

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR MULTNOMAH COUNTY, OREGON

ORDER NO. 06-144

Order Denying Measure 37 Request of Dean Richards and William Richards Relating to Real Property Located at 29415 and 29429 SE Powell Valley Road

The Multnomah County Board of Commissioners Finds:

a. **Parties:** Dean Richards and William Richards are the Ballot Measure 37 Claimants who filed a demand for compensation to Multnomah County on October 3, 2005.

b. **Subject Real Property:** This claim relates to real property located on 29415 and 29429 SE Powell Valley Road, Multnomah County, Portland, Oregon more specifically described as:

Section 19 AB, 1 South - 4 East (Tax Lot 200) – 19.99 acres

Section 19 AB, 1 South – 4 East (Tax Lot 100) – 18.63 acres

c. **Adequacy of Demand for Compensation:**

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. (See County planning staff report, incorporated herein by this reference.)

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. County planning 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 3, 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 28, 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 3, 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. The planning staff received no response to the May 3rd request and prepared a staff report for the Board of County Commissioners.

The Board finds that the materials submitted by the claimant do not constitute a complete written demand for compensation as required by Measure 37 and Multnomah County Code 27.520.

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

The claimants have submitted a Measure 37 request to divide two properties into a 40 lot subdivision, or have the county pay \$1,830,000 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 40 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 6, 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 thirty-five (35) of the 38.62 acres to their son William Richards according to the claimant. This arrangement could not be verified by the county planning 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.

A lease for farming purposes cannot 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. County knowledge of the nature of the lease is limited to the claimant's narrative description which asserted that it was drafted in 1973 for farming purposes. Staff requested a copy of this lease agreement in a May 10, 2005 letter and expected that the lease document would specifically describe the use or uses subject to the agreement. Deed records show that William Richards did not obtain a fee 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 27, 1994 and then back to Dean A. Richards, the individual on June 7, 2005. The nature of the trust arrangement is important because transfer of land to an irrevocable trust would 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 10, 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 the county recorder's office.

Transfer of Tax Lot 100 to an irrevocable 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.

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.

The Boards finds that 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.

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

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 6, 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, a 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 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, the Board finds this request to subdivide the property is not a valid request under Measure 37.

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

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.

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 27.520.

(2) The claimants failed to establish that they acquired the properties prior to the date the challenged regulations first prevented subdivision of the properties in 1977.

(3) There has been no restriction in use because land use regulations in place at the time of acquisition of Tax Lot 200 would have prevented a subdivision.

(4) 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.

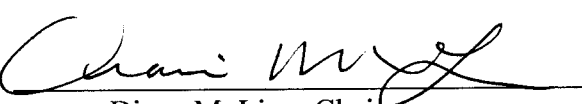
The Multnomah County Board of Commissioners Orders:

Claimants, Dean Richards’ and William Richards’ 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