

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR MULTNOMAH COUNTY, OREGON

ORDER NO. 05-041

**ORDER TO NOT APPLY LAND USE REGULATIONS TO 13100 N.W. McNAMEE ROAD
UNDER BALLOT MEASURE 37**

The Multnomah County Board of Commissioners Finds:

- a. **Parties:** Dorothy Pauline English, Christie Anne Verhoef and Douglas James Sellers are Ballot Measure 37 claimants who filed a demand for compensation under Ballot Measure 37 (2004) to Multnomah County on December 2, 2004, 12:11 a.m.
- b. **Subject Real Property:** This claim relates to real property commonly known as 13100 N.W. McNamee Road, Multnomah County, Portland, Oregon 97231, and more specifically described as:

Section 32A, T2N, R.1W, Willamette Meridian, consisting of 19.74 acres in Multnomah County, Oregon; Tax Account #R971320170 (Tax Lot 1200).

- c. **Adequacy of Demand for Compensation:** On December 2, 2004, a demand for compensation was filed with the County on behalf of claimants, Dorothy English, Christie Verhoef, and Douglas Sellers. The demand letter sought \$1,150,000 in compensation or the right to divide their property at 13100 NW McNamee Road into 8 parcels and construct 8 homes. An appraisal was submitted, on February 9, 2005, to substantiate the amount of compensation being sought.

The demand for compensation was faxed to the County Attorney's Office at 12:11 am, and the original was hand delivered to the same office at 8:15 a.m., before the adoption of the County's Ballot Measure 37 implementing ordinance that same date. The County is not applying the ordinance, but is instead, applying Ballot Measure 37 directly.

The measure requires an owner submit a written demand for compensation, but does not specify what that entails. The demand must, at a minimum, describe the use being sought, identify regulations that prohibit the use, and substantiate that land use regulations have reduced the value of the property. The Board finds that the claimants' letter and appraisal contain this minimal information.

- d. **Relevant Dates of Property Ownership:** Ballot Measure 37 exempts land use regulations enacted prior to the date the current owner acquired the property. Deed records show that claimants Christie Verhoef and Douglas Sellers acquired an interest in the property in 1999 (Instrument #99-01244). Land use regulations in effect at that time were substantially the same as they are now, providing for one single family dwelling per lawful parcel (Section 11.WH.2046, Ord. #916). Current assessment records show that the property is improved, with a residence built in 1948. As there is already a dwelling on the property, no additional dwellings would have been permitted under land use regulations in effect on the date Christie Verhoef and Douglas Sellers acquired an ownership interest. Accordingly, neither has a basis for a Ballot Measure 37 claim.

Claimant Dorothy English has provided evidence that she first acquired the property with her husband in November, 1953 pursuant to a land sales contract (Book, 1630, page 591). The current parcel is the south half of the original parcel in which Claimant Dorothy English has held a continuous ownership interest. In May of 1953 the County adopted its first interim zoning ordinance, a code that was primarily directed at nuisance uses and would not have prohibited more than one dwelling from being established on a parcel or lot. The Board finds that Claimant Dorothy English became the owner of her property prior to the County enacting land use regulations restricting the number of dwellings to one per property.

- e. **County Codes as a Restriction on Use of the Property:** Claimant Dorothy English asserts that these regulations and others (together totaling 61 regulations) restrict the use of land by prohibiting the construction of 8 dwellings on 8 lots. Claimant Dorothy English requests that these regulations not be applied to the property pursuant to the provisions of Ballot Measure 37.

The property is zoned Commercial Forest Use (CFU-2) with Protected Aggregate and Mineral, Significant Environmental Concern (SEC) for views and streams, and Hillside Development overlays (HDP). The Board finds that these regulations, and all other County codes challenged in the claim letter, can be placed in four separate categories and treats each of them differently.

Category 1 regulations include those which must not be applied in order for Claimant Dorothy English to construct up to 8 houses on her property. The Board finds that it is appropriate to not apply the regulations in Category 1 to claimant Dorothy English in lieu of paying compensation.

Category 2 regulations are regulations which guide the manner in which development can occur. It is not possible to know at this time whether or to what degree they will restrict the development of the property. None of these regulations in and of themselves prevent construction of 8 homes on 8 parcels. Claimants may resubmit to the Board any land use regulation listed in Category 3 for reconsideration under Ballot Measure 37, if, during the development process, enforcement of the county's codes will result in a restriction in use that has the effect of reducing the fair market value of the property. The Board finds that it would be premature to order that the regulations in Category 2 not be applied.

Category 2 regulations include land division codes (partitions and subdivisions), which is the mechanism to create new parcels of land. The Board finds that land division codes can be regulations restricting the use of Claimant Dorothy English's property to the extent that it may prohibit her from partitioning or subdividing her parcel. We have made this finding because Mrs. English was a chief petitioner of Ballot Measure 37, and had expressed an interest in further dividing her property as part of that campaign. It is appropriate to not apply County codes that would prevent the subdivision of the property into a maximum of 8 lots, and construct up to 8 homes.

This is, notwithstanding that the measure is unclear that dividing land is a "use" of property that can be granted by not applying regulations, and that any rights to divide and develop the property gained by the claimant cannot be transferred to subsequent buyers.

Because of the uncertainties surrounding this issue for both claimants and buyers, the Board does not view this action as a precedent for deciding future claims and would hope that the matter is clarified by the legislature.

Until more information is known about how they intend to partition or subdivide the property, the Board cannot determine which land division provisions will need to not be applied to allow up to 8 houses on up to 8 lots. The board intends that partitions or a subdivision be allowed on the subject property, but the determination of which code provisions not be applied is premature.

Category 3 regulations are exempt from Ballot Measure 37 claims because they are necessary to protect public health and safety, are necessary to comply with federal law or they were enacted prior to acquisition date of the owner. The Board finds that the regulations in Category 3 should continue to apply to the claimants and the property.

Category 4 regulations have no bearing on the claim. The Board finds that the regulations in Category 4 are not relevant to the claim and should therefore continue to apply.

The Board's Order, below, lists each regulation that Claimant Dorothy English requests not be applied, in the appropriate category.

- f. **County Code Restrictions Reduce Fair Market Value:** The Board finds that land use restrictions prohibit Claimant Dorothy English from constructing one or more additional homes on her property and that the appraisal she submitted to the County is evidence to support a finding of diminution in value.
- g. **Enforcement of County Code Restrictions:** Land use regulations enacted after the date the owner acquires the property must be enforced for the measure to be operative. The CFU-2 and Protected Aggregate and Mineral zoning rules effectively prohibit additional permanent dwellings, reducing the value of the property. There is no application that Claimant Dorothy. English can apply for that could lead to the approval of additional homes on her property and Board finds that the regulations, on their face, have been enforced.
- h. **Validity of Claim for Compensation:** The Board finds that:
 - (1) Claimants made a demand for compensation under the requirements set forth in Ballot Measure 37 by describing the use being sought, by identifying the regulations that prohibit the use, and by submitting evidence that land use regulations have reduced the value of the property;
 - (2) Claimant. Dorothy English provided evidence to prove that she acquired the property in 1953, before the regulations challenged in the claim;
 - (3) There is evidence in the record to show that land use regulations now in place on the property restrict the use of real property, specifically the ability to place up to 8 dwellings on up to 8 lots on the subject parcel;

- (4) The appraisal submitted by Claimant Dorothy English is evidence that the land use restrictions now in place on the property have the effect of reducing the fair market value of the property;
- (5) The land use regulations that reduce the fair market value of the property have been enforced in that the plain language of the CFU-2 and Protected Aggregate and Mineral zoning prohibit additional permanent dwellings in the zone; and
- (6) The Board elects not to pay the compensation demanded by Claimant Dorothy English.

The Multnomah County Board of Commissioners Orders:

1. Claimant Dorothy English's request be granted and the land use regulations restricting the use of her property not be applied in order to allow up to 8 dwellings on up to 8 lots on the subject property. Category 1 regulations which will not be applied are listed below:

- §33.2215, Uses. Requires that any building, structure, or land be used in compliance with the Commercial Forest Use rules, which prohibit the creation of small lots and limit new dwellings because of the inherent conflict between residential and commercial timber uses.
- §33.2220, Allowed Uses. Lists the uses allowed without County review in the Commercial Forest Use zone, pursuant to the Forest Practices Act and Statewide Planning Goal 4. Developing more than one permanent dwelling on a parcel is not listed as allowed.
- §33.2225, Review Uses. Although not listed in the claim letter, this category of uses in the Commercial Forest Zone would also need to be set aside, as it lists those activities that are allowed subject to administrative review by the County and the subdivision or development proposed is not listed as allowed.
- §33.2230, Conditional Uses. Lists the uses allowed when approved through a hearings process and found to meet specific approval criteria. The development rights being sought are not listed in this section, and like other sections of the Commercial Forest Use code that list uses that are allowed, this one should not be applied to avoid any confusion as to whether or not Claimant Dorothy English can proceed to develop the property.
- §33.2235, Large Acreage Dwelling. This is a conditional use process for qualifying one dwelling on a large forested property. The argument for not applying this section is the same as that for §33.2230.
- §33.2240, Template and Heritage Tract Dwellings. This is a conditional use process for qualifying one dwelling where the undeveloped property is in an area where there are already several dwellings or the property has been held in the same ownership for a long period of time. It would be §33.2230. The argument for not applying this section is the same as that for §33.2230.

- §33.2245, Use Compatibility Standards. These rules require that development not force changes in, or significantly increase the costs of accepted forestry or farming practices on surrounding properties nor increase fire hazards or fire suppression costs on those properties. Developing up to 8 homes on 8 lots necessarily conflicts with adjoining farm and forest operations (that is why it is not allowed), thus this section of the code would have to be set aside.
- §33.2260, Dimensional Requirements. The 80 acre minimum lot size requirement prevents further division of the property and needs to be set aside. The 130' setback is a problem for smaller lots, therefore it should not be applied.
- §33.5700 et. seq., Protected Aggregate and Mineral Sites. These rules prohibit or severely limit new noise sensitive uses, such as dwellings, in close proximity to aggregate sites. The aggregate overlay covers all of Claimant Dorothy English's property because of its proximity to the Angel Brothers Quarry, which is approximately 630 ft to the north.

2. **Claimant Dorothy Mrs. English's request be denied relating to the land use regulations listed below. It would be premature to not apply those regulations given the available evidence. Claimants may resubmit to the Board any land use regulation for reconsideration under Ballot Measure 37, if enforcement of the county's codes during development will result in a restriction in use that has the effect of reducing the fair market value of the property. This section of the order applies to the following Category 2 regulations:**

- §33.2255, Single Family Dwelling Condition of Approval, Prohibition on Claims Alleging Injury From Farm or Forest Practices. This standard requires that deed restrictions be recorded putting owners on notice that they are prohibited from taking legal action against *adjacent* property owners who are farming or conducting timber harvest or other forest management activities on their properties.
- §33.2260, Dimensional Requirements. Building heights are limited to 35' in height and lots must be at least 50 feet wide. It is unclear whether or not these will be an issue since the claimant has not provided information regarding how they intend to divide the property or the type of homes that they want to build. Remaining standards in this section relate to non-conforming structures and agricultural structures, neither of which are the subject of this claim.
- §33.2285 and §33.4100 et. seq., Off-Street Parking and Loading. These standards require that sufficient area be provided on each lot for off-street parking (typically two spaces per dwelling).
- §33.2290, Access. Requires that the lots or parcels possess street frontage or other access that is safe and convenient. Might qualify as a health and safety requirement, exempt from the measure.

- §33.2305, Development Standards for Dwellings and Structures. Includes road grade, clearance and improvement standards to ensure that emergency equipment can access property and includes requirements for fire breaks and other similar measures to limit fire hazards in forested areas. Parts of these codes might qualify as health and safety requirements.
- §33.2310, Exception to Secondary Fire Safety Zones and Forest Practice Setbacks. Alternative to fire break requirement, relying instead on certain fire resistant building materials, sprinkler systems, alarms, etc. Might also qualify as a health and safety requirement, exempt from the measure.
- §33.4500 et. seq., Significant Environmental Concern. These standards require development be clustered and located close to roads to provide for wildlife movement throughout the greater forest park area. Alternative protection standards are available if these standards cannot be achieved. These rules also require development to ensure that views of the ridge as seen from certain vantage points on Sauvie Island, the Multnomah Channel, and Highway 30 are as natural as possible. This influences dwelling location, height, color, etc. None of these standards prohibit the development of homes or the creation of lots.
- §33.7000, Land Divisions. The code section listed appears to be in error. Land division rules are listed under §33.7700 et. seq. and contain standards that are not expressly required under ORS 92. None of them; however, would prevent a further land division. These standards influence the form that the subdivision takes, and since the claimant has not provided any information as to how they intend to divide the property it would be premature to not apply them.
- §4.000 et. seq., Access to County Roads. Regulates access onto County roads, primarily to ensure that it is safe. Will not, on its face, prevent the development of up to 8 homes on up to 8 lots on the subject property.
- §5.000 et. seq., Transportation Impact. Sets thresholds as to what constitutes a traffic impact that might warrant a traffic study. Does not, in itself, dictate whether or not up to 8 homes on up to 8 lots can be built on the subject property.
- §6.000, Improvement Requirements. Could require certain public improvements depending upon the nature of the development that is proposed (e.g. culverts, paved approach, etc.). Might qualify as health and safety requirement.
- §7.000, Transportation Impact Studies. Includes requirements for studies. The need for a study is dependant upon the nature of the development that is proposed.
- §8.000, Off-Site Improvements. Would be limited to improvements along McNamee Road. Unlikely that they would be sought unless necessary for health and safety purposes and impossible to identify without having some ideas as to how the property is to be developed.

- §9.000, Compliance Method. Relates to how infrastructure improvements are guaranteed (e.g. developer constructs them, they pay the County to build, non-remonstrance, etc.). Dependant upon development that is proposed.
- §16.000 et. seq., Variances from County Standards and Requirements. Contains rules for obtaining a variance to road rules. Impossible to know if any are needed without some idea as to how the property would be divided and developed.

§29.506, Permits Required. Regulates work within the right-of-way. Whether or not improvements are needed within the road right-of-way depends upon the development that is proposed.

- §29.508, Acceptance of Deeds and Easements for Road Purposes. Regulates how these legal instruments must be structured. Impossible to know if dedications are needed without an idea as to how they intend to develop the property.
- §29.560, Street Standards, Rules and Guidelines. Explains that street standards implement established rules and policies and that access requirements are based upon the functional classification of a road. Largely a policy statement that may not be directly applicable to a subdivision or development. If directly applicable, impossible to say how it would impact this claim because no information has been provided as to how they intend to develop the property.
- §29.571, Right-of-Way and Improvement Standards. Requires road frontage within public rights-of-way to be improved where it is presently substandard and adjoining private development is adding a significant amount of traffic to the road segment. Might not be an issue with this section of McNamee Road.
- §29.572, Rules for Streets, Roads and Rights-of Way. Contains requirements for construction of public streets and roads, and the dedication of right-of-way for road purposes. It is unclear whether or not this will be an issue, since we do not know how they intend to develop the property.
- §29.573, Rules for Drainage Facilities. Includes standards for managing drainage across properties. It is unclear as to the extent to which these standards apply since we do not know how they intend to develop the property.
- §29.574, Rules for Traffic Control and Traffic Control Devices. Includes standards for stop signs and signalization. If it is at all applicable, its provisions are likely health and safety related and therefore exempt.
- §29.577, Utility Locations. Regulates how utilities are installed within the public right-of-way. Standards are typically applied to utility providers, not developers, so it is possible that they might not even apply.
- §29.578, Rules for Right-of-Way Use. Regulates location and number of accesses onto public roads. Might be exempt as necessary for health and safety, considering the curvature and grade of McNamee Road. The extent to which these standards apply though is unknown.

- §29.582, Rules for Accessways. Contains standards for the size and configuration of certain private roads. Impossible to know how these standards relate to this claim, since no information has been provided as to how the property is to be developed and access provided.
 - §12.000 et. seq., Public Roads. Standards are generally tailored to ensure that roads are safe and passable for emergency vehicles. Impossible to know how these standards relate to this claim, since no information has been provided as to how the property is to be developed.
 - §18.000 et. seq., Right-of-way Permits. Includes rules regulating how and where approaches onto a County Road are constructed. Largely health and safety related. Since no information has been provided as to where new approaches would be constructed onto the property, it is impossible to know how these standards relate to this claim.
3. **Claimant Dorothy English's request be denied because the regulations are exempt from Ballot Measure 37. These regulations are necessary to protect public health and safety or to comply with federal law. This section of the order applies to the following Category 3 regulations:**
- §33.5500 et. seq., Hillside Development and Erosion Control. A zoning overlay that applies to steeply sloped terrain or areas that have been mapped as susceptible to landslides, debris flows, etc. Its purpose is to ensure that proposed development is safe, and that the earthwork will not destabilize the slopes.
 - §29.350 West of Sandy River Grading and Erosion Control Code. This code citation is an error as it is applicable to the West of Sandy area. The Grading code applicable to this area is §29.330. Grading and erosion control rules have no bearing on whether or not up to 8 homes can be built on the subject property. They are structured to ensure that soil erosion attributed to development is minimized and storm run-off attributed to development is properly managed. These standards are necessary for health and safety and implement federal law, such as the Clean Water Act.
4. **Claimant Dorothy English's request be denied because the regulations she seeks to have the County not apply have no bearing on the claim. This section of the order applies to the following Category 4 regulations:**
- §33.2265, Lot of Exception. These rules allow the creation of small lots in certain circumstances, such as if there are 2 dwellings on a lot as of a certain date, assuming all other rules apply. They would have no bearing on Claimant Dorothy English's ability to divide or develop the property through waiver of other provisions of the Commercial Forest Use code.
 - §33.2270, Lot Line Adjustment. The requirement is relevant to when a land owner wants to move a line common to two lots or parcels.

- §33.2275, Lot of Record. These provisions explain what a legal, developable property is within the Commercial Forest Zone.
- §33.2280, Lot Sizes for Conditional Uses. This claim is not seeking to establish a use that is conditionally allowed in the Commercial Forest zone, so this provision is irrelevant to the request.
- §33.4300 et. seq., Planned Development. These standards allow the creation of lots smaller than would otherwise be allowed if remaining land is, for example, preserved as a common area for the residents. Its applicability is largely limited to urban areas.
- §33.7000 et. seq., Design Review. Not applicable to single family development.
- §33.7200 et. seq., Nonconforming Uses. Applies to the alteration or replacement of an existing non-conforming use. To our knowledge this claim does not involve any existing non-conforming uses; therefore, these provisions are not applicable.
- §33.7400 et. seq., Signs. This claim is not seeking to place signs on the property so these provisions are not applicable.
- §33.7000, Land Divisions. The code section listed appears to be in error. Land division rules are listed under §33.7000 et. seq. and contain standards that must be followed to create new conveyable properties in accordance with ORS 92. This statute is not referenced in Ballot Measure 37, so rules implementing it are outside the scope of this claim.
- §10.000 et. seq., Road. Corridor Specific Cross-Section Overlay. Applies to unique roadways such as freight corridors, Boulevards, etc. Is not applicable to McNamee Road.
- §11.000 et. seq., Local Access Roads. Establishes minimum standards for roads that are not maintained by the public but are located within publicly dedicated rights-of-way. No such rights-of-ways presently exist on, or in close proximity to the site.
- §13.000 et. seq., Temporary Road Closures. Requirements for when and how temporary road closures are to occur. Not applicable to a request to subdivide and develop property.
- §15.000 et. seq., Truck and Transit Restrictions. Restricts movement of large trucks and transit vehicles on certain roadways. Since the development sought does not generate either, it is not applicable.
- §17.000 et. seq., Appeals. Process for challenging how the County applies road standards. County processes, in themselves, are not land use regulations that are subject to Measure 37 claims.
- §22.000 et. seq., Property Owner Maintenance Requirements. Applies to maintenance of sidewalks and curbs within the right-of-way.

- §29.500, Street Standards. It contains no language that would be directly applicable to land divisions or development.
- §29.530, Street Standards, Adoption of Rules. Contains language explaining how the street standards can be amended. The provisions are procedural and outside the scope of the measure.
- §29.562, Local Street Category. Defines what constitutes a local street and is, in itself, not a standard that would be directly applicable to the subdivision of the property or the construction of homes.
- §29.563, Land Use Category. Rules are crafted for urban areas where site specific zoning is at odds with the classification of the roadway. Is not applicable to rural areas.
- §29.565, Scenic Route Category. Applies to scenic routes such Skyline Boulevard. Not applicable to McNamee Road.
- §29.575, Rules for Pedestrian Paths and Bikeways. Rules for when new paths and bikeways are required. Not applicable to rural local roadways, such as McNamee Road.
- §29.576, Rules for Sanitary Sewer. Contains standards for constructing sewer infrastructure within public roadways. State law prohibits new sewer systems outside Urban Growth Boundaries; therefore, this section of the code is not applicable. Any new lots or parcels would need to be served by on-site septic systems.
- §29.579, Rules for Street Lighting. Street lighting is required with urban subdivisions where districts exist or are formed to pay for on-going maintenance and utility costs. These provisions are not applicable to rural areas.
- §29.580, Rules for Street Trees. Street trees are required in conjunction with urban subdivisions and are not applicable to this request.
- §29.581, Rules for Development Support and Financing. Rules relate to the formation of local improvement districts and cost sharing of improvements by the County. None of these standards appear to be directly applicable to this claim.
- §29.620, West of Sandy River Flood Hazard Regulations. This code citation is an error as it is applicable to the West of Sandy area. The Flood Hazard code applicable to this area is §29.600. The property is not within a mapped Flood Hazard Area so these standards are not applicable.
- §33.7000, Land Divisions. The code section listed appears to be an error. Land division rules are listed under §33.7700 et. seq. and contain standards that must be followed to create new conveyable properties in accordance ORS 92. They are only

relevant to the partitioning or subdivision of property and are; therefore, outside the scope of the measure.

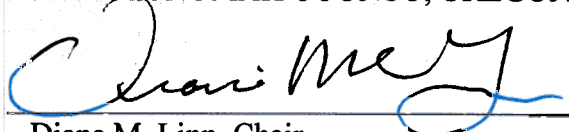
5. Conditions of Approval:

- (a) This Board Order allows certain County code provisions not to be applied by the County to Claimant Dorothy English's property as set out in Category 1 above. This does not constitute a waiver or modification of corresponding state law, or administrative rules.
- (b) This action by the Board, to not apply certain regulations to Claimant Dorothy English's property, does not authorize immediate construction of the dwellings. Rules that still apply to the property require that land use and building permits be approved by the County before development can proceed.
- (c) Any plat must include a note that this plat must record pursuant to Ballot Measure 37.

ADOPTED this 17th day of March, 2005.

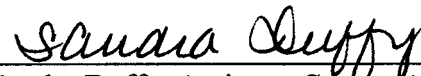


BOARD OF COUNTY COMMISSIONERS
FOR MULTNOMAH COUNTY, OREGON


Diane M. Linn, Chair

REVIEWED:

AGNES SOWLE, COUNTY ATTORNEY
FOR MULTNOMAH COUNTY, OREGON

By 
Sandra Duffy, Assistant County Attorney