

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

In the Matter of Claim No. CL 06-8 for)
Compensation under Measure 37 submitted)
by Robert and Elaine Erickson)

ORDER NO. 48-2006

WHEREAS, on August 15, 2005, Columbia County received a claim under Measure 37 and Order No. 84-2004 from Robert and Elaine Erickson related to a 8.99 acre parcel on Highway 30, Scappoose, Oregon, having Tax Account Number 4130-030-00300; 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 10, 2005 to toll the 180-day claim period pending review of the Marion County decision by the Oregon Supreme Court; and

WHEREAS, on March 27, 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 June 27, 2006; and

WHEREAS, according to the information presented with the Claim, Mr. and Mrs. Erikson have continuously owned an interest in the property since 1993, and are currently the sole fee owners of the property; and

WHEREAS, in 1993 Columbia County permitted lot sizes as small as two acres in the Rural Residential-5 (RR-5) zone under certain circumstances; and

WHEREAS, the subject parcel is currently designated RR-5 on the Columbia County Zoning Map; and

WHEREAS, pursuant to Columbia County Zoning Ordinance (CCZO) provisions that were adopted in 1999, the minimum parcel size in the RR-5 zone is now five acres; and

WHEREAS, Mr. and Mrs. Erickson claim that the minimum lot size requirements and have restricted the use of their property and has reduced the value of the property by \$450,000.00; and

WHEREAS, Mr. and Mrs. Erickson desire to divide the property into approximately four two-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 06-8, dated June 2, 2006, which is attached hereto as Attachment 1, and is incorporated herein by this reference.
2. In lieu of compensation, the County waives CCZO 201, 210, and 604.1 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 Lot number 4130-030-00300 without cost.

Dated this 21st day of June, 2006.

BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

Approved as to form

By: John L. Hyde
County Counsel

By: Joe Corsiglia
Joe Corsiglia, Chair

By: Rita 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: June 5, 2006
FILE NUMBER: CL 06-8
CLAIMANTSS/OWNERS: Robert K. Erickson
Elaine G. Erickson
55349 Columbia River Highway
Scappoose, OR 97056

SUBJECT PROPERTY

PROPERTY LOCATION: North of Fullerton Road
Scappoose, OR 97056
TAX ACCOUNT NUMBER: 4130-030-00300
ZONING: Rural Residential-5 (RR-5)
SIZE: 8.99 acres
REQUEST: To divide the parcel into 2+ acre lots for residential development
CLAIM RECEIVED: August 15, 2005; Claim Stayed per Agreement dated December 10, 2005
REVISED 180 DAY DEADLINE: June 27, 2006
NOTICE OF RECEIPT OF CLAIM: Mailed May 19, 2006.
As of June 2, 2006, no requests for hearing have been received.
BOC REVIEW DATE: June 21, 2006

I. BACKGROUND:

The subject property includes 8.99 acres located north of Fullerton Road and west of Highway 30. The property is developed with a single family dwelling constructed in 1951. The property was acquired by Mr. Erickson's parents in 1944. Mr. Erickson's mother transferred the property to Mr. Erickson and his first wife on December 17, 1976. Mr. Erickson conveyed the property to himself and his second wife, Elaine G. Erikson, by bargain and sale deed on August 19, 1993.

Claimants requests 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 2-acre parcels/lots. Claimants state that they intends to develop the parcels for residential uses.

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 supplied information supporting their claim that Robert K. Erickson and Elaine G. Erickson are the fee title owners of the subject property.

2. Date of Acquisition: Claimants acquired the property via bargain and sale deed on August 19, 1993. (Columbia County Deed Records F93-5246). Staff used this deed conveyance date (August 1993) to evaluate the claim.

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

The property was zoned RR-5 in 1984. 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. The subject property has access to Warren Water, and accordingly, could have been divided into two acre parcels/lots.

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

In 1999, the county amended the provisions of the RR-5 zone to prohibit the creation of new lots or parcels smaller than five acres in size. The claimants assert that the rural residential zoning designation reduced the fair market value of the property by eliminating the ability to subdivide their parcel into smaller than five acre lots. Accordingly, based on the claim, it appears that the county standards that clearly prevent the claimants from developing the property as desired are:

- CCZO 201 General requirement that all development conform with the zoning ordinance
- CCZO 210 Prohibiting land divisions into lots or parcels smaller than the minimum parcel size required in the applicable zoning district
- CCZO 604.1 Establishing the five acre minimum parcel size standard in the RR-5 zone

D. CLAIMANTS'S ELIGIBILITY FOR FURTHER REVIEW

Claimants acquired an interest in the property before the current provisions of the RR-5 zone became effective. 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 states that they cannot divide the property as proposed due to the county's 5-acre minimum parcel size standard. Staff concedes that CCZO 201, 210 and 604.1 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 the properties as \$388,000 (\$139,600 for the land and \$248,400 for improvements). Claimants also submitted copies of real estate listings showing that sales prices for undeveloped rural residential land are between \$32,000 and \$71,000 per acre.

2. Value of Property Not Subject To Cited Regulations.

Claimantss appear to allege that if their property is subdivided, the property would be worth approximately \$75,000 per acre (three additional parcels at \$150,000 per acre).

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

The claim alleges a total reduction in value of \$450,000.

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 two acre lots developed with single family dwellings than a single 8.99 developed with a 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

\$450,000 per page 1 of claimants'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 Sections 201, 210 and 604.1 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 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 CCZO Sections 201, 210 and 604.1.

(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 RR-5 zoning regulations which were enacted prior to the effective date of Measure 37 on December 2, 2004. The subject claim was filed on August 5, 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 Sections 201, 210 and 604.1.

III. STAFF RECOMMENDATION:

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

The following table summarizes staff findings concerning the land use regulations cited by the Claimants as a basis for its 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 regulations below have been found to meet these requirements of valid Measure 37 claim:

LAND USE CRITERION	DESCRIPTION	RESTRICTS USE?	REDUCES VALUE?	EXEMPT?
CCZO 201	General requirement that all development conform with the zoning ordinance	Yes	Yes	Yes
CCZO 210	Prohibiting land divisions into lots or parcels smaller than the minimum parcel size required in the applicable zoning district	Yes	Yes	Yes
CCZO 604.1	Establishing the five acre minimum parcel size standard in the RR-5 zone	Yes	Yes	Yes

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 201, 210 and 604.1.