



**LAND USE & TRANSPORTATION
PLANNING PROGRAM**

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Staff Analysis of a Measure 37 Claim

The following matter is scheduled for public hearing, deliberation and possible action before the Multnomah County Board of Commissioners

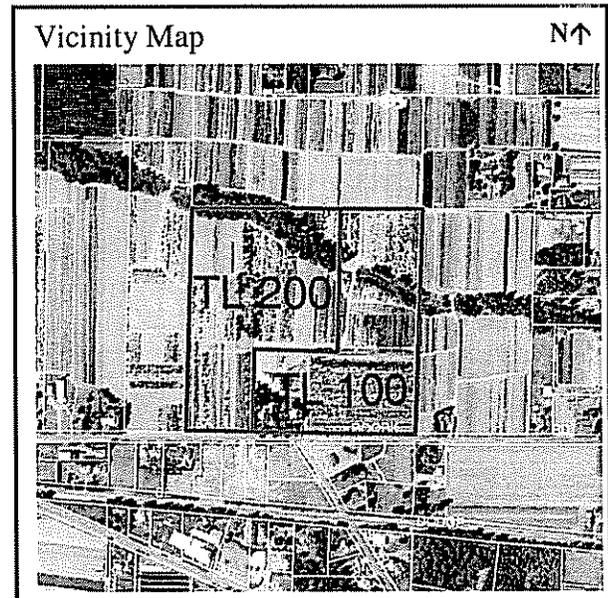
Hearing Date, Time, & Place:

August 10th, 2006 at 9:30 am or soon thereafter, in the Commissioners' Board Room of the Multnomah Building, located at 501 SE Hawthorne, Portland, Oregon.

Case File: T1-05-062

Claimants: Dean Richards and William Richards

Location: 29415 and 29429 SE Powell Valley Road
TL 200 & 100, Sec 19AB, 1S – 4E



Claim: Compensation in the amount of \$915,000 or relief from land use regulations to allow a 20 lot subdivision or any other use allowed in 1973.

Zoning: Exclusive Farm Use (EFU), Significant Environmental Concern (SEC water resources) and Hillside Development (HD).

Site Size: 29415 SE Powell Valley Road (TL 200) – 19.99 acres
29429 SE Powell Valley Road (TL 100) – 18.63 acres

Approach to Deciding the Claim:

For a claim to be valid, the land use regulations challenged must restrict the claimant's use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant acquired the property. As outlined in this report and memorandum from the County Attorney's Office dated June 8th, 2006, this requirement has not been met. The reasons for this are as follows:

- (a) The claimants have failed to establish that they acquired the property prior to the date the challenged regulations were enforced and;
- (b) Subdividing property is not a "use" subject to the provisions of Measure 37 and that, in any event, development rights gained through a waiver are personal to the claimant and cannot be transferred to a purchaser of a subdivided parcel. Since the rights are not transferable there has been no reduction in the fair market value of the property.

Consequently, the Planning staff recommends that the Board of Commissioners deny this claim.

(The following is a step-by-step evaluation of the claim, which consists of the application materials submitted by Mark O'Donnell, ESQ, applicant for the claimant. The analysis is structured as a series of questions that must be answered to establish if a claim is valid, comparable to the methodology outlined in a February 24th, 2005 memo authored by the State Attorney General's Office.)

1. *Has the owner made a complete written demand under Ballot Measure 37?*

No. The materials submitted by the claimant do not constitute a complete written demand for compensation as required by the county's code.

This claim involves two contiguous properties, one owned by Dean A. Richards (TL 100) and the other by the William Richards (TL 200). The subject properties are zoned Exclusive Farm Use (EFU) with zoning overlays for Significant Environmental Concern (SEC water resources) and Hillside Development (HD). Kelly Creek passes through the northern portion of both properties which are located between SE Powell Valley Road to the north and SE Dodge Park Blvd. to the south. The properties are less than ½ mile east of the City of Gresham limits. Both properties are developed with a residence and appear to be engaged in farming activities according to a recent aerial photo of the area.

Multnomah County Code 27.500 – 27.565 implements Oregon Revised Statutes Chapter 197, as amended by Ballot Measure 37 (ORS 197.352). These regulations, in part, provide the framework used to decide whether or not a claim is sufficiently complete, valid and eligible for compensation by either regulatory waiver or monetary compensation. Staff followed these guidelines to determine that the necessary contents of a written claim have not been submitted.

This claim was submitted to Multnomah County on October 3rd, 2005. On October 20th, the county sent the claimant a letter indicating the review would be suspended in light of the October 14th Marion County ruling in MacPherson v. Department of Administrative Services finding Measure 37 unconstitutional. On February 28th, 2006, a letter was sent to the claimant indicating the review would again commence because five days earlier, Oregon's Supreme Court overturned this ruling. On March 10th, County Staff provided a detailed letter to the claimant outlining the outstanding information required for a complete claim pursuant to the provisions of MCC 27.500 – 27.565.

The missing information included the \$1,500 processing fee, property appraisals and copies of the 1973 farm lease agreement and trust documents referenced in the claim's narrative. The details of the lease and trust documents are critical to the determination of property ownership interests.

By May 3rd, 2006 the required information for a complete claim had not been submitted. A letter was mailed on that date to the claimant indicating that the county could either process the claim as an invalid claim, or put the claim on hold in order to see how the land division issue is resolved by the courts. We received no response to the May 3rd request and therefore have prepared this report.

2. ***Did the claimant acquire the properties before the laws in question were adopted?***

No. The claimants have failed to establish that they acquired the properties prior to the date the challenged regulations first prevented subdivision of the properties in 1977.

The claimants have submitted a Measure 37 request to divide two properties into a 20 lot subdivision, or have the county pay \$915,000 in compensation. The claimants state that William Richards has held an ownership in both tax lots through a farming lease since 1973 when zoning regulations would have allowed a 20 lot subdivision.

Zoning was first applied to the properties in 1962 with the adoption of Suburban Residential (SR) zoning regulations. The zoning was changed from SR to Multiple Use Agriculture-20 (MUA-20) on October 6th, 1977 and from MUA-20 to Exclusive Farm Use (EFU) in 1980.

Adoption of MUA-20 zoning regulations in 1977 required new lots created in the district, by a subdivision for example, to be at least 20-acres in size. This minimum lot size requirement would have prevented the subdivision request outlined in this claim. In 1980, the minimum lot size was increased to 38-acres for all new properties. Currently, the EFU zoning district requires all newly created properties from a land division to be at least 80-acres in size (MCC 36.2660(C)).

Ownership History of Tax Lot 200 (29415 SE Powell Valley Road)

Property totaling 38.62 acres, referenced today as Tax Lot 100 and 200, was originally acquired by Eugene and Dean Richards from the Inland Feeding Company, Inc. on August 31, 1944 for farm purposes (Book 867 Page 173). In 1973, Eugene and Dean Richards leased thirtyfive (35) of the 38.62 acres to their son William Richards according to the claimant. This arrangement could not be verified by Staff because a copy of the lease agreement was not submitted with the claim and could not be obtained from county records.

Ownership of Tax Lot 200 was transferred from Eugene and Dean Richards to William Richards in 1978 with the recording of a bargain and sale deed (Book 1272, Page 842). Subsequent deeds were recorded in 1981 and 1998 which appear to release Mr. Richard's spouse's interest in the property after marriages were dissolved. These deeds did not impact Mr. Richard's ownership of Tax Lot 200.

Staff does not believe a lease for farming purposes can be used to claim a right to other uses allowed at the time (e.g. a dwelling) because the leaseholder's interest in the land did not extend to those uses. What we know of the nature of the lease is limited to the claimant's narrative description that it was drafted in 1973 for farming purposes. Staff requested a copy of this lease agreement in a May 10th, 2005 letter and would expect that the lease document would specifically describe the use or uses subject to the agreement. Deed records show that William Richards did not obtain an interest in the property for the type of development envisioned until 1978, after the MUA-20 zoning was adopted prohibiting further subdivision.

Ownership History of Tax Lot 100 (29429 SE Powell Valley Road)

Although Dean Richards has owned 18.63 acre Tax Lot 100 since 1944, ownership of this lot was transferred to a trust on December 27th, 1994 and then back to Dean A. Richards, the

individual on June 7th, 2005. The details of the trust arrangement are important because transfer of land to a non-revocable trust would likely constitute a transfer of ownership because the trustee holds legal title to the property and the settler retains no rights over the property. Staff requested a copy of the trust documents in a letter sent May 10th, 2005 in order to determine if a change in ownership had occurred. A copy of that document was not provided by the claimants and was not able to be located by county's recorders office.

Transfer of Tax Lot 100 to a non-revocable trust would effectively reset the date of acquisition of Tax Lot 100 to the time the land was put in the trust's name (i.e. 1994). On the other hand, if the land were put into a revocable trust, a change in ownership would not have likely occurred because the transfer could be reversed by the individual controlling the trust. Even if the trust was set up as a revocable trust, the claim is for both properties rather than just Tax Lot 100.

In conclusion, the claimants have not established that both properties involved in this claim were acquired before the restrictive Multiple Use Agriculture-20 zoning regulations were first applied in 1977.

3. *Have the challenged regulations restricted the use of the properties for the claimant?*

Zoning was first applied to the properties in 1962 with the adoption of Suburban Residential (SR) zoning regulations. The zoning was changed from SR to Multiple Use Agriculture-20 (MUA-20) on October 6th, 1977 and from MUA-20 to Exclusive Farm Use (EFU) in 1980. The claimants have indicated William Richards has held an interest in both properties since 1973 when the SR zoning regulations were in effect. Deed records show William Richards did not obtain a fee interest in Tax Lot 200 until 1978 when a subdivision of land could not have been approved under the Multiple Use Agriculture-20 zoning regulations. As a result, there has been no restriction in use for the claimant.

Even if a subdivision were permissible, Multnomah County's understanding of the law as reflected in its Measure 37 ordinance is that division of a property is not a 'use' of land subject to the provisions of Measure 37 and that development rights gained through a waiver are personal to the claimant and will result in no restriction in use if transferred to a third party. No restriction in use would occur for the third party because the newly purchased subdivision lots would be subject to the current Exclusive Farm Use regulations preventing a dwelling from being built.

This legal issue is analyzed in detail within a memo prepared by the Assistant County Attorney, Sandra Duffy, which has been attached to the staff report as Exhibit A1. For the reasons outlined in this legal memorandum, Staff finds this request to subdivide the property is an invalid request.

4. *Have the regulations reduced the fair market value of the properties?*

A reduction in value has not occurred because land use regulations would have prevented the subdivision in 1978 when William Richards first obtained fee interest in Tax Lot 200 and because development rights for each subdivision lot would not transfer to the new owners of those lots. Measure 37 rights are personal to the claimant and are of no value to a third party. For instance, the current Exclusive Farm Use zoning regulations would be applied once a newly created subdivision lot is sold to a third party. These regulations would prohibit the establishment of a dwelling on each subdivision lot rendering it an unbuildable lot. Because the resulting lots would have no development value, no reduction in value will occur as compared to the current development value of each property under the current zoning regulations.

PUBLIC NOTICE

Public notice of this hearing was mailed to all property owners within 750 feet of the subject property. Deliberation and any action on this item will be done following a public hearing at which interested citizens will have an opportunity to testify and provide written comment in accordance with the Board of Commissioners rules of procedure for the hearing.

After receiving notice of the claim; Alison Winter, Multnomah County Transportation Planning Specialist, indicated the County Transportation department will need more information regarding the proposed development to determine the necessary transportation-related requirements. Ms. Winter indicated that on and/or off site-improvements, right-of-way dedication, and/or permits for access or construction within the County right-of-way may be required in the event development occurs as a result of this Measure 37 process. A copy of Ms. Winter's comment letter is presented as Exhibit A2 to this report.

CONCLUSION

In conclusion, the claimants have failed to establish that they acquired the property prior to the date the challenged regulations were enforced. Staff also finds subdividing property is not a "use" subject to the provisions of Measure 37 and that, in any event, development rights gained through a waiver are personal to the claimant and cannot be transferred to a purchaser of a subdivided parcel. Since the rights are not transferable there has been no reduction in the fair market value of the property.

Consequently, the Planning staff recommends that the Board of Commissioners deny this claim.

Issued by:

By: 
Adam Barber, Planner

For: Karen Schilling, Planning Director

Date: July 12, 2006

Exhibits

Copies of the exhibits, referenced herein, are in the case record that is on file at the Land Use and Transportation Planning Office.

A1 – Memo from Sandra Duffy, Assistant County Attorney dated June 8, 2006

A2 – Comment letter from Alison Winter, County Transportation Planning Specialist dated June 26, 2006.