



**LAND USE & TRANSPORTATION
PLANNING PROGRAM**

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Staff Analysis of Measure 37 Claim

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

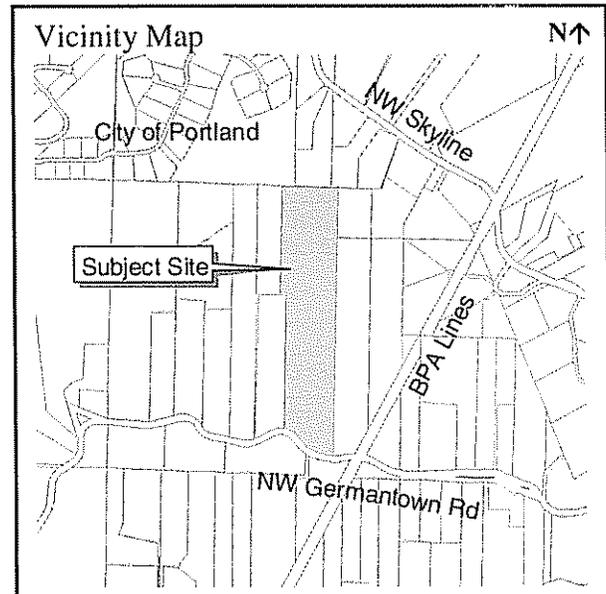
Hearing Date, Time, & Place:

December 14, 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: T1-05-063

Claimants: Cecelia Hunziker
4840 Penns Valley Road
Spring Mills, PA 16875

Location: 13715 NW Germantown Road
TL 300, Sec 09, T1N, R1W, W.M.
Tax Account # R961090210



Claim: A claim for \$890,000 in compensation or relief from land use regulations to allow the land to be divided into 5 parcels of five acres each with dwellings on each lot.

Zoning: Rural Residential (RR), Significant Environmental Concern overlay for wildlife habitat (SEC-h), Hillside Development overlay, and OAR Chapter 660, Division 004 requiring 20-acre minimum lot size if within 1-mile of the Urban Growth Boundary.

Site Size: 25.13 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 claimants acquired the property. As outlined in this report and memorandums from the County Attorney's Office dated June 8, 2006 and November 14, 2006, this requirement has not been met because (a) land use regulations in effect when the owner acquired a right to use the property did not allow a further division of the property, (b) dividing property in itself is not a "use" subject to the provisions of Measure 37, and (c) in any event, development rights gained through a waiver are personal to the claimants 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.

Staff Analysis

(The following is a step-by-step evaluation of the claim, which consists of the application materials submitted by the claimants. 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 24, 2005 memo authored by the State Attorney General's Office.)

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

Yes. The materials submitted by the claimant constitute a complete “written demand for compensation” within the meaning of the measure.

On October 11, 2005, the claimant submitted a completed Measure 37 Claim Form (Exhibit 1), a \$1,500 deposit, a list of regulations which the claimant asserts reduce their property value, a narrative (Exhibit 2), a copy of the 1989 contract of sale (Exhibit 3) a copy of the November 7, 2002 Warranty Deed which transferred ownership of the property to the claimant (Exhibit 4). On May 19, 2006, the claimants submitted a title report prepared by Fidelity National Title Company of Oregon (Exhibit 5). Also on May 19, 2006, the claimant submitted the required appraisal of the property (Exhibit 6). The claim is considered to be complete consistent with the county's requirements outlined under MCC 27.520.

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

No. The Claimant obtained a warranty deed for the property on November 7, 2002 (Exhibit 4) but did not obtain a right to use the property until February 28, 2005 when the exclusive Life Estate of the previous owners expired.

County assessment records show that the claimant is the current owner of the subject property. A land sale contract from 1989 was submitting showing that the current owner had entered into an agreement to purchase the property. A warranty deed dated November 7, 2002 was submitted showing a transfer of ownership to the current owner, Cecelia Hunziker. Normally, a vendee's interest in a land sale contract would be sufficient to establish a interest or ownership for a Measure 37 claim. However, the 1989 contract, as well as the warranty deed from 2002, have terms that prohibited the current owner from using the property by way of a Life Estate for Wesley and Fern Wiseman. In essence, the previous owners had exclusive use of the property until their deaths, which occurred in 2005. The current owner, Cecelia Hunziker, only had a future right to use the property until after that time. Consistent with the State's Measure 37 decision (Exhibit 7) and the County Attorney's opinion (Exhibit 8), Cecelia Hunziker did not obtain a right to use the property until the Life Estate expired on February 28, 2005. However, in the State's Measure 37 decision, it indicated that Cecelia Hunziker obtained fee interest to the property on November 7, 2002, which gave the claimant a right to use and possess the property. It is not clear why the State used the November 7, 2002 date, because the life estate was still in effect until the death of the second life estate in 2005.

On February 28, 2005, the zoning of the lot was Rural Residential (RR). A copy of the RR regulations in effect at the time are included as Exhibit 9. Oregon Administrative Rule 660-004-0040 prohibits the creation of lots and parcels smaller than 20-acres within 1-mile of the Urban Growth Boundary. This rule was effective on October 4, 2000, prior to the claimant having a right to use the property. Because the OAR was not codified, the County was obligated to implement the rule directly after its adoption in 2000. The County adopted the rule and amended its code on May 16, 2002.

3. *Have the challenged regulations restricted the use of the property?*

No. The claimant has failed to establish that the challenged regulations have restricted her use of the property.

Rural Residential regulations in existence when the claimant acquired the property prohibit further division of the subject property, meaning relief from challenged regulations would not allow the development that is sought.

A land division in the RR zone within one mile of the UGB would have required the subject property to be at least 40 acres. Even if land divisions were allowed, Multnomah County's interpretation of the law as reflected in its Measure 37 ordinance is that dividing property in itself is not a 'use' of land subject to the provisions of Measure 37. 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 they would be subject to the same Rural Residential regulations which have prohibited the partition of parcels under 40-acres in size since 2000.

This legal issue is analyzed in detail within a memo prepared by the Assistant County Attorney, Sandra Duffy, dated June 8, 2006. For the reasons outlined in this legal memorandum, staff finds this claim seeking the right to partition the property to be invalid.

The claimant also identified regulations pertaining to the Significant Environmental Concern overlay, land division regulations, and LAND USE definitions as part of her claim. However, those issues are moot since the claimant obtained the property after the RR regulations prohibited lots smaller than 20-acres, which was the primary regulation in her claim.

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

No. The claimant has failed to establish that the challenged regulations have reduced the fair market value of the property.

An appraisal submitted by the claimant (Exhibit 6) was performed by a licensed Oregon Certified General Appraiser. The appraisal did not give a specific reduction in the dollar amount of the value of the property based on the regulations; rather, it stated that the restrictions the claimant claimed were on the property did in fact reduce the value of the property. A specific dollar amount would need to be determined later if the County were to pay the claim.

Using the narrative materials and appraisal data submitted by the claimant to substantiate the claim, staff determined that the claimant was requesting between \$491,700 and \$890,000 in compensation. However, a reduction in value has not occurred because a right to use the property was not acquired in 1989 as claimed. Rather the right to use the property was acquired in 2005, after the 2000 adoption of OAR 660-04-0040. As such, regulations restricting the use of the property were already in effect. Additionally, development rights cannot be transferred.

As stated earlier, the claimant identified several other regulations other than the minimum lot size that reduced the fair market value of their property. Again, they are moot since the property was acquired after the primary regulation of their claim was adopted.

Public Comment

After a claim for compensation is declared complete pursuant to MCC 27.520(B), the Director shall mail notice of the claim to the claimant, other owners of record of the property, and all owners of property within 750 feet of the subject property. Additional mail notice shall be sent to any public entities with land use regulatory authority over the property and other organizations or persons as the Director may designate (MCC 27.530(A)).

Pursuant to the provisions of MCC 27.530, a 14-day Opportunity to Comment packet was mailed on October 27, 2006. No comments were submitted. Notice was also provided to claimant and adjacent owners advising them of the scheduled hearing date.

Conclusion

In conclusion, the claimant has failed to establish that regulations enacted after she obtained a right to use the property have prevented her (or others) from dividing the property so that they can develop homes on the new parcels. Consequently, there is no restriction of her use of the land or reduction in its value.

Additionally, dividing property is not a “use” subject to the provisions of Measure 37 and, in any event, development rights gained through a waiver are personal to the claimants and cannot be transferred to a purchaser. The County’s RR zoning regulations and State Administrative Rules in effect when the owners acquired a right to use the property did not allow for land divisions for properties less than 20 acres in size.

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

Issued by:

By:  Don Kienholz, Planner

For: Karen Schilling- Planning Director
November 20, 2006

Exhibits

Copies of the exhibits, referenced herein, and all other materials submitted to the County related to this claim are included in the case record that is on file at the Land Use and Transportation Planning Office.

Exhibit #	# of Pages	Description of Exhibit	Date Received/ Submitted
1	1	Measure 37 Claim Form	October 11, 2005

2	1	List of Regulations Claimant Asserts Reduces Property Value	October 11, 2005
3	2	1989 Contract of Sale	October 11, 2005
4	7	November 7, 2002 Warranty Deed	October 11, 2005
5	4	Title Report Prepared by Fidelity National Title Company of Oregon	October 11, 2005
6	5	Measure 37 Appraisal Prepared By Cushman & Wakefield	May 19, 2006
7	8	State of Oregon's Measure 37 Claim Decision	August 24, 2006
8	2	Multnomah County Attorney Opinion	November 14, 2006
9	5	Rural Residential Regulations In place at the Time Claimant Obtained Right to Use Property	November 20, 2006

Multnomah County Attorney's Office
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MEMORANDUM

To: Don Kienholz
Multnomah County Planner

From: Sandy Duffy
Assistant County Attorney
Multnomah County Attorney's Office

Date: November 14, 2006

Re: Cecilia Hunziker, Ballot Measure 37 Claim

I have reviewed your staff report for legal sufficiency under Multnomah County Code 27.500 *et. seq.*

This application seeks a subdivision of property creating 5 parcels. My memorandum dated June 8, 2006, sets out a legal opinion stating that subdividing property is not a "use" of land. Further, since the Measure 37 rights are not transferable, there has been no reduction in the fair market value of the property.

Additionally, this application raises a unique question of who is an "owner" for purposes of a Measure 37 claim. ORS 197.352 provides for payment of compensation or relief from specific laws for "owners" as that term is defined in ORS 197.352(11)(C). That provision defines "owner" as "the present owner of the property, or any interest therein."

The claimant asserts an acquisition date of December 31, 1989, when Wesley Horace Wiseman and Fern Cecelia Wiseman entered into a land sale contract with the claimant. Normally, a vendee's interest in a land sale contract would be a sufficient basis for a claim. However, in this case, under the land sale contract,

Wesley Horace Wiseman and Fern Cecilia Wiseman retained life estate interests in the subject property with the exclusive right to use the property during the duration of their life estates. As a result, although the claimant acquired a right to use the subject property in the future through the land sale contract, that right did not include a present right to use the property since it was subject to Wesley Horace and Fern Cecilia Wiseman's life estates. On November 7, 2002, claimant obtained a warranty deed for the fee title to the property, but did not obtain a right to use the property until February 28, 2005, when the exclusive Life Estates of the previous owners expired, as reflected by a September 14, 2005, title search report.

You have adequately addressed each required criteria and have substantial evidence to support your conclusions that the claimant did not acquire the property before the laws in question were adopted; that claimant failed to establish that the challenged regulations restricted her use of the property; and, that the claimant failed to establish that the regulations reduced the fair market value of the properties.

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MEMORANDUM

To: Derrick Tokos, Principal Planner

From: Sandy Duffy, Assistant County Attorney

Re: All Measure 37 Land Divisions Are Facially Invalid

Date: June 8, 2006

INTRODUCTION:

A substantial portion of the Measure 37 claims being submitted to Multnomah County are for partitions or subdivisions. MCC 27.530(O) authorizes the Planning Director to determine whether a claim is invalid on its face and to recommend to the Board of County Commissioners that the claim be denied. The question this memorandum addresses is whether claims for land divisions are invalid on their face. This memorandum is intended as guidance for the Planning Director and the land use planners who are reviewing Measure 37 claims.

Set out below is the County's legal analysis addressing whether partitioning and/or subdividing land is a "use" of land which is subject to the provisions of Measure 37 and whether development rights gained through a waiver are personal to the claimant are transferable to a purchaser of a subdivided parcel. If the development rights are not transferable, there has been no "... reduc[tion in] the fair market value of the property," which is required for a valid Measure 37 claim.

DISCUSSION:

A. County land division regulations do not restrict the owner's "use" of the property.

The meaning of the term "use" in the Measure is a critical factor in determining the validity of claims, as well as the governing bodies' authority to pay compensation or to waive¹ regulations. Section (1) of the Measure requires compensation from the County if it enforces an ordinance that "restricts the *use* of private real property."

As an alternative to paying compensation, the Measure, in Section(8) authorizes the governing body to: "...modify, remove or not to [sic] 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."

If the county land division regulations (MCC 33.7700 – 33.8035) are a *use* restriction, the Board may pay compensation or waive the regulations which would allow Measure 37 claimants to partition or subdivide their parcels.

(1) Land division ordinances as land use regulations in Measure 37.

The proponents of the Measure give import to the fact that the Measure defines "land use regulation" in subsection (11)(B) as including "land division ordinances." First, land division ordinances do not specify how a property is to be *used*. Land division ordinances set out the requirements for and procedures to partition or subdivide parcels of land.

Second, on February 24, 2005, the Attorney General's Office issued a Measure 37 letter-opinion to Lane Shetterly, Director of DLCD. That letter-opinion makes it very clear that a

¹ Waiver is a term used in this memorandum in lieu of the Measure 37 language which authorizes the governing body to "modify, remove or not to [sic] apply the land use regulation..."

waiver is valid only if a *series* of conditions are met², including: “The law [county code] restricts the use of private real property or any interest therein,” and “The law [county code] has the effect of reducing the fair market value of the claimant’s property or any interest therein.” Inclusion of a type of regulation within the definition of “land use regulation” does not necessarily mean that it is a “use” regulation which restricts the use and diminishes the value of property, giving rise to a Measure 37 claim.

Finally, the two sections of the Measure (the definitions and the requirement that a restriction in use diminish the value), must be read in context and effect must be given to both, if possible. The general definition provision will not take precedence over the substantive provision requiring a restriction in *use* and a diminution in value to prove a valid claim under the Measure.³

(2) Interpreting the word “use.”

When construing a statute, the court’s task is to determine the intent of the legislature. The best indication of legislative intent is the text of the statute. Only if the court finds the text is ambiguous will the court analyze the legislative history of the statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993); ORS 174.010. The same analysis applies whether the statute was enacted by the legislature or through the initiative process. *Stranahan v. Fred Meyer, Inc.*, 331 Or 61; 11 P3d 228 (2000).

The term “use” is undefined in the Measure which means it is to be interpreted in its common, everyday meaning. The common meaning of “use,” in the context of land use

² The same holds true for a determination to pay compensation. There must be a valid Measure 37 claim which meets the same series of conditions.

³ ORS 174.020(2) “When a general and particular provision are inconsistent the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.”

regulations, includes such uses as: rural residential use, commercial use, farmland use, forestland use, industrial use, community service use.⁴ Those broad categories of uses are subdivided into more specific uses in the zoning code. For example, rural residential allowed uses include: raising and harvesting of crops, raising livestock and honeybees, and family day care.⁵ All of these uses can take place on a parcel of land without subdividing the parcel.

The common dictionary definition of the word “use” is:

“The act of using or the state of being used.” Webster’s New Universal Unabridged Dictionary, Second Edition, (Dorset and Baber 1989).

The legal definition of the word “use” is:

“The application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional <the neighbors complained to the city about the owner’s use of the building as a dance club>.” Black’s Law Dictionary, Seventh Edition, West Group, St. Paul Minn., (1999).

Both of these definitions contemplate active employment of the land for a specific purpose. The acts to subdivide land (applying for a land use permit, obtaining a title report, obtaining a survey, recording a plat) do not involve the employment of land. Subdividing is preparation for a use of the land, but is not, itself, a use.

Other than *MacPherson*⁶, there are no cases to date interpreting the language of Measure 37, however, the Court of Appeals, in *Parks v. Tillamook County*, 11 Or App 177 (1972),

⁴ This is a representative sample of some of the uses contained in MCC Chapter 33; there are many others but none of them include partitions or subdivisions.

⁵ These are examples from MCC Chapter 33.

⁶ *MacPherson v. Department of Administrative Services*, 340 Or 117, 130 P3d 308 (2006) found Measure 37 to be constitutional.

recognized that platted but undeveloped land is not regarded as a “use” in zoning law.⁷ It follows that the process of subdividing land would not be a “use” of land either.

(3) The Attorney General concludes Measure 37 rights are not transferable.

The Attorney General’s letter-opinion to the Director of DLCDC also reviews the voter’s pamphlet statements for voter intent on transferability of Measure 37 relief. Some of that discussion may be relevant as legislative history of voter’s intent on whether the Measure was intended to allow subdivision of qualified parcels. It states:

The arguments in favor include 40 submissions ...slightly more than half of the arguments discuss the perceived adverse effects of land use laws in the abstract... slightly fewer than half are statements about how land use laws are preventing a specific owner from putting his or her property to some particular current use. All of those specific concerns could be remedied either by a decision that is personal to that owner or one that ran with the land, with the possible exception of several owners who expressed dissatisfaction with not being able to subdivide their property and give parcels to descendents, sell them to third parties, or both. Allowing an owner to subdivide property by not applying a prohibition would do him no good, of course, unless the subdivision remained lawful after its transfer to one or more new owners. Existing laws generally allow new owners to perpetuate non-conforming uses that were lawful when instituted, but it is not certain whether all would apply to a decision under Measure 37. See, e.g., ORS 215.130. [non-conforming use statute – footnote omitted] None of the arguments in favor addresses whether subsequent purchasers would acquire the rights, or step into the shoes, of owners covered by the measure. Likewise, no argument directly mentions the effect of laws on property’s resale value, although one argument states that they restrict the use of home equity to fund owners’ retirements. The latter implies an adverse effect on resale value, which might be recognized by discerning voters as a problem that would only be remedied if the exemptions ran with the land. On the other hand, an argument in favor of the measure by the chief petitioners expressly states that if an owner entitled to Measure 37 compensation conveys her property, that will establish a new “date of acquisition” for purposes of determining what laws may give rise to a claim. This is a clear statement that the chief petitioners expected that the relief available under the measure depends on when the current owner acquired the property – that the relief is personal to the current owner. If the current owner is eligible for relief, but sells the

⁷ At 196.

property, then only laws adopted after the new owner acquired the property create a right to relief. (Emphasis added.)

The opinion, in a footnote to this quoted section, which related to the non-conforming use statute (ORS 215.130), questions whether Measure 37 implementing ordinances, adopted by local governments, can confer non-conforming use status upon transferred properties. The footnote states:

“This statute [ORS 215.130] allows the continuation of uses that have been made unlawful by a subsequent change in the law. But if a decision to grant non-monetary relief under Measure 37 is personal to the owner, uses covered by an [sic] decision would be made unlawful not by a change in the law but by a change in ownership, which does not come under ORS 215.130. Therefore, voters whose decision to support the measure was motivated by the arguments about subdivision restrictions presumably expected either that a decision to grant non-monetary relief would run with the land or that existing law would not require that a subdivision be undone upon the property’s sale. Additional legislation may be needed to implement that intent.” (Page 6.) (Emphasis added.)

This footnote implies that the voter’s pamphlet “legislative history” probably includes an intent to perpetuate a legal use of the property upon transfer, but it does not fit into the nonconforming use statute because the trigger is sale, not change in land use laws. This footnote seems to suggest that the nonconforming use statute (ORS 215.130) could be amended by the legislature to add the sale of Measure 37 properties as creating a nonconforming use.

In light of the Attorney General’s letter-opinion, the *Parks* case, common land use parlance, the dictionary definitions of “use,” and the failure of the Measure to specifically authorize partitions or subdivisions in zones where those actions are prohibited, this Court should interpret Measure 37 to exclude a subdivision or partition of land as a “use” of land.

B. A “diminished value” relies on an erroneous assumption of transferability.

Even assuming an owner’s evidence of value is legally sufficient to support a finding in his/her favor, it is erroneously predicated on an assumption that the owner can sell his/her properties with Measure 37 historical rights to use the property intact.

If Measure 37 rights do not transfer with the sale of a property, the property has only the value it will have in the hands of the purchaser with *current* applicable regulations.

(1) Regulatory Relief is Personal to the Present Owner

Regulatory relief under ORS 197.352 is personal to the present owner of the property. When the County finds that a claimant meets the standards for relief under ORS 197.352, the County may, in lieu of compensation, waive land use regulations “to allow *the owner* to use the property for a use permitted at the time *the owner* acquired the property.” ORS 197.352 (8) (emphasis added). The statute then defines “owner” as the “present owner of the property.” ORS 197.352 (11)(C). Therefore, the regulatory relief authorized by the statute as an alternative to compensation is personal to the present owner.

This conclusion is consistent with the advice the Oregon Attorney General (“AG”) has given to State agencies. In a letter dated February 24, 2005, to the Director of the Department of Land Conservation and Development, the AG writes that a decision “to ‘not apply’ a law would necessarily be personal to the owner submitting the claim.” The letter cites to and relies on arguments made by the proponents of the statute that were presented in the Voters Pamphlet:

“[A]n argument in favor of the measure by the chief petitioners expressly states that if an owner entitled to Measure 37 compensation conveys her property, that will establish a new ‘date of acquisition’ for purposes of determining what laws may give rise to a claim. This is a clear statement

that the chief petitioners expected that the relief available under the measure depends on when the current owner acquired the property – that the relief is personal to the current owner. If the current owner is eligible for relief, but sells the property, then only laws adopted after the new owner acquired the property create a right for relief.”

Any rights obtained by and owner pursuant to a state waiver or a county waiver are personal to the owner with Measure 37 rights and may not be transferred to subsequent owners. Because a subsequent owner would acquire the property subject to all laws in effect on the date the subsequent owner acquired it, the subsequent owner would not acquire a “buildable lot.”

Property owners who are making Measure 37 claims to Multnomah County are claiming that they are entitled to compensation in some identified amount based on an assertion that they can divide the property into some specific number of “buildable lots.” The core of this claim is the assertion that, absent zoning regulations enacted after date of owner acquisition, the claimant could divide the property into some specified number of “buildable lots.” However, as noted above, any rights obtained pursuant to a claim filed under ORS 197.352 are personal to the claimant and do not transfer with the property. Accordingly, a purchaser of a lot from a Measure 37 owner will acquire the property subject to all laws currently in effect and current laws do not allow new dwellings on the lots in contravention of the current regulations.⁸

Because the lots cannot be sold as residential building sites, they have no real market value for residential use and regulations that prohibit their creation do not reduce the property’s value.

(2) Plaintiff cannot divide land because land division is not a “use”.

⁸ State and local laws allow new dwellings in commercial forest zones only under very limited circumstances – none of which would apply to the subdivision lots created pursuant to this claim. *See e.g.* ORS 215.705, 215.720, 215.730, 215.740 and 215.750; Multnomah County Code (“MCC”) 33.2220, 33.2225, 33.2230, 33.2235 and 33.2240.

See Section A(3) above. (The Attorney General concludes Measure 37 rights are not transferable.)

If Measure 37 rights do not run with the land, then Plaintiff's property has no enhanced value in the eyes of a potential purchaser and no diminution in value attributable to current regulations.

CONCLUSION:

Partitioning and subdividing land is not a "use" of land which is subject to the provisions of Measure 37. Development rights gained through a waiver are personal to the claimant and are not transferable to a purchaser of a subdivided parcel. Because the development rights are not transferable, there has been no reduction in the fair market value of the property, which is required for a valid Measure 37 claim. A potential purchaser will only pay the fair market value of the property with land use restrictions in place because those restrictions will apply to the purchaser.