

AFTER RECORDING, RETURN TO:

Board of County Commissioners
Columbia County Courthouse
230 Strand, Room 331
St. Helens, OR 97051

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

In the Matter of Claim No. 07-33 Submitted by)
Thomas L. and Mary E. Whittaker, Trustees for the) Order No.75-2007
Whittaker Living Trust and Fred D. and Marian D.)
Rauch, Trustees for the Rauch Family Living Trust)
for Compensation Under Measure 37)

WHEREAS, on November 21, 2006, Columbia County received a claim for compensation under Measure 37 and Order No. 84-2004 from Thomas L. And Mary E. Whittaker, trustees for the Whittaker Living Trust, and Fred D. and Marian D. Rauch, trustees of the Rauch Family Living Trust, related to a parcel of property located near Neer City Road in Rainier, Oregon, having tax account numbers 7227-000-00203 and 7227-000-00205; and

WHEREAS, according to the information presented with the Claim, the Whittaker Living Trust acquired an interest in the property in 2005, and the Rauch Family Living Trust acquired an interest in the property in 1996; and

WHEREAS, according to the information presented with the Claim, the Claimants, as individuals, acquired an interest in the property in 1978; and

WHEREAS, the County zoned the subject property as Primary Forest (PF-76) in 1984, after the acquisition by the Claimants, as individuals, but prior to the acquisition by the trusts; and

WHEREAS, pursuant to Columbia County Zoning Ordinance (CCZO), Section 506.1, the minimum lot or parcel size for new land divisions in the PF-76 zone is 76 acres; and

WHEREAS, the Claimants claim that the minimum lot size requirement for new land divisions has restricted the use of the property and has reduced the value of the property by \$360,000; and

WHEREAS, the Claimants desire to subdivide the property into six 5 acre parcels

and one 1.5 acre parcel; 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 property and reduces the fair market value of the property to allow a use which was allowed at the time the owner acquired the property; and

WHEREAS, in 1978, the Claimants, as individuals, could have divided the property into 5 acre and 1.5 acre minimum lot size parcels; and

WHEREAS, in 1996 and 2005, the trusts could not have divided the property into 5 acre and 1.5 acre minimum lot size parcels;

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 07-33, dated April 6, 2007, which is attached hereto as Attachment 1, and is incorporated herein by this reference.
2. The County denies the Claim as to Thomas L. Whittaker and Mary E. Whittaker, as Trustees for the Whittaker Living Trust.
3. The County denies the Claim as to Fred D. Rauch and Marian D. Rauch, as Trustees for the Rauch Family Living Trust.
4. The County approves the Claim as to Thomas L. Whittaker, Mary E. Whittaker, Fred D. Rauch, and Marian D. Rauch, as individuals (hereinafter referred to as the "Claimants"). In lieu of compensation, the County waives CCZO Section 506.1 to the extent necessary to allow the Claimants to subdivide the property into six 5 acre minimum lot size parcels and one 1.5 acre minimum lot size parcel.
5. 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, Thomas L. Whittaker, Mary E. Whittaker, Fred D. Rauch, and Marian D. Rauch, as individuals, 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.
6. 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 18th day of April, 2007.

Approved as to form

By: Sarah K. Keeson
Assistant County Counsel

BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

By: Rita D. Bernhard
Rita Bernhard, Chair

By: Anthony Hyde
Anthony Hyde, Commissioner

By: Joe Corsiglia
Joe Corsiglia, Commissioner

COLUMBIA COUNTY LAND DEVELOPMENT SERVICES
MEASURE 37 CLAIM
STAFF REPORT

DATE: April 6, 2007

FILE NUMBER(s): CL 07-33

CLAIMANTS: Thomas L. Whittaker, Trustee(s) for the Whittaker Living Trust
and Mary E. Whittaker
73765 Neer City Rd.
Rainier OR 97048

Fred D. Rauch & Marian D. Rauch, Trustees for the Rauch
Family Living Trust
20301 NE 194th Ave.
Battleground, OR 98604

PROPERTY LOCATION: East of Neer City Road and Rainier city limits

TAX ACCOUNT NUMBERS: 7227-000-00203 and 00205

ZONING: Primary Forest - 76 (PF-76)

SIZE: Approximately 32.53 acres [16.28 (lot 203) + 16.25 (lot 205)]

REQUEST: To divide property into six lots of approximately 5 acres each and one
lot of approximately 1.5 acres.

CLAIM RECEIVED November 21, 2006

180 DAY DEADLINE: May 20, 2007

NOTICE: Sent March 7, 2007
No comments or request for hearing were received

I. BACKGROUND:

The subject property includes two parcels totaling 32.33 acres and is zoned Primary Forest(PF-76). The property is forested. A single family dwelling is located on TL 205. The property was acquired jointly by the Claimants in 1978. Later, the property was divided among the Claimants, and subsequently transferred into their respective trusts.

II. APPLICABLE CRITERIA & 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 & OWNERSHIP INTERESTS

1. **Current ownership:**

Tax lot 7227-000-00203 is owned by Frederick D. Rauch and Marian D. Rauch, Trustees under the Rauch Family Living Trust dated May 24, 1996.

Tax lot 7227-000-00205 is owned by Thomas L. Whittaker, Trustee of the Whittaker Living Trust dated February 22, 1999.

2. **Date of Acquisition:**

Thomas L. Whittaker, Mary E. Whittaker, Fred D. Rauch, and Marian D. Rauch acquired tax lot 205 and tax lot 203 from Tommy E. And Marlene L. Burbach on January 6, 1978, by deed recorded at Book 215, page 723.

Thomas and Mary Whittaker and, Fred and Marian Rauch deeded the portion of tax lot 205 that is East of Neer City Road to Thomas L. Whittaker and Mary E. Whittaker on June 23, 1979, by deed recorded at Book 218, page 703. Thomas Whittaker and Mary Ellen Whittaker transferred the property to Thomas L. Whittaker, Trustee of the Whittaker Living Trust dated February 22, 1999, on November 29, 2005. Deed recorded as document no. 99-02614, and correction deed recorded as document no. 2005-016279. Therefore, the date of acquisition for the trust is November 29, 2005. However, because Thomas and Mary Whittaker are the settlors of the revocable living trust, they have retained an interest in the property as individuals for purposes of Measure 37. Their date of acquisition is the date they first acquired an interest in the property, January 6, 1978.

Thomas and Mary Whittaker, and Fred and Marian Rauch deeded tax lot 203 to Fred D. Rauch and Marian D. Rauch by deed dated September 1, 1979 (Book 220, p. 177). Frederick Donald Rauch and Marian Doyne Rauch transferred this portion to Frederick Donald Rauch, Trustee of the Frederick Donald Rauch Revocable Living Trust executed June 21, 1982, and to Marian Doyne Rauch, Trustee of the Marian Doyne Rauch Revocable Living Trust executed June 21, 1982. (Deed recorded at Book 243, page 479). Then, Frederick and Marian, as trustees of their respective revocable living trusts, transferred this property to the Frederick D. Rauch and Marian D. Rauch, Trustees under the Rauch Family Living Trust dated May 24, 1996 (recorded as document no. 96-09869). Therefore, the date of acquisition for the trust is May 24, 1996. However, because Fred and Marian Rauch are the settlors of the revocable living trust, they have retained an interest in the property as individuals for purposes of Measure 37. Their date of acquisition is the date they first acquired an interest in the property, January 6, 1978.

B. LAND USE REGULATION(s) IN EFFECT AT THE TIME OF ACQUISITION

The County did not have a Zoning Ordinance which applied to the subject property until 1984, and the property was not subject to County zoning regulations when it was acquired by the Whittakers and Rauchs 1978. However, the property was subject to the County's Subdivision and Partitioning Ordinance, effective January 10, 1975. The property was subject to the County zoning regulations when it was acquired by the current owners, the two trusts, in 1996 and 2005.

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

The Claimants allege that the Columbia County Zoning Ordinance (CCZO) sections 501-510 (Primary Forest) reduced the fair market value of the property.

Challenged regulation	Description
CCZO 501	Provides that the purpose of the PF Zone is to retain forest land for forest use, and allows dwellings only under certain conditions
CCZO 502	Sets forth the permitted uses in the PF zone
CCZO 503 and 504	Conditional Uses and requirements for Conditional Uses in the PF zone
CCZO 505	Sets forth requirements for Residential Structures in the PF zone
CCZO 506	Sets forth the minimum lot size in the PF zone
CCZO 507	Sets forth requirements for approval of a lot or parcel division for a principal dwelling on the effective date of the zoning ordinance
CCZO 508	Discusses non-forest use that are unintentionally destroyed
CCZO 509	Relates to notification of state agencies for certain uses
CCZO 510	Sets forth fire Siting Standards for Dwellings and Roads

D. CLAIMANT'S ELIGIBILITY FOR FURTHER REVIEW

The Claimants acquired an interest in the property as individuals before the minimum lot/parcel size standards of the PF-76 zone became effective. Therefore, the Claimants, as individuals, may be eligible for compensation and/or waiver of the CCZO sections cited above that are pertinent to a Measure 37 claim.

E. STATEMENT AS TO HOW THE REGULATIONS RESTRICT USE

The Claimant(s) state that the property cannot be divided and developed due to the 76-acre minimum lot size of the PF-76 zone. Section 500 sets forth the zoning regulations for PF-76 zoned property. However, with the exception of Section 506.1, imposing the 76 acre minimum lot size, the regulations don't restrict the use of the property for residential development. Section 501 describes the general purpose of the PF-76 zone and does not restrict or prohibit the use of the property. Sections 502 and 503 describe the permitted and conditional uses in the PF-76 zone. These provisions do not restrict or prohibit the proposed subdivision for single family dwellings because non-resource dwellings are allowed in the PF-76 zone as a conditional use and other types of dwellings are allowed as permitted uses. CCZO Sections 504, 505 and 506 do not restrict or prohibit the proposed subdivision for development of single family dwellings because single family dwellings are allowed as conditional uses. During the hearing process on the proposed conditional use dwellings, conditions may be imposed that may restrict

or prohibit the use. Some of those conditions may be exempt from waiver under Measure 37. However, the County cannot determine whether conditions will qualify for waiver under Measure 37 until the County knows what they are. CCZO Section 506.1 prohibits a division of land in the PF-76 zone below 76 acres. Staff concedes that this minimum lot size regulation restricts and prohibits the use of the property. However, the County does not have any information that the remaining standards set forth in Section 504, 505, and 506 cannot be met and thereby restrict the use of the property.

F. EVIDENCE OF REDUCED FAIR MARKET VALUE

1. **Value of property as regulated:** Based on County Assessor data the property's real market value for the land itself is \$243,400. (\$125,700 for tax lot 205, and \$117,700 for tax lot 203).
2. **Value of property not subject to cited regulations:** Claimants submitted an estimated value if the subject property were divided into 5 acre parcels, reflecting a value of \$80,000 per parcel. With 32.53 acres, the property's value would be \$520,480 if Claimants could divide it.
3. **Loss of value as indicated in the submitted documents:** Based on the above, the claim reflects a potential loss of value of \$277,080.

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(s). Staff concedes, however, that it is more likely than not that the property would have a higher value if it could be divided for residential development as proposed.

G. COMPENSATION DEMANDED

As noted on page 1 of the Measure 37 Claim Form: \$360,000.

(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.

Staff finds that CCZO Section 506.1 is not exempt from compensation or waiver under Subsection 3(B), above. However, Staff notes that other standards including but not limited to fire suppression/protection, access, adequacy of domestic water, subsurface sewage, erosion control and storm water requirements 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(s) has/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(s) or in lieu of compensation, modify, remove, or not apply the above-cited CCZO section(s).

(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/parcel size and related regulations of the PF-76 zone, which were enacted prior to the effective date of Measure 37 on December 2, 2004. The subject claim was filed on November 21, 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(s) has/have demonstrated a reduction in fair market value of the property due to the cited regulation(s), the Board may pay compensation in the amount of the reduction in fair market value caused by said regulation(s) or in lieu of compensation, modify, remove, or not apply said regulations to allow a use that was permitted when the Claimants acquired the property as individuals.

III. STAFF RECOMMENDATION:

The following table summarizes staff findings concerning the land use regulation(s) cited by the Claimant as a basis for the 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 regulations identified in this table have been found to apply to this Measure 37 claim.

LAND USE CRITERION	DESCRIPTION	RESTRICTS USE?	REDUCES VALUE?	EXEMPT?
CCZO 501	Provides that the purpose of the PF Zone is to retain forest land for forest use, and allows dwellings only under certain conditions	No	No	No
CCZO 502	Sets forth the permitted uses in the PF zone	No	No	No
CCZO 503 and 504	Conditional Uses and requirements for Conditional Uses in the PF zone	No	No	No except for 504.4 and possibly 504.6 which deals with health and safety.
CCZO 504.1	Use consistent with forest and farm uses and Forest Practices Act	No	No	No
CCZO 504.2	Use will not significantly increase cost, nor interfere with accepted forest management practices or farm uses on adjacent or nearby forest or farm uses.	No	No	No
CCZO 504.3	Limit site to no larger than necessary to accommodate activity. Won't materially alter stability of land use pattern, limit or impair surrounding permitted uses. If necessary measures will be taken to minimize negative effects on adjacent forest lands.	No	No	No
CCZO 504.4	Use does not constitute an unnecessary fire hazard; provides for safety measures in planning, design, construction, and operation.	No	No	Yes
CCZO 504.5	Public utilities develop or utilize ROWs that have least adverse effect on forest resources. Use existing ROWs where possible.	No	No	No
CCZO.504.6	Development within major or peripheral big game ranges shall be sited to minimize impact on big game habitat.	No	No	No
CCZO 505.1	Nonresource-related structures shall be placed only on land that is generally unsuitable for commercial forestry or agricultural use considering terrain, adverse soil or land conditions, drainage, and flooding, vegetation, location, and size of the tract.	No	No	No

CCZO 505.2	Provision be made for fire safety measures consistent with NIFPG publication "Fire Safety Considerations for Development in Forest Areas"	No	No	Yes
CCZO 505.3	Dwelling owner/occupant assume responsibility for wildlife damage.	No	No	No
CCZO 505.4	Use does not impose limitation on operation of primary wood processing facility.	No	No	No
CCZO 505.5	Forest management impact statement may be required showing relationship between the proposed residential use and surrounding resource uses, including setbacks for any dwellings from forest or farm uses to assure above conditions met.	No	No	No
CCZO 506.1	Minimum parcel size for new land divisions is 76 acres.	Yes	Yes	No
CCZO 509	Relates to notification of state agencies for certain uses	No	No	Yes (health and safety)
CCZO 510	Sets forth fire Siting Standards for Dwellings and Roads	No	No	Yes (health and safety)

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 Section 506.1.

LEGAL DESCRIPTION

PARCEL 1:

Beginning at an iron pipe which is the Southwest corner of the Northeast quarter of the Northwest quarter of Section 27, Township 7 North, Range 2 West, Willamette Meridian, Columbia County, Oregon; thence North 0° 18' West 87.09 feet to an iron pipe; thence North 89° 14' East 211.18 feet to the true point of beginning of the tract herein described; thence continuing North 89° 14' East a distance of 185.48 feet to an iron pipe on the Westerly right of way line of a County Road; thence along the said Westerly right of way line South 6° 01' West 124.74 feet; thence South 16° 18' West 152.80 feet; thence leaving the County Road South 89° 18' West 126.12 feet; thence North 0° 43' West 269.76 feet to the true point of beginning.

PARCEL 2:

All that part of the following described tract, lying North of a line drawn 704.49 feet North of and parallel to the South line of the Northwest quarter of Section 27, Township 7 North, Range 2 West, Willamette Meridian, Columbia County, Oregon:

Beginning at the center of Section 27, Township 7 North, Range 2 West, Willamette Meridian, Columbia County, Oregon; thence North along the East line of the Northwest quarter of said Section 27, a distance of 1450 feet; thence West parallel to the South line of said Northwest quarter a distance of 880 feet, more or less, to the Easterly right of way line of the T.H. Timoney County Road #P-77; thence Southerly along said Easterly right of way line to the South line of said Northwest quarter; thence East along said South line to the point of beginning. EXCEPTING THEREFROM that portion conveyed to Gerald T. Whittaker by deed recorded February 4, 2004 as Instrument Number 2004-01587, Records of Columbia County, Oregon.

PARCEL 3:

All that part of the following described tract, lying South of a line drawn 704.49 feet North of and parallel to the South line of the Northwest quarter of Section 27, Township 7 North, Range 2 West, Willamette Meridian, Columbia County, Oregon:

Beginning at the center of Section 27, Township 7 North, Range 2 West, Willamette Meridian, Columbia County, Oregon; thence North along the East line of the Northwest quarter of said Section 27, a distance of 1450 feet; thence West parallel to the South line of said Northwest quarter a distance of 880 feet, more or less, to the Easterly right of way line of the T.H. Timoney County Road #P-77; thence Southerly along said Easterly right of way line to the South line of said Northwest quarter; thence East along said South line to the point of beginning.