

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

In the Matter of Claim No. CL 06-9 for Compensation)
under Measure 37 submitted by Forrest and Geraldine) Order No. 40-2006
Hemeon)

WHEREAS, on August 7, 2005, Columbia County received a claim under Measure 37 and Order No. 84-2004 from Forrest and Geraldine Hemeon related to a 54.60 acre parcel on Wallace Road in Mist, Oregon, having Tax Account Number 6514-000-0900; 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 December 13, 2005 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 December 13, 2006 stipulation, the deadline for a County decision on the claims is now May 17, 2006; and

WHEREAS, according to the information presented with the Claim, Mr. and Mrs. Hemeon have continuously owned an interest in the property since 1965, and are currently the sole fee owners of the property; and

WHEREAS, in 1965 Columbia County did not regulate minimum lot sizes or impose dwelling siting standards for agricultural lands; and

WHEREAS, the subject parcel is currently designated Primary Agriculture (PA-38) on the Columbia County Zoning Map; and

WHEREAS, pursuant to Columbia County Zoning Ordinance (CCZO), Section 300 et. seq., impose minimum parcel size and dwelling siting requirements on PA-38 zoned property; and

WHEREAS, Mr. and Mrs. Hemeon claim that the minimum lot size requirements and dwelling siting standards have restricted the use of their property and has reduced the value of the property by \$494,000.00; and

WHEREAS, Mr. and Mrs. Hemeon desire to divide the property into approximately 10-acre lots/parcels and place dwellings on those lots/parcels that are currently undeveloped; 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 Staff Report for Claim Number CL 06-9, dated May 8, 2006, which is attached hereto as Attachment 1, and is incorporated herein by this reference.
2. In lieu of compensation, the County waives CCZO 303, 304.1, 305.2 and 309 to the extent necessary to allow the Claimants to divide and develop the subject property as proposed.
3. This waiver is subject to the following limitations:
 - A. This waiver does not affect any land use regulations of 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 #6514-000-0900, without cost.

Dated this 10th day of May, 2006.

BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

Approved as to form

By: John K. Hyde
County Counsel

By: Joe Corsiglia
Joe Corsiglia, Chair

By: Rita M. Bernhard
Rita Bernhard, Commissioner

By: Not Present
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

Staff Report

DATE: May 8, 2006
FILE NUMBER: CL 06-09
CLAIMANTS/OWNERS: Forrest Hemeon
Geraldine Hemeon
14090 Wallace Road
Mist, OR 97016

SUBJECT PROPERTY

PROPERTY LOCATION: 14090 Wallace Road
Mist, OR 97016
TAX ACCOUNT NUMBER: 6514-0000-0900
ZONING: Primary Agriculture (PA-38)
SIZE: 54.60 acres
REQUEST: To partition the parcel into three 10-plus acre parcels
CLAIM RECEIVED: August 7, 2005; Claim Stayed per Agreement dated December 13, 2005
REVISED 180 DAY DEADLINE: May 17, 2006
NOTICE OF RECEIPT OF CLAIM: Mailed April 13, 2006.
As of May 8, 2006, no requests for hearing have been received.
HEARING DATE: May 10, 2006

I. BACKGROUND:

The subject property includes 54.60 acres located south of the Nehalem River and Nehalem Road. It is developed with a single family dwelling, with access via Wallace Road. The subject property was included in an approximately 95-acre parcel at the time the claimants acquired the property. Claimants have sold portions of the property over the years, and have reconfigured the property several times. According to the claimant and county records, in 1977 the applicant received county approval for a three-parcel minor partition for the southerly 38.25 acres of the subject property. It is not clear if the partition was finalized, and no deed conveyances have been recorded that reflect the 1977 configuration.

Claimants request that minimum parcel size standards that were imposed after they acquired title to the property be waived so they can divide the subject property into approximately 10-acre parcels/lots. Claimants

have stated that they intend to convey at least some of the resulting parcels/lots to their children for them to build on.

I. 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 supplied information supporting their claim that Forrest L. Hemeon and Geraldine L. Hemeon are the fee title owners of the subject property.

2. **Date of Acquisition:** Claimants stated in the claim that they acquired the property in 1962, but that the deed evidencing the conveyance was not recorded until 1965. The claimants supplied title documents showing that they acquired the property via a quit claim deed on October 14, 1965, recorded in the Columbia County deed records at Book 159, page 175. Staff has used the deed conveyance date (October 1965) to value the claim.

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

The property was not zoned when the claimants acquired the property in October 1965, and was therefore not subject to any minimum parcel size requirements or dwelling siting standards set out in the county zoning ordinance. The property was subject to subdivision regulations established by state statute in 1955.

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

County zoning was first adopted in 1973, and property zoned Primary Agriculture (A-1) had a minimum parcel size of 40 acres. However, it is not clear whether the A-1 zoning designation applied to the subject property. In 1980, the county adopted Ordinance 80-7, which required an evaluation of agricultural land divisions under Statewide Land Use Goal 3. However, claimants do not assert that zoning adopted prior to 1984 would have applied to the property, nor have they asserted that those standards would have required more strict application than the 1984 zoning standards. Therefore, staff has not evaluated those prior ordinances.

The PA-38 zoning designation was applied to the subject property in 1984, almost 19 years after claimants acquired the subject property. The claimants allege that the PA-38 zoning designation prevents the claimants from dividing their property and constructing dwellings on them. Accordingly, based on the claim, it appears that the county standards that clearly prevent the claimants from developing their property as desired are:

- CCZO 303 Conditional use requirements to site dwellings on agricultural land
- CCZO 304.1 Minimum parcel sizes and setback standards
- CCZO 305.2 Land division requirements for substandard nonfarm parcels
- CCZO 309 Land division requirements for substandard farm parcels

D. CLAIMANT'S ELIGIBILITY FOR FURTHER REVIEW

Claimants acquired an interest in the property before CCZO Section 300, the Primary Agriculture zoning became effective and therefore the Claimants may be eligible for compensation and/or waiver of the cited regulations 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 80-acre minimum parcel size standard. Staff notes that the 80-acre minimum parcel standard is a state regulation (OAR Chapter 660, division 33). The minimum parcel size set out in the CCZO is 38 acres. However, staff concedes that CCZO 303, 304.1, 305.2 and 309 can be read and applied to "restrict" the use of claimants' property within the meaning of Measure 37.

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 2005 value of the property as \$368,300 (\$120,300 for land and \$248,300 for improvements.) Claimants also submitted a broker price opinion from Rick Gardner, Vernonia Realty and Ins. Mr. Gardner estimated that 38 undeveloped acres is worth approximately \$2,500-3,500 per acre. Using that estimate, the undeveloped acreage is worth between \$136,000 and \$191,100.

2. Value of Property Not Subject To Cited Regulations.

Claimants allege that if their property is subdivided and developed with dwellings, the property would be worth in the range of \$819,000 to \$955,500. They base their valuation on a broker price opinion from Rick Gardner, Vernonia Realty and Ins. Center. Mr. Gardner's estimate was based on a per acre estimate of \$15,000-\$17,000 per acre for 38 acres, if that acreage was divided into 10-acre parcels with an approved dwelling on each parcel.

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

The claim alleges a total reduction in value of \$494,000. However, the documentation supporting the claim appears to estimate a total reduction in value ranging from \$450,700 to \$587,200 (current value of the property based on the assessor's market value (\$368,300) subtracted from \$819,000 to \$955,500 (the total value of the property based on a \$15,000-\$17,000 per acre estimate.) The loss in value would be lower if staff used the estimated current value for 54.60 undeveloped acres rather than the assessed fair market value.

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 the cited regulations, staff concedes that it is more likely than not that the property would have a higher value if divided into five 10-plus acre lots developed with single family dwellings than a single 54.60 acre resource parcel developed with one single family dwelling.

Staff notes that this value assumes that the resulting lots will be developed with dwellings prior to sale to third parties. If the subject property is merely subdivided and then sold as undeveloped lots, 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.

G. COMPENSATION DEMANDED

\$494,000 per page 1 of claimants' Measure 37 Claim form.

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 Sections 303, 304.1, 305.2 and 309 do not qualify for any of the exclusions listed.

Staff notes that other siting standards, including fire suppression requirements, access requirements and requirements for adequate domestic water and subsurface sewage, continue to apply as they are exempt from compensation or waiver under Subsection 3(B), above.

(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 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 Sections 303, 304.1, 305.2 and 309.

(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 and dwelling siting provisions of the PA-38 zoning regulations which were enacted prior to the effective date of Measure 37 on December 2, 2004. The subject claims were filed on August 7, 2005, which is within two years of the effective date of Measure 37.

(6) 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 Sections 303, 304.1, 305.2 and 309.

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 303	Conditional use requirements to site dwellings on agricultural land	Yes	Yes	No
CCZO 304.1	Minimum parcel sizes and setback standards	Yes	Yes	No
CCZO 305.2	Land division requirements for substandard nonfarm parcels	Yes	Yes	No
CCZO 309	Land division requirements for substandard farm parcels	Yes	Yes	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 Claimants' property, and act accordingly to pay just compensation in that amount, or, in the alternative, to not apply CCZO Sections 303, 304.1, 305.2 and 309.