

In the Matter of Claim No. CL 07-01)
for Compensation under Measure 37 submitted)
by Robert Smejkal on behalf of the Fred Smejkal)
and Louise Judith Smejkal Irrevocable Trust)

/ / / / /

3. The Board of County Commissioners denies Claim No. CL 07-01.

Dated this 27th day of December, 2006.

BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

Approved as to form

By: Sarah Hanson
County Counsel

By: Joe Corsiglia
Joe Corsiglia, Chair

By: Rita M. Bernhard
Rita Bernhard, Commissioner

By: not present
Anthony Hyde, Commissioner

Measure 37 Claim

Staff Report

DATE: November 20, 2006

FILE NUMBERS: CL 07-01

CLAIMANT: James A. Smejkal, Trustee
Fred Smejkal and Louise Judith Smejkal Irrevocable Trust
42142 NW Palace Drive
Banks, OR 97106

SUBJECT PROPERTY

PROPERTY LOCATION: Janshaw Road

TAX ACCOUNT NUMBER: 5301-000-01200

ZONING: Rural Residential-5 (RR-5)

SIZE: .62 acre

REQUEST: To site a single-family dwelling

CLAIM RECEIVED: July 17, 2006

REVISED 180 DAY DEADLINE: January 2, 2007

NOTICE OF RECEIPT OF CLAIM: September 2006

As of the date of the staff report, no requests for hearing have been received.

DATE OF BOCC REVIEW: December 13, 2006

I. BACKGROUND:

The subject property includes an undeveloped triangular-shaped parcel acquired by the Trust on January 30, 1995 as part of a 1031 IRC exchange. Property dimensions are approximately: 146.84 feet by 126.69 feet by 155.60 feet. The property is undeveloped and abuts resource zones on two sides. The property owner applied for a variance from setback standards to site a dwelling on the parcel in 2004. That application was denied, in part because the parcel is not large enough to accommodate setbacks for domestic wells and subsurface sewage disposal drainlines. Administrative rules typically require at least 100 feet between a well and the drainfield.

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 information supplied by the claimant, the property is owned by the Fred Smejkal and Louise Judith Smejkal Irrevocable Trust dated March 4, 1974. As noted above, James A. Smejkal is the trustee of the trust.
2. **Date of Acquisition:** The property was acquired by the trust on January 30, 1995, by deed Warranty Deed located in the Columbia County Clerk at F 95-753.

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

The property was zoned in RR-5 in 1984 and that zoning has remained on the property to date. At the time the RR-5 zoning designation was applied, property with access to a community water system could be divided into parcels as small as two acres. However, the subject property is smaller than two acres, and there is no evidence that the property can be served by a community water system. Therefore, at the time of acquisition, a dwelling could not be placed on the property outright, and public health and safety concerns (e.g., the lack of available space on the parcel to accommodate a well, a septic system and applicable yard setbacks) led to the denial of the claimant's application for a variance (see V 04-02) that would have allowed development of the property.

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

In 2000, the county adopted Ordinance 99-5, which amended the provisions of the RR-5 zone to prohibit the creation of new lots or parcels smaller than five acres in size. The claimant asserts that the revised rural residential development standards reduced the fair market value of the property by eliminating the ability to subdivide the parcel into smaller than five acre lots. The claimant asserts that the following standards prevent the proposed development:

- CCZO 601 Purpose of the RR-5 Zone
- CCZO 602 Permitted Uses
- CCZO 603 Conditional Uses
- CCZO 604 Development Standards
 - 604.1 Minimum Parcel Size [5 acres]
 - 604.2 Development Standards [access to domestic water supply, on-site subsurface sewage disposal, be located within a rural fire protection district]
 - 604.3 Minimum parcel width [100 feet]
 - 604.4 Minimum parcel depth [100 feet]
 - 604.5 Parcel Access standards
 - 604.6 Setbacks from Property Lines [30 feet] and Resource Zones [50 feet]
 - 604.7 Maximum Building Heights [excluding chimneys, 35 feet]
 - 604.8 Resource Related and Auxiliary Building Heights [50 feet]
 - 604.9 Development Standards for Churches
- CCZO 605 Standards for Lots or Parcels of Record
- CCZO 607 Two or More Existing Dwellings on a Parcel
- CCZO 621 Purpose of the RR-2 Zone

- CCZO 622 Permitted Uses
- CCZO 623 Conditional Uses
- CCZO 624 Development Standards
 - 624.1 Minimum Parcel Size [2 acres]
 - 624.2 Development Standards [access to community water supply, on-site subsurface sewage disposal or public sewer, access to public road, be located within a rural fire protection district]
 - 624.3 Minimum parcel width [100 feet]
 - 624.4 Minimum parcel depth [100 feet]
 - 624.5 Parcel Access standards
 - 624.6 Setbacks from Property Lines [30 feet] and Resource Zones [50 feet]
 - 624.7 Maximum Building Heights [excluding chimneys, 35 feet]
 - 624.8 Resource Related and Auxiliary Building Heights [50 feet]
 - 624.9 Development Standards for Churches
- CCZO 625 Lot or Parcel of Record
- CCZO 626 Two or More Existing Dwellings on a Parcel

- CCZO 651 Purpose of the Rural Community Zone
- CCZO 652 Permitted Uses
- CCZO 653 Conditional Uses
- CCZO 654 Development Standards
 - 654.1 Minimum Parcel Size [40,000 square feet]
 - 654.2 Minimum average parcel width [75 feet]
 - 654.3 Minimum average parcel depth [75 feet]
 - 654.4 Parcel Access standards
 - 654.5 Setbacks from Property Lines [20 feet] and Resource Zones [50 feet]
 - 654.6 Maximum Building Heights [excluding chimneys, 35 feet]
 - 654.7 Resource Related and Auxiliary Building Heights [50 feet]
 - 654.8 Development Standards for small-scale commercial uses
 - 654.9 Development Standards for small-scale industrial uses
 - 654.10 Development Standards for Churches

Claimant has not adequately explained why the provisions of CCZO Sections 620 through 626 and Sections 651 through 654 apply to the property, as the property has never been zoned either RR-2 or RC. As for the RR-5 provisions, claimant has not explained why CCZO Sections 601, 603, 604.7, 604.8, 604.9 and 607 apply to the proposed development or restrict the use proposed. With respect to CCZO Subsections 604.1, 604.3 and 604.4, those standards do not apply as the subject property is a lot of record as defined in CCZO 605. With respect to CCZO 603 and 605, claimant has not explained why those regulations restrict the use of his property within the meaning of Measure 37. Dwellings are permitted uses in the zones, provided development standards are satisfied, and the lot of record provisions allow for development on otherwise substandard parcels if the parcel was legally created prior to 1991. This parcel was created by deed in 1963.

CCZO Sections 604.2, 604.5 and 604.6 appear to apply to the subject property, and do restrict development of the property; however, those standards are public health and safety standards that were applied to the property prior to the acquisition of the property by the claimant. Therefore, the land use regulations at issue are exempt from compensation or waiver under Measure 37.

D. CLAIMANT'S ELIGIBILITY FOR FURTHER REVIEW

Claimant acquired an interest in the property before the current provisions of the RR-5 zone became effective. However, claimant has not demonstrated that the changes in regulations have precluded the proposed development. As noted above, the regulations in place at the time the property was acquired by claimant would not have allowed the placement of a dwelling on the subject property.

E. STATEMENT AS TO HOW THE REGULATIONS RESTRICT USE

The Claimant states that the property cannot be developed as proposed due to the county's rural residential development standards. Staff concedes that the following standards "restrict" the use of claimant's property within the meaning of Measure 37:

F. EVIDENCE OF REDUCED FAIR MARKET VALUE

1. Value of the Property As Regulated.

The claimant's representative has submitted a copy of a 1995 deed showing that the parcel was conveyed to claimant for \$12,061 in 1995. There is no other evidence as to current value.

2. Value of Property Not Subject To Cited Regulations.

Claimant has not submitted any evidence of value if the property is not regulated.

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

Per page 1 of the Measure 37 claim, the claimant asserts that the difference between the value of the property per the current regulations and the value of the property with a dwelling sited on it is \$60,000.

Staff does not agree that the information provided by the claimant is adequate to fully establish the current value of the property or the value of the property if it was not subject to the cited regulations. Staff concedes, however, that it is more likely than not that the property would have a higher value if developed for residential use.

G. COMPENSATION DEMANDED

Claimant claims the following compensation, per page 1 of the Measure 37 claim forms: \$60,000.

(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.

As noted above, Paragraph (3)(B) applies, in that at least some of the regulations that restrict development of the property are public health and safety regulations. Paragraph (3)(E) applies, in that the land use regulations cited were enacted prior to the date of acquisition by the property owner.

'4) 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 Claimant has demonstrated a reduction in fair market value of the property due to the cited regulations and that the regulations are not exempt regulations, 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 CCZO Sections 600 through 654.

(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 development standards for RR-5 zoned parcels adopted in 1984 and amended in 2000, which were enacted prior to the effective date of Measure 37 on December 2, 2004. At least some of the cited standards were applied to deny an application filed by claimant in 2004. The subject claim was filed on July 17, 2006, which is within two years of the effective date of Measure 37. Staff assumes that the two-year filing deadline for Measure 37 is later than the two year filing deadline from the date the owner submitted an application in which the land use regulations were approval criteria. If that is the case, then the 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 that the Claimant has demonstrated a reduction in fair market value of the property due to the cited regulation, the Board may pay compensation in the amount of the reduction in fair market value caused by said regulation or modify, remove or not apply the land use regulations cited above.

III. STAFF RECOMMENDATION:

Staff concludes that the claimant has NOT met the threshold requirements for approval of a Measure 37 claim.

The following table summarizes staff findings concerning the land use regulations cited by the Claimant as a basis for the claim. In order to meet the requirements of Measure 37 for a valid claim an applicable 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. As noted above, many of the regulations cited by claimant do not apply to the property.

LAND USE CRITERION	DESCRIPTION	RESTRICTS USE?	REDUCES VALUE?	EXEMPT?
CCZO 604.2	Development Standards [access to domestic water supply, on-site subsurface sewage disposal, located within a rural fire protection district]	No	No	Yes
604.5	Parcel Access standards	No	No	Yes
604.6	Setbacks from Property Lines [30 feet] and Resource Zones [50 feet]	No	No	Yes