

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

In the Matter of Claim No. CL 07-11)
for Compensation under Measure 37)
submitted by John S. McCarthy) Order No. 39-2007

WHEREAS, on October 26, 2006, Columbia County received a claim under Measure 37 (codified at ORS 197.352) and Order No. 84-2004 from John S. McCarthy, for property having Tax Account Numbers: 4221-040-00100, 4221-040-00102, 4221-040-00103 and 4221-010-01302; and

WHEREAS, according to the information presented with the Claim, John S. McCarthy has continuously had an interest in the property subject to CL 07-11 since May 6, 1981; and

WHEREAS, the 18.34-acre zoned Rural Residential-5 (RR-5) since 1985; and

WHEREAS, in 1981 the property was not zoned, and thus was not subject to any minimum parcel sizes; and

WHEREAS, pursuant to Columbia County Zoning Ordinance (CCZO) provisions that were adopted in 1999, eliminating the 2 acre go-below, the minimum parcel size in the RR-5 zone is now five acres; and

WHEREAS, John S. McCarthy claims that CCZO Section 604.1 has restricted the use of the property and has reduced the value of the property by \$1,410,000; and

WHEREAS, John S. McCarthy desires to divide the property into six 2.3 to 3 acre 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 Claimant's property and reduces the fair market value of the property to allow a use which was allowed at the time the Claimant 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 07-11, dated March 13, 2007, which is attached hereto as Attachment 1, and is incorporated herein by this reference.

2. In lieu of compensation, the County waives CCZO Section 604.1 to the extent necessary to allow the Claimant to divide the property into six parcels with a minimum lot size of 2 acres.
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 Claimant. If it is later determined that Claimant is 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, Claimant is 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 Claimant, 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, Claimant does so at his 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.

/

/

/

/

/

/

/

/

/

/

/

/

/

/

4. This Order shall be recorded in the Columbia County Deed Records, referencing the legal description which is attached hereto as Attachment 2, and is incorporated herein by this reference, without cost.

Dated this 28th day of March, 2007.

BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

Approved as to form

By: Sarah Hunsen
County Counsel

By: Rita M. Bernhard
Rita Bernhard, Chair

By: Anthony Hyde
Anthony Hyde, Commissioner

By: Joe Corsiglia
Joe Corsiglia, Commissioner

After recording, please return to:

Columbia County
230 Strand Street
St. Helens, OR 97051

**COLUMBIA COUNTY
LAND DEVELOPMENT SERVICES**

Measure 37 Claims

Staff Report

DATE: March 13, 2007
FILE NUMBER: CL 07-11
CLAIMANT/OWNER: John S. McCarthy
P.O. Box 100
Scappoose, Oregon 97056

SUBJECT PROPERTY

PROPERTY LOCATION: 56436 Walker Rd.
Scappoose, Oregon
TAX ACCOUNT NUMBER: 4221-040-00100 (Tax lot 100)
4221-040-00102 (Tax lot 102)
4221-040-00103 (Tax lot 103)
4221-010-01302 (Tax lot 1302)
ZONING: Rural Residential-5 (RR-5)
SIZE: 18.38 acres
REQUEST: To divide and develop the property into Six 2.3– 3 acre lots.
CLAIM RECEIVED: October 26, 2006
180-DAY DEADLINE: April 25, 2007
NOTICE OF RECEIPT OF CLAIM: January 19, 2007

I. BACKGROUND:

According to a title report submitted with the claim, the Claimant first acquired an interest in the 18.38 acre parcel on December 3, 1976. The Claimant thereafter transferred the property Scott A. Smith in 1980. Mr. Smith reconveyed the property to the Claimant by deed recorded on May 6, 1981.

The property includes four abutting tax lots. Tax lot 100 is developed with a dwelling; all other tax lots are undeveloped.

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 the evidence provided by the Claimant, John S. McCarthy is the fee owner of the property.
2. **Date of Acquisition:** Claimant first acquired an interest in the property in 1976. In 1980, he conveyed the property to Scott A. Smith. According to Mr. McCarthy, the conveyance was in error, and the property was reconveyed to Mr. McCarthy by a bargain and sale deed filed in the deed records of the Columbia County Clerk at Book 236, Page 862, on May 6, 1981. For the purposes of this evaluation, staff uses May 6, 1981 as the date of acquisition.

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

At the time of acquisition, the property was unzoned. The property was zoned RR-5 in 1984, and that designation has continued to apply to date.

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

The RR-5 zone has a minimum parcel size of five acres. Accordingly, based on the claim, it appears that the county standards that clearly prevent the claimant from developing the property as desired are:

CCZO 604.1 Establishing the five acre minimum parcel size standard in the RR-5 zone

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. Therefore the Claimant 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 Claimant states that they cannot divide the property as proposed due to the county's 5-acre minimum parcel size standard. Staff concedes that CCZO 604.1 can be read and applied to "restrict" the use of claimant's property within the meaning of Measure 37.

F. EVIDENCE OF REDUCED FAIR MARKET VALUE

Value of the Property As Regulated:

The claimant submitted no copies of county assessor's records that estimate the 2006 value. The claimant submitted a Market analysis report from Prudential Realtors for which estimates three five-acre building sites as having a value between \$225,000 to \$250,000, resulting in a total value of between \$675,000 and \$750,000.

2. Value of Property Not Subject to Cited Regulations:

Claimant submitted a market analysis report and copies of real estate listings showing subject properties as two, five acre lots and one 6.61 acre lot, for a total of 16.61 acres currently zoned as RR-5 (claim is for 18.35). Analysis and real estate listings show sales prices for undeveloped rural residential land are between \$160,000 and \$235,000 for 2 acres lots. The Claimant alleges that if the subject property is divided, the property would be worth approximately \$1,410,000.

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 regulation, staff concedes that it is more likely than not that the property would have a higher value if subdivided for residential development.

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. 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.

Loss of Value Indicated in the Submitted Documents is:
The claim alleges a total reduction in value of \$1,410,000.

G. COMPENSATION DEMENDED

\$1,410,000 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 604.1 does not qualify for any of the exclusions listed.

Staff notes that other siting standards, including general subdivision standards in effect in 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 Claimant has 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 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 October 26, 2006, 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 Claimant has 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 604.1.

III. STAFF RECOMMENDATION:

Based on the above findings, staff concludes that the claimant 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 Claimant 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 a valid Measure 37 claim:

LAND USE CRITERIA	DESCRIPTION	RESTRICTS USE?	REDUCES VALUE?	EXEMPT?
CCZO 604.1	Establishing the five acre minimum parcel size standard in the RR-5 zone	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 Claimant's property, and act accordingly to pay just compensation in that amount, or, in the alternative, to not apply CCZO Section 604.1.

LEGAL DESCRIPTION

Beginning at the East quarter corner of Section 21, Township 4 North, Range 2 West, Willamette Meridian, Columbia County, Oregon; thence South 1022' East a distance of 691.69 feet to the Southeast corner of the North half of the Northeast quarter of the Southeast quarter of said Section 21; thence Westerly along the South line of the said North half of the Northeast quarter of the Southeast quarter to the Southwest corner thereof; thence Northerly along the West line of the Northeast quarter of the Southeast quarter to its intersection with the Easterly right of way line of the Rudloff County Road; thence following said right of way Northerly to a point which is South 224.99 feet and West 1236.95 feet from the aforesaid East quarter corner; thence leaving said right of way South 8909' East a distance of 275.78 feet; thence North 5028' East a distance of 70.45 feet; thence North 82017'20" East a distance of 176.29 feet; thence North 61014'20" East a distance of 887.40 feet to the East line of said Section 21; thence South 0022' East a distance of 291.70 feet to the point of beginning.