

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR MULTNOMAH COUNTY, OREGON

ORDER NO. 06-143

Order Denying Measure 37 Request of James and Elizabeth McGrew Relating to Real Property Located at 13154 NW McNamee Road

The Multnomah County Board of Commissioners Finds:

- a. Party: James & Elizabeth McGrew are the Ballot Measure 37 Claimants who filed a demand for compensation to Multnomah County on September 28, 2005.
- b. Subject Real Property: This claim relates to real property located at 13154 NW McNamee Road, Multnomah County, Portland, Oregon more specifically described as:

TL 700, 800, 900 & 1000, Sec 32A, 2N-1W
- c. **Adequacy of Demand for Compensation:**

The materials submitted by the claimant do not constitute a complete written demand for compensation as required by Multnomah County Code 27.520.

This claim was submitted to Multnomah County on September 28, 2005. On October 20th, the county sent the claimants a letter indicating the review would be suspended in light of the October 14th Marion County ruling MacPherson v. Department of Administrative Services finding Measure 37 unconstitutional. On February 27, 2006, a letter was sent to the claimants indicating the review would again commence because five days earlier, Oregon's Supreme Court overturned this ruling. On February 27, 2006, County Staff provided a detailed letter to the claimants 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, a title report to verify ownership and property appraisals to support the alleged reduction in value. The chain of title in a title report is critical to understanding the property ownership. There is no evidence in the record regarding whether or not the claimants have had continuous ownership of the subject property.

By May 4, 2006 the required information for a complete claim had not been submitted. A letter was mailed on that date to the claimants 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. County planning staff received no response to the May 4th request and prepared its staff report without benefit of the required information.

The Board finds that the materials submitted by the claimant do not constitute a complete written demand for compensation as required by Multnomah County Code 27.520.

d. **Relevant Dates of Property Ownership:**

The claimants have submitted a Measure 37 request to divide four properties into a 38 lot subdivision, or have the county pay \$8,097,000 in compensation. The claimants state that James and Elizabeth McGrew have held an ownership in tax lots 800, 900, and 1000 since July 24, 1974, when zoning regulations would have allowed the division of these tax lots into up to 10 lots of at least 1 acre each. The claimants also state that James and Elizabeth McGrew have held an ownership in tax lot 700 since November 2, 1973, when zoning regulations would have allowed the division of this tax lot into up to 27 lots of at least 2 acres each.

Zoning was first applied to the properties in 1958 with the adoption of Suburban Residential (SR) and Agricultural District (F-2) zoning regulations. Tax lots 1000, 900, and 800 were zoned SR and tax lot 700 was zoned F2. The zoning of all four tax lots was changed to Multiple Use Forest-20 (MUF-20) on October 6th, 1977. The MUF-20 zone was changed to MUF-19 on tax lots 1000, 900, and 800 and MUF-38 on tax lot 700 on August 14, 1980. The zoning of all four lots was changed to CFU-80 on January 7, 1993, which was changed to the current CFU-1 zone on August 8, 1998.

Adoption of MUF-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. 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 1000, 900, and 800

Property totaling 10.76 acres, referenced as Tax Lots 1000, 900 and 800 today, was originally acquired by James and Elizabeth McGrew from the Dorothy and Nykee English on July 24, 1974. (Book 1069 Page 993) This property was divided by deed into three lots on June 6, 1986. Tax lot 1000 was transferred to Elizabeth McGrew (Book 1919 Page 2170), tax lot 900 was transferred to James McGrew (Book 1919 Page 2172) and tax lot 800 was transferred to Kyle and Robbie Preedy who are listed in Assessment and Taxation data as the current owners of tax lot 800. This division by deed was found to be unlawful by a Multnomah County Hearing Officer in land use planning cases CU 1-93 and CU 2-93. At the time the division was executed, land use review was required and not obtained by the owners. Tax lots 1000 and 900 are currently owned by Elizabeth McGrew and James McGrew respectively. No chain of title has been submitted to the file to allow county planning staff to verify that the McGrews have had continuous ownership of tax lots 1000 and 900 since their original purchase date of July 24, 1974. Staff requested a title report in a letter sent February 27, 2006 to verify that ownership of tax lots 1000 and 900 had been continuous. No title report was provided by the claimants.

Ownership History of Tax Lot 700

James and Elizabeth McGrew purchased a ½ undivided interest in tax lot 700 on November 2, 1973 (Book 957 Page 1555). The applicants have submitted this deed as the only evidence of ownership for tax lot 700 and state that James and Elizabeth McGrew have owned the property since 11-2-1973. While researching the claim, staff located a real estate contract dated February 20, 1984 (Book 1732 Page 1198) showing that James and Elizabeth McGrew acquired the other ½ interest in tax lot 700 from Kenneth McGrew, Dorothy McGrew, William Sander, and Helen Yeager. This contract was satisfied on June 14, 1993 in a deed recorded in Book 2722 Page 869. It is unclear if additional sales transactions have taken place related to this property since the McGrew's first purchased the land. Staff requested a title report in a letter sent February 27, 2006 to verify the chain of title of tax lot 700. No title report had been provided by the claimants.

The Board finds that the claimants have not established that they have had continuous ownership of all four tax lots involved with the claim. The claimants sold tax lot 800 in 1997, thus terminating their ownership of this lot and their rights to make a Measure 37 claim on tax lot 800. The claimants established that they originally purchased tax lots 700, 900 and 1000 prior to the enactment of the 1977 regulations but have not established that they have had continuous ownership of tax lots 1000, 900 or 700 since before the restrictive Multiple Use Forest-20 zoning regulations were first applied in 1977.

e. **County Codes as a Restriction on Use of the Property:**

Zoning was first applied to the properties on July 10, 1958 with the adoption of Suburban Residential (SR) and Agriculture District (F2) zoning regulations. Tax lots 1000, 900, and 800 were zoned SR and tax lot 700 was zoned F2. The zoning of all four tax lots was changed to Multiple Use Forest-20 (MUF-20) on October 6th, 1977. The MUF-20 zone was changed to MUF-19 on tax lots 1000, 900, and 800 and MUF-38 on tax lot 700 on August 14, 1980. The zoning of all four lots was changed to CFU-80 on January 7, 1993, which was changed to the current CFU-1 zone on August 8, 1998. The claimants have indicated James and Elizabeth McGrew have held an interest all four properties since 1974 when the SR and F2 zoning regulations were in effect. Deed records show the McGrews transferred tax lot 800 to other owners in 1986. Additional deed records show changes to the ownership of lots 1000, 900, and 700 since the original purchase. While the claimants have established the dates that they first became owners, they have not provided a chain of title to document that they have had continuous ownership of tax lots 1000, 900, or 700 since their original purchase dates. Without verifying that ownership has been continuous, it is not possible to determine what date the claimants have the right to seek a waiver of regulations back to. Without knowing what ownership date a claim stems from, it is not possible to determine that regulations have resulted in a restriction of use.

Division of a property is not a 'use' of land subject to the provisions of Measure 37 and 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 Commercial Forest Use-1 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.

Even if a land division were a use eligible for regulatory relief, the claimant has failed to show that one could be approved under the rules in effect when they purchased the property. County planning staff's review of County decisions from the 1970's involving land divisions in the F-2 and SR districts indicates that a 38 lot subdivision would have been denied. The McGrew properties do not adjoin a public road and the County would have required the subdivision include public roads that connect to the public road system in order for them to be approved. SR zoning was in place when Tax Lots 800, 900, and 1000 were created as a 10.76 acre property with a recorded sales contract from Dorothy and Nykee English to James and Elizabeth McGrew in 1974. This zone required all lots abut a street or have other access held suitable by the Planning Commission (§ 3.1536). When the McGrew's sought non-resources dwelling approvals on the properties in 1993 a County Hearings Officer found that the properties did not comply with this requirement because alternative access was not approved by the Planning Commission. The Hearings Officer denied the applications (Case No. CU 1-93 and 2-93). The Hearings Officer's decision was affirmed by the Board of Commissioners. In the F-2 district, road frontage was required through exercise of the subdivision code and authority to evaluate new streets or roads under ORS 92.014. When challenged, the County's authority to take such action was affirmed by the Circuit Court. The County also denied large subdivision requests in the F-2 zone finding that they were inconsistent with the Comprehensive Plan which called for these lands to be used for agricultural purposes. There was discretion involved in these decisions, with subdivisions as large as 19 lots being approved but those over 50 lots being denied. At 38 lots, this request is twice the size of the largest subdivision approved in this district so we expect that it would have been denied on these grounds. The county planning staff's review of historic records was not exhaustive, but was adequate to show a pattern of practice.

f. **County Code Restrictions Reduce Fair Market Value:**

A reduction in value has not occurred because the owners have failed to establish that their proposed 38 lot subdivision could have been approved at the time they acquired the property and because development rights for each subdivision lot would not transfer to the new owners of those lots.

As discussed in section 3 of this report, questions related to the ability of the property to be tied into the public road system and the appropriateness of a 38 lot subdivision on land designated for farm uses in the comprehensive plan would likely have lead to a denial of the subdivision under rules in effect at the time the owners acquired the property. Even if a subdivision could have been approved at the time the owners acquired the property, Measure 37 rights are personal to the claimant and are of no value to a third party.

The current Commercial Forest Use-1 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

g. **Public Notice:**

This action is before the Board under MCC 27.530(N), which authorizes the Planning Director to determine whether a claim is complete and allows the Director to recommend to the Board that the claim be denied if it is invalid on its face. Section 3.50 of the County Charter requires notice to the public of all Board agenda matters. This notice was provided. The claimant and persons who own land within 750 feet of the subject property received notice by mail.

h. **Validity of Claim for Compensation: The Board finds that:**

(1) The claim materials submitted by the claimants do not constitute a complete written demand for compensation as required by Measure 37 and Multnomah County Code 27.530.

(2) The claimants have not established that they have had continuous ownership of all four tax lots involved with the claim. The claimants sold tax lot 800 in 1997, thus terminating their ownership of this lot and any Measure 37 rights they may have had to make a claim on tax lot 800. The claimants established that they originally purchased tax lots 700, 900 and 1000 prior to the enactment of the 1977 regulations but have not established that they have had continuous ownership of tax lots 1000 or 900 since before the restrictive Multiple Use Forest-20 zoning regulations were first applied in 1977.

(3) Without verifying that ownership has been continuous, it is not possible to determine what date the claimants have the right to seek a waiver of regulations back to. Without knowing what ownership date a claim stems from, it is not possible to determine that regulations have resulted in a restriction of use.

(4) Even with continuous ownership of tax lot 700 and assuming continuous ownership of tax lots 1000 and 900, there has been no restriction in use because land use regulations in place at the time of acquisition would have prevented a subdivision.

(5) Subdividing 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 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.

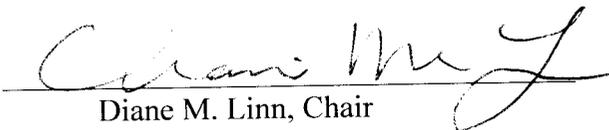
The Multnomah County Board of Commissioners Orders:

Claimants, James and Elizabeth McGrew's request is denied.

ADOPTED this 10th day of August, 2006.

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