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Memorandum Date: October 6, 2006
Order Date: October 25, 2006

TO: Board of County Commissioners

DEPARTMENT: Public Works Dept./Land Management Division

PRESENTED BY: BILL VANVACTOR, COUNTY ADMINISTRATOR
KENT HOWE, PLANNING DIRECTOR

AGENDA ITEM TITLE: IN THE MATTER OF CONSIDERING A BALLOT MEASURE 37 CLAIM AND DECIDING WHETHER TO MODIFY, REMOVE OR NOT APPLY RESTRICTIVE LAND USE REGULATIONS IN LIEU OF PROVIDING JUST COMPENSATION (PA05-6827, BERRY)

I. MOTION

Move to approve the Measure 37 Claim and adopt the order attached to this memo.

II. AGENDA ITEM SUMMARY

Shall the Board of County Commissioners compensate an applicant under Ballot Measure 37 and LC 2.700 through 2.770 for the reduction in fair market value of the affected property interest resulting from enactment or enforcement of restrictive land use regulations or modify, remove, or discontinue application of those land use regulations to the subject property to allow Robert and Mary Jane Berry to use the property as allowed at the time they acquired an interest in the property?

III. BACKGROUND/IMPLICATIONS OF ACTION

A. Board Action and Other History

Applicant: Robert and Mary Jane Berry

Current Owner: Robert and Mary Jane Berry

Agent: Joshua Clark

Map and Tax lots: 21-02-19 #100

Acreage: 127 acres

Current Zoning: E40 (Exclusive Farm Use)

Date Property Acquired: April 13, 1970.

Date claim submitted: December 29, 2006. The 180-day processing deadline was June 27, 2006. On May 3, 2006, the applicant extended processing deadline to September 1. On July 31, the applicant extended the deadline to October 31, 2006.

Land Use Regulations in Effect at Date of Acquisition: unzoned

County land use regulation which restricts the use and reduces the fair market value of claimant's property: Minimum parcel size and restrictions on new dwellings in the E40 (Exclusive Farm Use) zone, LC 16.212.

B. Policy Issues

As directed by the Board on March 21, 2006, a claimant must submit reasonable and competent evidence of a reduction in fair market value from a land use regulation. An appraisal is not required, but an analysis of the tax values is not adequate.

The applicant has submitted a Comparative Market Analysis prepared by a real estate broker. Because of this, the County Administrator has waived the requirement for an appraisal. If the Board determines the submitted evidence is not reasonable or competent, the Board has the authority to require an appraisal.

C. Board Goals

The public hearing will provide an opportunity for citizen participation in decision making, in conformance with the overall goals of the Lane County Strategic Plan.

D. Financial and/or Resource Considerations

The applicant has requested compensation in the amount of \$2,773,764 or a waiver of the E40 (Exclusive Farm Use) zone regulations that prohibit the division of the property into lots containing less than 40 acres and construction of a dwelling on each lot.

E. Analysis

The claimant has submitted information in support of this claim including a Comparative Market Analysis, deeds and the processing fee. The property contains approximately 127 acres and is zoned E40. In this zone, the minimum lot size is 40 acres and new dwellings require a special use permit. The claimant wishes to subdivide the property into lots that contain less than 40 acres and place a dwelling on each lot.

Robert and Mary Jane Berry acquired an interest in the property on April 13, 1970, as evidenced by Bargain and Sale Deed #43489. On that date, the property was unzoned.

To have a valid claim against Lane County under Measure 37 and LC 2.700 through 2.770, the applicant must prove:

1. Lane County has enacted or enforced a restrictive land use regulation since the owner acquired the property, and
2. The restrictive land use regulation has the effect of reducing the fair market value of the property, and
3. The restrictive land use regulation is not an exempt regulation as defined in LC 2.710.

Restrictive Regulations

Robert and Mary Jane Berry acquired an interest in the property when it was unzoned (Bargain and Sale Deed #43489). Currently, it is zoned E40 (Exclusive Farm Use), the minimum parcel size is 40 acres and new dwellings require a special use permit. Because of these restrictions, they are prevented from developing the property as could have been allowed when they acquired an interest on April 13, 1970.

Reduction in Fair Market Value

The claimant has submitted a Comparative Market Analysis prepared by a real estate broker. The CMA alleges a reduction of \$2,773,764 and is based, in part, on the sales prices of comparable properties. If the Board determines the submitted evidence demonstrates a reduction in fair market value resulting from enforcement of a restrictive land use regulation, it appears this is a valid claim.

Exempt Regulations

The E40 (Exclusive Farm Use) limitations on new dwellings, and the minimum parcel size of 40 acres do not appear to be exempt regulations described in Measure 37 or LC 2.710.

Conclusion

It appears this is a valid claim if the Board determines the submitted evidence demonstrates a reduction in fair market value resulting from enforcement of a restrictive land use regulation.

F. Alternatives/Options

The Board has these options:

- Determine the application appears valid and adopt the order attached to this report.
- Require more information regarding the reduction in value.
- Conclude the application is not a valid claim and direct the issuance of a final written decision by the County Administrator denying the Claim.

V. TIMING/IMPLEMENTATION

If the Board determines this is a valid claim and waives a land use regulation, the claimant must receive a similar waiver from the state before a land use application and/or development proposal is submitted.

VI. RECOMMENDATION

If the Board determines the submitted evidence demonstrates a reduction in fair market value from enforcement of a restrictive land use regulation, the County Administrator recommends the Board waive the restrictive land use regulations.

VII. FOLLOW-UP

If an order is adopted, it will be recorded.

VII. ATTACHMENTS

This cover memo prepared for the Board hearing does not contain the entire submittal. The entire submittal is contained in a notebook labeled "PA05-6827/Berry", available in the County Commissioners Office. The portions of the submittal included with this memo are identified below:

- Draft order to approve the claim of Robert and Mary Jane Berry.
- Vicinity Map.
- Application form.
- Bargain and Sale Deed #43489.
- Comparative Market Analysis.

**BEFORE THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY,
OREGON**

ORDER No.) IN THE MATTER OF CONSIDERING A BALLOT
) MEASURE 37 CLAIM AND DECIDING
) WHETHER TO MODIFY, REMOVE OR NOT
) APPLY RESTRICTIVE LAND USE
) REGULATIONS IN LIEU OF PROVIDING JUST
) COMPENSATION (PA05-6827/Berry)

WHEREAS, the voters of the State of Oregon passed Ballot Measure 37 on November 2, 2004, which added provisions to Oregon Revised Statutes (ORS) Chapter 197 to require, under certain circumstances, payment to landowner if a government land use regulation restricts the use of private real property and has the effect of reducing the property value; and

WHEREAS, the Board of County Commissioners of Lane County enacted Ordinance No. 18-04 on December 1, 2004, to establish a real property compensation claim application process in LC 2.700 through 2.770 for Ballot Measure 37 claims; and

WHEREAS, the County Administrator has reviewed an application for a Measure 37 claim submitted by Robert and Mary Jane Berry (PA05-6827), the owners of real property located at 76171 Mosby Creek Road, Cottage Grove, and more specifically described in the records of the Lane County Assessor as map 21-02-19, tax lot 100, consisting of approximately 127 acres in Lane County, Oregon; and

WHEREAS, the County Administrator has determined that the application appears to meet all of the criteria of LC 2.740(1)(a)-(d), appears to be eligible for just compensation and appears to require modification, removal or not applying the restrictive land use regulations in lieu of payment of just compensation and has referred the application to the Board for public hearing and confirmation that the application qualifies for further action under Measure 37 and LC 2.700 through 2.770; and

WHEREAS, the County Administrator has determined under LC 2.740(4) that modification, removal or not applying the restrictive land use regulation is necessary to avoid owner entitlement to just compensation under Ballot Measure 37 and made that recommendation to the Board; and

WHEREAS, the Board has reviewed the evidence and confirmed the application appears to qualify for compensation under Measure 37 but Lane County has not appropriated funds for compensation for Measure 37 claims and has no funds available for this purpose; and

WHEREAS, on October 25, 2006, the Board conducted a public hearing on the Measure 37 claim (PA05-6827) of Robert and Mary Jane Berry and has now determined that the restrictive E40 (Exclusive Farm Use) zone dwelling and land division requirements of LC 16.212 were enforced and made applicable to prevent Robert and Mary Jane Berry from developing the property as might have been allowed at the time they acquired an interest in the property on April 13, 1970, and that the public benefit from application of the current E40 dwelling and

division land use regulations to the applicant's property is outweighed by the public burden of paying just compensation; and

WHEREAS, Robert and Mary Jane Berry request either \$2,773,764 as compensation for the reduction in value of their property, or waiver of all land use regulations that would restrict the division of land into lots containing less than forty acres and placement of a dwelling on each lot, uses that could have otherwise been allowed at the time they acquired an interest in the property; and

WHEREAS, the Board finds that under LC 2.760(3) the public interest would be better served by modifying, removing or not applying the challenged land use regulations of the E40 zone to the subject property in the manner and for the reasons stated in the report and recommendation of the County Administrator incorporated here by this reference except as explicitly revised here to reflect Board deliberation and action to allow Robert and Mary Jane Berry to make application for development of the subject property in a manner similar to what they could have been able to do under the regulations in effect when they acquired an interest in the property; and

WHEREAS, this matter having been fully considered by the Lane County Board of Commissioners.

NOW, THEREFORE IT IS HEREBY ORDERED that the applicant Robert and Mary Jane Berry made a valid claim under Ballot Measure 37 by describing the use being sought, identifying the county land use regulations prohibiting that use, submitting evidence that those land use regulations have the effect of reducing the value of the property, showing evidence that they acquired an interest in the property before the restrictive county land use regulations were enacted or enforced and the Board hereby elects not to pay just compensation but in lieu of payment, the request of Robert and Mary Jane Berry shall be granted and the restrictive provisions of LC 16.212 that limit the development of dwellings and the division of land in the E40 (Exclusive Farm Use) Zone shall not apply to Robert and Mary Jane Berry, so they can make application for approval to develop the property located at located at 76171 Mosby Creek Road, Cottage Grove, and more specifically described in the records of the Lane County Assessor as map 21-02-19, tax lot 100, consisting of approximately 127 acres in Lane County, Oregon, in a manner consistent with the land use regulations in effect when they acquired an interest in the property on April 13, 1970.

IT IS HEREBY FURTHER ORDERED that Robert and Mary Jane Berry still need to make application and receive approval of any division of the property or placement of a dwelling under the other land use regulations applicable to dividing the property or placing a dwelling that were not specifically identified or established by their as restricting the division of the property or placement of a dwelling, and it would be premature to not apply those regulations given the available evidence. To the extent necessary to effectuate the Board action to not apply the dwelling or division restrictions of the applicable zone described above, the claimant shall submit appropriate applications for review and approval of a new dwelling to show the specific development proposals and in the event additional county land use regulations result in a restriction of those uses that have the effect of reducing the fair market value of the property, the County Administrator shall have the authority to determine those restrictive county land use regulations that will not apply to that development proposal to preclude entitlement to just compensation under Measure 37, and return to the Board for action, if necessary. All other Lane

Code land use and development regulations shall remain applicable to the subject property until such time as they are shown to be restrictive and that those restrictions reduce the fair market value of the subject property.

IT IS HEREBY FURTHER ORDERED that this action making certain Lane Code provisions inapplicable to use of the property by Robert and Mary Jane Berry does not constitute a waiver or modification of state land use regulations and does not authorize immediate division of the subject property or immediate construction of a dwelling. The requirements of state law may contain specific standards regulating development of the subject property and the applicant should contact the Department of Administrative Services (DAS - State Services Division, Risk Management - Measure 37 Unit, 1225 Ferry Street SE, U160, Salem, OR 97301-4292; Telephone: (503) 373-7475; website address: <http://www.oregon.gov/DAS/Risk/M37.shtml>) and have the State of Oregon evaluate a Measure 37 claim and provide evidence of final state action before seeking county land use approval.

IT IS HEREBY FURTHER ORDERED that the other county land use regulations and rules that still apply to the property require that land use, sanitation and building permits be approved by Lane County before any development can proceed. Notice of this decision shall be recorded in the county deed records. This order shall be effective and in effect as described in LC 2.770 and Ballot Measure 37 to the extent permitted by law. This order does not resolve several questions about the effect and application of Measure 37, including the question of whether the right of applicant to divide or build dwellings can be transferred to another owner. If the ruling of the Marion County Circuit Court in *MacPherson v. Dept. of Administrative Services*, (Marion County Circ. Ct. Case No. 00C15769, October 14, 2005) or any other court decision involving Ballot Measure 37 becomes final and that decision or any subsequent court decision has application to Lane County in a manner that affects the authority of this Board to grant relief under Ballot Measure 37 and LC 2.700 through 2.770 then the validity and effectiveness of this Order shall be governed by LC 2.770 and the ruling of the court.

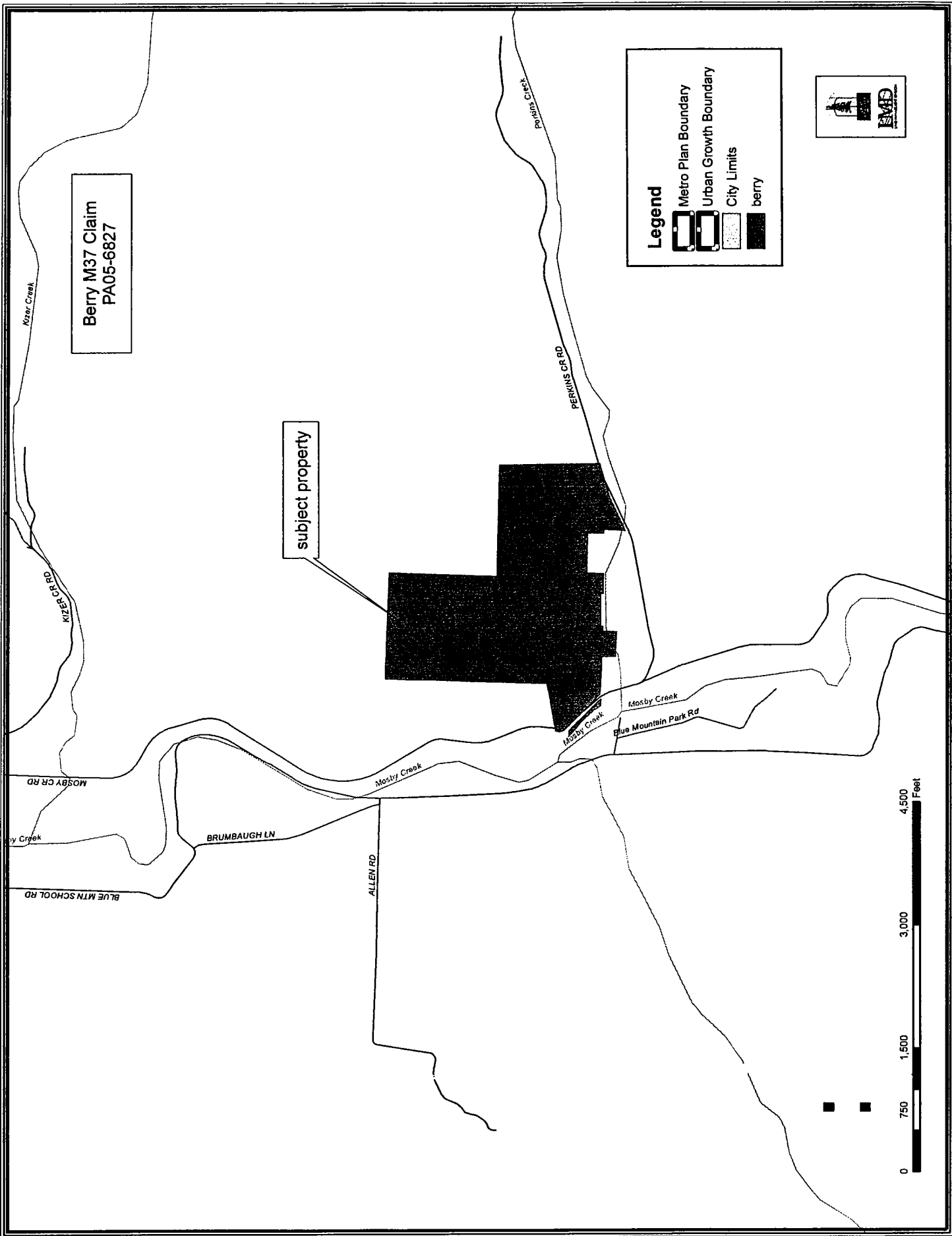
DATED this _____ day of _____, 2006.

Bill Dwyer, Chair
Lane County Board of County Commissioners

APPROVED AS TO FORM

Date 10-17-2006 Lane County


OFFICE OF LEGAL COUNSEL



Application for Claims Under LC 2.700 through 2.770

Due to Regulatory Reduction of Property Value Under Provisions Added to ORS Chapter 197 by BM37

Note: This completed form together with the referenced supporting documentation and application fee must be submitted to the Lane County Land Management Division, 125 East 8th Avenue, Eugene, Or., 97401 for all claims subject to the provisions added to ORS Chapter 197 by Ballot Measure 37 (November 2, 2004), to be considered for compensation under LC 2.700 through 2.770. In all cases, the applicant has the burden of demonstrating, with competent evidence, that all applicable criteria are met and the applicant would be entitled to compensation if the land use regulation continues to apply. Use additional paper, if necessary.

1. Applicant/ Agent

Robert + Mary Jane Berry 76171 Mosby Creek Rd. 541) 942-4222
 Applicant Name (Please Print) Mailing Address Cottage Grove, OR 97424 Phone

 Agent Name (Please Print) Mailing Address Phone

2. Property Owner

Please provide the Name, Mailing Address and telephone number of all property owners of record holding interest in the property that is the subject of this application. Include a complete listing of all lien holders, trustees, renters, lessees or anyone with an interest in the property and describe the ownership interest.

Robert Berry 76171 Mosby Creek Road 541) 942-4222
 Property Owner Name (Please Print) Mailing Address Cottage Grove, OR 97424 Phone

Mary Jane Berry 76171 Mosby Creek Road 541) 942-4222
 Property Owner Name (Please Print) Mailing Address Cottage Grove, OR 97424 Phone

3. Legal Description

Please provide an accurate legal description, tax account number(s), map, street address and location of all private real properties that are the subject of this application.

Assessor Map & Tax Lot 21 02 19 00 00100

Street Address 76171 Mosby Creek Road Legal Description Attached
Cottage Grove, OR 97424

4. Identification of Imposed Land Use Regulation

Please identify the Lane Code section or other land use regulation imposed on the private real property that is alleged to restrict the use of the subject property in a manner that reduces the fair market value. Include the date the regulation was first adopted, enforced or applied to the subject property and a written statement addressing all the criteria in LC 2.740(1).

E 40 Lane Code 16, 211 (5), (6), (7) and (10)

5. Title Report

Please attach a Preliminary Title Report showing title history and continuous ownership traced to the earliest family member ownership, the date of current owner(s) acquisition and all current interests of record for the subject property, issued within 30 days of the application submittal. Provide copies of relevant deeds.

6. Appraisal/Regulatory Effect

Please provide one original, signed appraisal prepared by an appraiser licensed by the Appraiser Certification and Licensure Board of the State of Oregon addressing the requirements of provisions added to ORS Chapter 197 by Ballot Measure 37 (November 2, 2004) and indicating the amount of the alleged reduction in fair market value by showing the difference in the fair market value of the property before and after the application of the challenged regulations as of the date the owner makes written demand for compensation. Include all of the supporting methodology, assumptions and calculations affecting the appraisal.

Analysis attached

7. Leases, Covenants, Conditions and Restrictions

Please provide copies of any leases or covenants, conditions and restrictions applicable to the subject property.

None

8. Identification of Relief Sought

Please specifically indicate what relief is being sought, either a monetary value of the claim describing the reduction in fair market value of the property or the specific use authorization sought in any waiver of the land use regulation.

Not seeking monetary compensation

Request authorization to split property for subdividing

I (we) have completed all of the attached application requirements and certify that all statements are true and accurate to the best of my (our) knowledge and belief. I am (We are) authorized to submit this application on behalf of all those with an interest in the property and all the owner(s) agree to this claim as evidenced by the signature of those owner(s) below. Include additional signatures, as necessary.

Entry by County or its designee upon the subject property is authorized by the owner(s) and the owner(s) consent to the application for claims under provisions added to ORS Chapter 197 by Ballot Measure 37 (November 2, 2004).

Robert Berry

MaryJane Berry
Owner(s) Signature

Dec 29, 2005

Date

Robert Berry

Applicant/Agent Signature

Dec 29, 2005

Date

The following contacts are provided to assist you in finding the necessary information for this application.

For zoning and land use information, please contact the Land Management Division at 682-3577.

This phone contact is a message line. Please leave a message and a Planner will return your call.

For deeds and records information, please contact Lane County Deeds and Records at 682-3654.

43489

ALSO EXCEPTED: beginning at a point marked by an iron rod on the East-West center line of said Section 19, which point is South 89° 41' East a distance of 1358.45 feet from a stone marking the center of said Section 19; thence North a distance of 210.9 feet to a point marked by an iron pipe; thence South 89° 41' East parallel with said East-West center line of said Section a distance of 495.2 feet to a point marked by an iron pipe; thence South a distance of 210.9 feet to a point marked by an iron rod on said East-West center line; thence North 89° 41' West along said East-West center line a distance of 495.2 feet to the Point of Beginning, in Lane County, Oregon.

SAVE AND EXCEPT: That portion conveyed by John F. Walden, et al; to Lane County, a political subdivision, recorded April 3, 1933, in Book 175, Page 623, Lane County Oregon Deed Records, in Lane County, Oregon.

The true and actual consideration for this transfer is \$28,000.00.

Dated: ~~March~~ 12, 1970.

John E. Lee
Olga Lee

STATE OF OREGON)
) ss.
COUNTY OF LANE)

Personally appeared the above named JOHN E. LEE and OLGA A. LEE, Husband and wife, and acknowledged the foregoing instrument to be their voluntary act and deed. Before me:

Dated: ~~March~~ 12, 1970.



Barbara J. Watkins
Notary Public - Oregon
My Commission Expires: October 1971



SEP 25 1999

Mr. and Mrs. Robert Berry
46171 Mosby Creek Rd.
Cottage Grove, OR 97424

SEP 25 REC'D

Dear Robert and Mary Jane,

Thank you for the opportunity to provide you with this Comparative Market Analysis on your property at 76171 Mosby Creek Rd, Cottage Grove, OR

I hope to assist you in the future in the marketing of this property.

If you have any unanswered questions in this regard, please feel free to call me at any time.

Sincerely,

Mick Cates
Broker
RE/MAX Integrity

RE/MAX Integrity
4710 Village Plaza Loop, Suite 200
Eugene, Oregon 97401
Office: (541) 345-8100
Fax: (541) 302-4899



Comparative Market Analysis

For: Robert and Mary Jane Berry

Subject Property:

76171 Mosby Creek Rd.
Cottage Grove, Oregon 97424

Tax Lot: 21-02-19-00-00100

Tax Account: 1080231

Subject Property Description:

This is a 126.56 acre parcel zoned E-40 that includes a modest home approximately 2342 square feet in size including three bedrooms and one bath. The home was built in 1948 and has been partially updated particularly in the kitchen area. Improvements to the property include a small lean-to/shed and a small barn/shed.

The purpose of this CMA is to establish the current fair market value of subject property. Additionally, this CMA will establish the value of the property if it were currently subdivided into 16 buildable, 5 acre parcels plus the existing home on the remaining approximately 46.56 acres. The difference of these values will be noted.

I have provided sales data for comparable sized acreages as well as modest homes on relatively small acreages (3.21-6.65 acres). I have also included sales data on bare land parcels of 4.07-5.0 acres in size. Additionally, I have provided sales information on properties which include modest homes on mid sized parcels (30-53.15 acres). All included sales have occurred in the previous twelve months.

Values:

To establish the current market value of the subject property in its present condition I have used similar sized bare land parcels in addition to smaller

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parcels with modest homes. This is the most accurate comparison method as there are very few parcels recently sold that are similar in size that include modest homes.

The Data Includes:

1. 30701 Camas Swale Rd. in Creswell, Oregon – Tax Lot 19-04-11-106 . Zoned E-40. 184.64 acres sold for \$280,000 or \$1,516.46/Acre.
2. No Site Address – Tax Lot 18-10-34-400 Zoned E-40. This sale is 162.92 acres and sold for \$550,000 or \$3,376/Acre.
3. No Site Address – Tax Lot 18-10-34-200 Zoned E-40. This sale is 159.51 acres sold for \$550,000 or \$3,439/Acre.
4. No Site Address – Tax Lot 18-06-02-100 Zoned F-2. This sale is 143 acres sold for \$275,000 or \$1,923/Acre.

The average price/acre of these bare land parcels sales is \$2,544/Acre based on this data the subject property without improvements would be worth:

121.69 acres x \$2,544.00/Acre or \$309,579

To arrive at the total value of the subject I have provided recent sales of 5 properties with modest homes on approximately 5 acre sites. The data indicates these five sales range in value from \$243,000 to \$359,500 and averages \$301,900.00

Therefore the total current fair market value of the subject property is:

$\$309,579.00 + \$301,900.00 = \$611,479.00$

Projected Subdivided Fair Market Value:

There are seven sales which have occurred on buildable bare land parcels of approximately 5 acres (the data is included). They average 4.67 acres in size and \$183,171.00 in price.

This indicates a current fair market value of 16 (5) acre parcels sub divided off the subject parcel would have a value of:

$\$183,171.00 \times 16 = \$2,930,743.00$

There are 10 sales which have recently occurred with modest homes sited on larger acreages. They range in size from 30 acres to 53.15 acres and from \$421,000 to \$650,000 and average 41.54 acres in size and \$481,500.00 in sales price.

Therefore the current fair market value of the subject property if it were subdivided as discussed above would be:

16 (5) acre parcels \$2,903,743.00

Existing Home and

Remaining 46.56 acres + \$481,500 = \$3,385,243.00

The difference between the current fair market value of the existing subject property and if it were subdivided as proposed above:

$$\begin{array}{r} \$3,385,243.00 \\ - \quad \$611,479.00 \\ \hline \$2,773,764.00 \end{array}$$

If I may be of further service in this matter please do not hesitate to call me.

Sincerely,



Mick Cates
Broker
RE/MAX Integrity