

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

In the Matter of Claim No. CL 06-05)
for Compensation under Measure 37)
submitted by Stephen M. Edney and) Order No. 24-2006
Sally Edney, trustees for the Edney Family)
Living Trust)

WHEREAS, on July 27, 2005, Columbia County received claims under Measure 37 and Order No. 84-2004 from Stephen M. Edney and Sally Edney, Reno, Nevada, trustees of the Edney Family Living Trust, for property having Tax Account Number 3210-000-01000; and

WHEREAS, on October 15, 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 January 5, 2006 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 January 5, 2006 stipulation, the deadline for a County decision on the claims is now March 29, 2006; and

WHEREAS, according to the information presented with the Claim, Mr. and Mrs. Edney have continuously owned an interest in the property since July 23, 1984, and are currently the trustees of a revocable living trust that includes the property as an asset of the trust; and

WHEREAS, on the prior to the date of acquisition, Columbia County zoned the subject property Primary Forest (F-38) which allowed land divisions for parcels with a minimum parcel size of 38 acres; and

WHEREAS, the subject parcel is zoned Primary Forest (PF-76) pursuant to the Columbia County Zoning Map; and

WHEREAS, pursuant to Columbia County Zoning Ordinance (CCZO) Section 506.1, the minimum size for new parcels is 76 acres; and

WHEREAS, Mr. and Mrs. Edney claim that the minimum lot size requirement for new land divisions has restricted the use of the property and has filed a claim for \$2,430,700; and

WHEREAS, Mr. and Mrs. Edney desire to subdivide the property into approximately 30 two-acre lots; and

WHEREAS, the Board of County Commissioners concludes that the zoning in place at the time the Edneys acquired the subject property did not permit subdivisions or the parcel sizes proposed in the claim; and

WHEREAS, the Board of County Commissioners nevertheless concludes that the imposition of the PF-76 zoning of the property restricted development on the property by eliminating the option to divide the property into two 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 Revised Staff Report for Claim Number CL 06-05, dated April 14, 2006, which is attached hereto as Attachment 1, and is incorporated herein by this reference.
2. In lieu of compensation, the County waives CCZO 506.1 to the extent necessary to allow the Claimants to partition the property into two 38+-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.

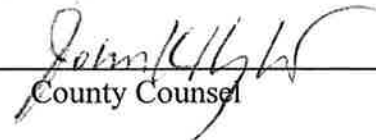
E. By developing the parcel in reliance on this waiver, Claimants do so at their own risk and expense. The County makes no representations about the legal effect of this waiver on the sale of lots resulting from any land division, on the rights of future land owners, or on any other person or property 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 3210-000-01000, without cost.

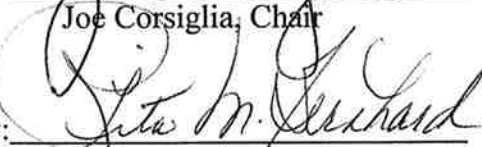
Dated this 26th day of April, 2006.

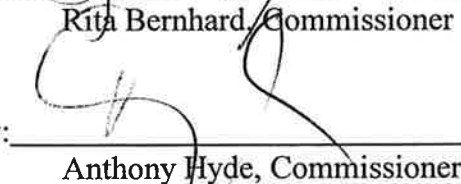
BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

Approved as to form

By: 
County Counsel

By: 
Joe Corsiglia, Chair

By: 
Rita Bernhard, Commissioner

By: 
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

REVISED Staff Report

DATE: April 14, 2006

FILE NUMBERS: CL 06-05

CLAIMANTS/OWNERS: Stephen Edney and Sally Edney, Trustees
Edney Family Living Trust
4481 West Hidden Valley Drive
Reno, NV 89502

**CLAIMANT'S
REPRESENTATIVE:** Jim Dias
2504 Sykes Road
St. Helens, OR 97051
503.397.5556

SUBJECT PROPERTY

PROPERTY LOCATION: 51952 & 51954 Mountain View Road
Scappoose OR 97056

TAX ACCOUNT NUMBERS: 3210-000-01000

ZONING: Primary Forest-76 (PF-76) (Tax Lot 100)

SIZE: 79.00 acres

REQUEST: To subdivide the parcel into 30 two-acre lots, plus access roads and infrastructure

CLAIM RECEIVED: July 27, 2005; Claim Stayed per Agreement dated January 5, 2006

REVISED 180 DAY DEADLINE: March 29, 2006

NOTICE OF RECEIPT OF CLAIM: Mailed March 9, 2006.
Requests for hearing were received from:

Carl L. Krieger and Sandy Krieger 51876 Mountain View Road Scappoose, OR 97056	Claudette J. Teifke and Fred C. Teifke 51680 Mountain View Road Scappoose, OR 97056
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TESTIMONY WAS RECEIVED FROM THE FOLLOWING PARTIES AT THE APRIL 9, 2006 HEARING:

Patricia J. Zimmerman 2057 Rabinsky Road	Alice Hulse 51958 Mountain View Road
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Claudette J. Teifke and Fred C. Teifke, Jr.
1680 Mountain View Road
Scappoose, OR 97056

HEARING DATE: April 9, 2006, Board decision tabled to April 26, 2006

I. BACKGROUND:

The subject property includes 79 acres and is developed with a single family dwelling that assessors records date to 1863. According to the claimants, they acquired the property on July 23, 1984. According to evidence and testimony presented at the April 9, 2006 hearing, on July 23, 1984 the property was zoned Primary Forest (F-38). This zoning was applied through the adoption of Ordinance No. 83-7 on June 29, 1983. On August 1, 1984, the county adopted Ordinance 84-4, a variation of which was acknowledged by LCDC in 1985. Ordinance 84-3 explicitly repealed Ordinance 83-7 (See 84-3, Section V.) Ordinance 84-3 applied the PF-76 zoning to the property that claimants allege reduces the development potential of their property.

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:** The claimants submitted a title report issued by Ticor Title on July 26, 2005. The title report shows that Stephen Monroe Edney and Sally Weare Edney conveyed fee title to the subject property to Stephen Edney and Sally Edney as co-trustees of the Edney Family Living Trust dated 2/3/94, in a warranty deed recorded in the Deed Records of the Columbia County Clerk on February 7, 1994. (Columbia County Deed Records F94-1475.)

2. **Date of Acquisition:** According to the claimants, the property was acquired by Stephen Edney and Sally Edney on July 23, 1984. A property tax summary from the Columbia County Assessor's office supports that assertion.

Based on an advisory opinion by the Oregon Attorney General, which was endorsed by Columbia County Assistant County Counsel Sarah Hanson on September 7, 2005, if a property is conveyed by grantors into a revocable living trust, the date of acquisition for the purposes of Measure 37 is the date the trustors acquired the property. In this case, Stephen Edney and Sally Edney acquired the property in July 1984 and conveyed the property into a revocable trust on February 7, 1994. Therefore, the date of acquisition is July 23, 1984.

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

The property was zoned F-38 at the time of acquisition. According to Section 505.1 of Ordinance 83-7, the minimum parcel size for new parcels in the F-38 zone was 38 acres. A non-forest dwelling could be approved

on the property provided the applicant demonstrated compliance with conditional use criteria set out in Section 504, and setback standards set out in Section 503. A forest related dwelling could be approved provided the applicant demonstrated compliance with standards set out in Section 507.1. If an applicant proposed to divide a parcel to separate the forest related dwelling from the parent parcel, the dwelling site could be no smaller than one acre. Section 507.4 provided that "[o]nly one (1) lot for a forest related dwelling may be created from any lot of record which existed at the date this Ordinance became effective [June 29, 1983.]"

The property was also subject to partition regulations adopted by the county in 1973.

From the testimony and evidence, it appears that the county land use regulations in effect at the time of acquisition permitted no more than one land division to create two parcels including at least 38 acres each, or a forest dwelling land division that resulted in no less than a one acre dwelling site, with a 78-acre remainder parcel.¹ It appears that if the property were divided into two parcels comprised of at least 38 acres each, a nonforest dwelling could have been placed on each resulting parcel, in accordance with the applicable regulations. As noted above, the subject property is developed with a single-family dwelling constructed prior to zoning in the area, so the maximum number of additional dwellings that could be permitted under the F-38 zoning is one.

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

The claimants allege that the PF-76 zoning designation prevents the claimants from subdividing their property and constructing dwellings on the resulting lots. The PF-76 zoning designation was applied to the subject property in 1984, after claimants acquired the subject property. The PF-76 zoning limited claimant's ability to divide the property into parcels smaller than 76 acres, which is more restrictive than the zoning in place when the property was acquired.

Pat Zimmerman testified that she believed that Ordinance 80-8 applies to development on the property as well. Ordinance 80-8 was adopted to assure that agricultural lands were protected in accordance with Goal 3 (Agricultural Lands). Under Ordinance 80-8, land divisions and developments were prohibited on land located outside rural residential enclaves identified in the ordinance. The subject property was located outside of the rural residential enclaves. However, Ordinance 80-8 also provided that development on forest land with forest soil rankings 1-5 could be evaluated in accordance with Goal 4 (Forest Lands). See Section 4, Ordinance 80-8. Staff interprets this to mean that the county could either apply Goal 3 or Goal 4 when evaluating land use applications affecting forest lands. In this case, staff asserts that the adoption of Ordinance 83-7 demonstrates that as far as the subject property is concerned, the county chose to implement Goal 4 rather than Goal 3 and, therefore, the provisions of Ordinance 80-8, which were not repealed by the adoption of Ordinance 83-3, do not apply to the property subject to this claim.

D. CLAIMANT'S ELIGIBILITY FOR FURTHER REVIEW

Claimants acquired an interest in the property before CCZO Section 506.1 became effective and therefore the Claimants may be eligible for compensation and/or waiver of the cited regulation under Measure 37.

E. STATEMENT AS TO HOW THE REGULATIONS RESTRICT USE

The Claimants state that they cannot divide their property as proposed due to the county's 76-acre minimum parcel size standard. Staff concedes that CCZO 506.1 can be read and applied to "restrict" the use of claimants' property within the meaning of Measure 37. However, staff does not agree that claimants are

¹As Ms. Zimmerman notes, the county was subject to an LCDC enforcement order from 1982 through 1985, and during that time the county adopted a series of ordinances in an effort to address the issues set out in the enforcement order. Staff does not believe that the acknowledgement status of a county ordinance affects its applicability to development requests submitted during the time the ordinance was in effect. Accordingly, staff has revised its analysis to reflect the land use regulations in effect at the county level on July 23, 1984, the date the Edneys acquired the property. Staff makes representations that DLCD will waive its regulations in order to permit further land divisions or residential development on the property.

entitled to subdivide their property as proposed, because the property was subject to regulation as a resource zone at the time the claimants acquired the property. The regulations in place at the time of acquisition could have permitted no more than two parcels and no more than a total of two dwellings.

F. EVIDENCE OF REDUCED FAIR MARKET VALUE

1. Value of the Property As Regulated.

The claimants submitted copies of county assessor's records that estimate the value of the property as \$329,100 (\$293,600 for land and \$35,500 for improvements.)

2. Value of Property Not Subject To Cited Regulations.

Claimants allege that if their property is subdivided, the developed property would be worth more than \$2,700,000. They base their estimate on realtor summary sheets for five properties, ranging in size from 1.13 acre to 2.75 acres in size. The summary sheets are dated March 15, 2006, and provide general descriptions of the location and services available to the properties. The parcels sold for between \$80,000 for the 2.75 acre parcel to \$225,000 for a 2.01 acre parcel located on a paved road. The other parcels do not front paved roads. None of the parcels are developed. Based on an average sales price of \$124,980, the real market value of claimants' property if divided into 30 2-acre lots is \$3,749,400.

As noted above, the zoning in place at the time claimants acquired the subject property would not have allowed the subdivision of the property into two acre lots. The claimants have not submitted testimony or evidence estimating the value of the property if divided into two parcels, with each parcel developed with a dwelling.

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

The written documentation in support of the claim appears to allege a total reduction in value of \$3,420,300 (the difference between the estimated market value of the property in its current condition, and the estimated value of the property if divided into 30 two-acre lots and sold at \$124,980 per lot.)

While staff does not agree that the information provided by the claimants is adequate to fully establish the current value of the property or the value of the property if it was not subject to Ordinance 84-4, staff concedes that it is more likely than not that the property would have a higher value if divided into two parcels developed with dwellings than as single 79-acre resource parcel developed with a single dwelling.

Staff notes that this value assumes that the second parcel will be developed with a dwelling prior to sale to third parties. If the subject property is merely partitioned into a two parcels with one parcel sold as-is, there is a significantly lower value, as the attorney general opinion concludes that while the claimants themselves may avail themselves of the benefits of Measure 37 and develop the property according to the regulations in place at the time of acquisition, that benefit is not transferable. Nevertheless, staff concludes that for the purpose of establishing a loss in value, the claimants have made a prima facie case that the application of the PF-76 zoning on the property has resulted in a loss in value.

G. COMPENSATION DEMANDED

\$2,430,700 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.**

CCZO Section 506.1 does not qualify for any of the exclusions listed.

Staff notes that other standards, including conditional use criteria and forest-related dwelling standards in effect in July 1984, 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.

(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.

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 or in lieu of compensation, modify, remove, or not apply the provisions of CCZO Section 506.1 that prohibit land divisions that result in parcels of less than 76 acres and permit no more than one dwelling on the 79 acre parcel.

(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 provisions of the PF-76 zoning regulations which were enacted prior to the effective date of Measure 37 on December 2, 2004. The subject claims were filed on July 27, 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.

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 or in lieu of compensation, modify, remove, or not apply CCZO Section 506.1.

III. STAFF RECOMMENDATION:

Based on the above findings, staff concludes that the claimants have met the threshold requirements for proving a Measure 37 claim.

The following table summarizes staff findings concerning the land use regulations cited by the Claimant as a basis for their claim. In order to meet the requirements of Measure 37 for a valid claim 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 regulation below has been found to meet these requirements of a valid Measure 37 claim:

LAND USE CRITERION	DESCRIPTION	RESTRICTS USE?	REDUCES VALUE?	EXEMPT?
CCZO 506.1	Limiting substandard parcel divisions to uses that do not include non-forest dwellings	Yes	Probably	No

Staff recommends the Board of County Commissioners take action to determine the amount, if any, by which the cited regulations reduced the value of the Claimant's property, and act accordingly to pay just compensation in that amount, or, in the alternative, to not apply CCZO Section 506.1.