 apply to the approval of any farm or non-farm dwellings on the existing property or any resulting parcels. The determination of whether the claimant's property can be further divided or developed is for Hood River County to determine when it determines what use of the property was permitted at the time Mr. Benton acquired it.

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

The claim was submitted to DAS on December 14, 2004 for processing under OAR 125, Division 145. The claim identifies Hood River County's High Value exclusive farm use (EFU) zoning 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 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

The claim includes two tracts: the Brinkhaven orchard and the Lucich orchard. Mr. Benton's grandfather, Charles King Benton, acquired the Brinkhaven orchard on August 16, 1927. He conveyed that property to the claimant's father, Charles King Benton, Jr., on February 19, 1955. Mr. Benton's aunt and uncle, Mr. and Mrs. James Carr, acquired the Lucich orchard tract on June 19, 1951. They conveyed that property to the claimant's father on January 1, 1959. The claimant, Charles Benton, III, acquired both orchard tracts from his father by warranty deed on July 27, 1977.

Conclusions

Mr. Charles King Benton, Mr. Charles King Benton, Jr. and Mr. and Mrs. James Carr are "family" members and the claimant, Mr. Charles Benton III, is an "owner" of the subject property as those terms are defined by Section 11 of Ballot Measure 37. Charles Benton III acquired the property on July 27, 1977.

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

Mr. Benton's claim asserts that current land use regulations do not allow the division of the subject property into "the smallest rural lot size capable of being supported by the land considering public health and safety regulations" (about four parcels per acre with dwellings). The subject orchard tracts are both zoned Exclusive Farm Use (EFU) as required by Statewide Planning Goal 3 in accord with OAR 660, Division 33, and 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 or for the subject tract or the proposed parcels to have farm or non-farm dwellings on them.

Conclusions

The minimum lot size and dwelling standards established by ORS 215.263, 215.284 and ORS 215.780, as applied by Goal 3 and OAR 660, Division 33 were all adopted after the property was acquired by the claimant's family in 1927 and 1951, and do not allow the division of the property or the placement of dwellings on them as was possible in 1927 or 1951, thereby restricting the use of the property relative to the uses allowed when the property was acquired in 1927 by Charles King Benton or in 1951 by Mr. And Mrs. James Carr.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any laws 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

According to the claimant, the inability to divide his property into small rural lots because of the current restrictions of the County's EFU zone as required by Statewide Planning Goal 3, results in a reduction in fair market value of \$12,751,760. Specifically, the claim states that the basis for this reduction is that when the claimant's family members (grandfather, father, aunt and uncle) acquired the property beginning in 1927, it could have been divided and developed into four residential lots per acre. The amount of compensation is identified as the difference between the value of the undeveloped 58-acre parcel and the property divided and developed with four dwellings per acre. No information on how the compensation amount was calculated is provided in the claim.

Conclusions

As explained in section V.(1) of this report, Charles Benton, III is an owner of the property and acquired the property on July 27, 1977. The claimant's family members acquired the property in 1927 and 1951.

Without an appraisal based on the value of the proposed development 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 restriction of the use of the property and 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 includes both specific reference to particular County EFU zoning and a general claim based on state land use regulations that restrict the use of the property relative to what would have been allowed in 1927 and 1951 when the Benton family first acquired the properties. These provisions include requirements of Statewide Planning Goal 3, ORS 215 and OAR 660, Division 33 relating to land divisions and the establishment of farm or non-farm dwellings, all of which are “land use regulations” under the Measure, and were adopted after a family member acquired the properties in 1927 and 1951.

Conclusions

It appears that the general statutory, goal and rule restrictions on residential development and use of agricultural land apply to the claimant’s anticipated use of the property, and for the most part these laws 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, because they were not raised in this claim, or because they are laws that are not covered by the Measure to begin with.

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 a 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 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 prohibit the division of the subject property into “the smallest rural lot size capable of being supported by the land considering public health and safety regulations” (about 4 parcels per acre with dwellings). The claimant cannot create the desired small rural lots out of the subject 58-acre property and sell or develop those lots for residential use. Laws enforced by the Commission or the department reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$12,751,760. Although the claim provides an explanation about how the specified restrictions reduce the fair market value of the property, an appraisal was not submitted and it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the current record for this claim, the department finds that the laws on which the claim is based more likely than not 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, Measure 37 authorizes the department to modify, remove or not apply one or more land use regulations to allow Mr. Benton to use the subject property for a use permitted at the time he acquired the property on July 27, 1977.¹

Mr. Benton acquired the property on July 27, 1977 when it was zoned by the County as A-1, a qualified exclusive farm use zone under ORS 215. Under this zone, there was a five-acre minimum parcel size for the creation of new lots or parcels. However, the County’s A-1 Zone that applied to the property at that time had not been acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251. The Commission reviewed the Hood River County Comprehensive Plan in 1980 and later acknowledged that the plan and land use regulations complied with the statewide goals in 1984. Because the Commission had not acknowledged Hood River County’s comprehensive plan and land use regulations, including the A-1 Zone in effect when the property was acquired by the Mr. Benton on July 27, 1977, site-specific Goal provisions, including Statewide Planning Goal 3, applied directly to property on the date of acquisition.² Until the

¹ While the date of acquisition by a prior family member is relevant to the amount of compensation that may be claimed under Measure 37, Section 8 of the Measure provides that a government decision to remove, modify or not apply a land use regulation extends back in time to the date the present owner acquired the title to the property that is the subject of the claim.

² Statewide Planning Goal 3 became effective on January 25, 1975 and was applicable to legislative land use decisions and some quasi-judicial land use prior to the Commission’s acknowledgment of the County’s Goal 3 program in December 1984. (See *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978); *Jurgenson v. Union County*, 42 Or App 505 (1979); *Alexanderson v. Polk County*, 289 Or 427, rev. denied, 290 Or 137 (1980); and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985). After the county’s plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly applied to such local land use decisions. (*Byrd v. Stringer*, 295 Or 311 (1983). However, the applicable statutes continue to apply, and insofar as the local implementing provisions are materially the same as the rules, the local provisions must be interpreted consistent with the substance of the rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 OR App 131 (1992).

County's land use regulations were acknowledged by the Commission, the use of the subject property was subject to both the County's ordinances and the applicable statewide planning goals.

Statewide Goal 3 "Agricultural Lands," as adopted in 1975, required that agricultural land be "preserved and zoned for exclusive farm use pursuant to ORS Chapter 215." The subject property is "agricultural land" as defined by Goal 3 because it is composed predominantly of Class I-IV soils and was subject to EFU zoning pursuant to ORS 215 when acquired by the claimant on July 27, 1977.

In 1977, the state standards for a land division involving property where the local zoning was not acknowledged, in this case the A-1 zone, required that the resulting parcels must be of a size that are "appropriate for the continuation of the existing commercial agricultural enterprise in the area" (Statewide Planning Goal 3).³ Further, ORS 215.263 (1975 edition) required that all divisions of land subject to the provisions for exclusive farm use zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy).⁴ Thus, the opportunity to divide the property when acquired by the claimant in 1977 was limited to land divisions done consistent with Goal 3 that required the resulting parcels be: (1) "appropriate for the continuation of the existing commercial agricultural enterprise in the area;" and (2) shown to comply with the legislative intent set forth in ORS 215.243.

As for dwellings allowed under EFU zoning as required by Goal 3 on the date of acquisition in 1977, farm dwellings were allowed if determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1975 edition) and non-farm dwellings were subject to ORS 215.213(3) (1975 edition).⁴

³ The Goal 3 standard for the review of land divisions or the establishment of a minimum lot size states:

"Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area."

On August 20, 1977, the Commission distributed a policy paper explaining the meaning of the Goal 3 minimum lots size standard (see "Common Questions about Goal 3; Agricultural Lands" (August 30, 1977, as revised and added to July 12, 1979). Further interpretation of the Goal 3 minimum lot size standard can be found in *Meeker v Clatsop County*, 36 Or App 699 (1978); *Jurgenson v. Union County*, 42 Or App 505 (1979); *Alexanderson v. Polk County*, 289 Or 427, rev. denied, 290 Or 137 (1980); and *Thede v. Polk County*, 3 Or LUBA 336 (81).

In 1982, the policy paper and court decisions were incorporated into an administrative rule to guide the interpretation and application of the Goal 3 minimum lot size standard (see OAR 660, Division 5, specifically rules 015 and 020 effective July 21, 1982).

For further guidance on the interpretation and application of this standard and rule see *Kenagy v. Benton County*, 6 Or LUBA 93 (7/16/82); *Goracke v. Benton County*, 8 Or LUBA 128 (6/8/83); 68 Or App 83 (5/9/84); 12 Or LUBA 128 (9/26/84); 13 Or LUBA 146 (4/4/85); 74 Or App 453 (7/17/85), rev. denied 300 Or 322 (11/26/85); and OAR 660-05-015 and 020 as amended effective June 7, 1986 (repealed effective August 7, 1993).

The 1982 administrative rule (OAR 660-05-015 and 020) was further amended to incorporate the holdings of these cases (effective June 7, 1986 and repealed effective August 7, 1993).

⁴ Under the version of ORS 215.213 in effect when the claimant acquired the property, a farm dwelling could be established on agricultural land, only if the farm use to which the dwelling relates is existing, (*Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) *affirmed without opinion*, 70 Or App 179 (September 14, 1984) and *Newcomer v. Clackamas County*, 92 Or App 174, modified 94 Or App 33, November 23, 1988).

No information has been provided showing that the development desired by the claimant complies with either the Goal 3 minimum lot size standard for farm parcels under Goal 3, the standards for new non-farm parcels under ORS 215.263 (1975 Edition) or the approval standards for dwellings, in effect at the time the Mr. Benton acquired the property in 1977.⁵

Conclusion

Based on the record before the department, Mr. Benton has established that he is entitled to relief. Therefore, the department staff recommends that, in lieu of compensation, the requirements of applicable state laws enforced by the Commission or the department not apply to the extent necessary to allow the claimant a use of the property permitted at the time he acquired it on July 27, 1977.

On July 27, 1977, the property was subject to Statewide Goal 3 and the minimum lot size and dwelling standards specified therein (effective January 25, 1975), as well as the standards in ORS 215 for land divisions and dwellings. Therefore, staff recommends that the department not apply the current provisions of Statewide Goal 3, ORS 215.263, ORS 215.284, ORS 215.780, and OAR 660, Division 33, as they relate to land divisions and the establishment of dwellings. This proposed action would authorize Mr. Benton to apply to Hood River County for the division of the subject property and the development of a dwelling on each parcel or lot created pursuant to the provisions of Goal 3 and ORS 215 in effect when he acquired the subject property in 1977. These earlier provisions require that the resulting parcels or lots be: (1) “appropriate for the continuation of the existing commercial agricultural enterprise in the area; and (2) shown to comply with the standards for the creation of non-farm parcels under ORS 215.213 (1975 Edition). Similarly, the standards for residential dwellings in effect in 1977 generally require that any farm dwelling be customarily provided in conjunction with farm use, or meet the requirements for non-farm dwellings under Goal 3 and ORS 215.213(1)(e) and (3) (1975 Edition).

Any use of the property by the claimant remains subject to the following laws: (a) those state laws not specifically waived by the Final Order on this claim; (b) any laws enacted or enforced by a public entity other than the Commission or department; and (c) those laws not subject to Measure 37 including without limitation, those laws exempt under Section (3) of the Measure.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on May 19, 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.

⁵ An indication of how these land division and dwelling standards applied to the property when it was acquired and that comply with the Goal 3 minimum lot size standards, ORS 215.263 and the farm and non-farm dwelling standards under ORS 215.213 are the land division and dwelling standards in the County’s acknowledged EFU zone. The acknowledged EFU zone for Hood River County established a 20-acre minimum lot size for new parcels and required that farm and non-farm dwellings comply with the applicable standards under ORS 215.213.

