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VIA FACSIMILE
VIA ELECTRONIC MAIL

Multnomah County Board of Commissioners
c/o Derrick Tokos
Land Use & Transportation Planning Program
1600 SE 190th Ave
Portland, OR 97233

Re: County Claim Number: T1-05-063
Name of Claimant: Cecelia L. Hunziker
Staff Analysis Comments
Our File No. 708042.0004

Dear Commissioners:

As you are aware, this firm represents the Claimant with regard to the above referenced Claim. We are in receipt of your Staff Analysis of Measure 37 Claim for the hearing before the Board of Commissioners scheduled for December 14, 2006 (the "Analysis"). Please accept this letter as comments to the Analysis directed to Sections 2, 3 and 4 and the memoranda referenced therein.

1. Ownership

In Section 2 of the Analysis, staff correctly states that Cecilia Hunziker is an owner for purposes of ORS 197.352 (the "Statute"). However, the Analysis incorrectly describes the date of acquisition of her ownership interest as February 28, 2005, the date that the life estate for Wesley and Fern Wiseman expired, notwithstanding the fact that Claimant became an "owner" for purposes of the Statute on December 31, 1989, pursuant to a contract of sale for the property under which the Claimant became the owner of a vendee's interest subject to the life estate of the Wisemans.

Section 2 of the Analysis asserts the date when the "owner acquired the property" is the date that the owner acquired the right to use the property. However, that is an interpretation of the Statute which is contrary to the text and context of the Statute and long established principles of real property law.

Claimant became an "owner" for purposes of the Statute on December 31, 1989 pursuant to a contract of sale for the property. A "Memorandum of Contract" for the described agreement was recorded in Book 2269, Pages 2725 and 2726 of Multnomah County records on January 19, 1990.

The text of the Statute (at ORS 197.352(11)(C)) defines an owner as "the present owner of the property, or any interest therein." It is undisputed from the record that Cecilia Hunziker became the owner of a vendee's interest in the subject real property at the date of the contract for which the above-described memorandum was recorded. A vendee's interest in a contract for sale of real property has been recognized as a true interest in the property by the State and by every city, county and Metro. This is evidenced by the rules or ordinances adopted by all such entities granting contract vendees the power and right to make land use and other applications relating to the real property. The interest of a contract vendee in real property is also uniformly recognized by the title laws and title insurers of this state who uniformly issue policies of title insurance insuring the interests of contract vendees. It is black letter law that in a contract for the sale of real property, whereas the seller will retain title of record, the vendee becomes the holder of an "equitable interest" in the property that is enforceable in law and at equity, is insurable for title purposes and is recognized by every governmental entity in the state. It must also be noted that the Claimant agreed to and paid all property taxes for the property from and after the date of the contract, as provided in that document.

There are a potentially infinite number of estates in any parcel of real property (the "bundle of sticks" analogy). Here, two estates, the life estate of the Wisemans and the remainder estate of Hunziker, existed concurrently from December 31, 1989. In fact the interest of Hunziker was substantially greater than that of the Wisemans since their interest was finite (limited to their lives) while the Claimant's interest in the property could continue into the indefinite future.

In Section 2, staff acknowledges that the land sale contract from 1989 shows that Claimant had entered into an agreement to purchase the property but goes on to state that, "Normally a vendee's interest in a land sale contract would be sufficient to establish a [sic] 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 Horace and Fern Wiseman . . . [and] . . the previous owners had exclusive use of the property until their deaths," which left Claimant without a present right to use the property. Therefore, staff concludes that the Claimant "did not obtain a [present] right to use the property until 2005 when the exclusive Life Estate of the previous owners expired."

This is a very tortured argument that fails to take into consideration the context of the Statute, which, in fact, is a compensation statute based upon eminent domain principles. Contrary to the staff's argument described above, the Statute at ORS 197.352(2) states:

> "Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this section."

At the time Claimant acquired her interest in the property, on December 31, 1989, it was relatively free of restrictions (the regulation prohibiting division of the property into lots smaller than 20 acres having not been adopted until 2000). The absence of restrictions on use which are the subject of the claim on file would have substantially enhanced the market value of the property both in 1989 and at the present time. An increase in the value of the property would have accrued in some measure to the benefit of Cecelia Hunziker, as any purchaser of the property for development would have required acquisition of the entire fee ownership, including the equitable interest and remainder interests of the Claimant. Her interest in the property could have been sold or otherwise assigned at any time after December 31, 1989. If the property had been condemned by any governmental entity having authority any time after December 31, 1989, Ms. Hunziker would have been entitled to monetary compensation for her interest. Furthermore, in the event the Wisemans attempted actions on the property that would diminish the value of her estate, she could have filed a legal action for waste to protect her interests. *See* PRINCIPLES OF OREGON REAL ESTATE LAW, Chapter 1, Section 1.6, Oregon CLE 2003 Revision, and REAL ESTATE DISPUTES, Chapter 10, Oregon CLE 1993).

Oregon Courts interpret state statutes in accordance with the method described in *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610-612, 859 P.2d 1143 (1993)[1] Under the text in context of the Statute, the Claimant had an "interest" in the property. Under the plain language of the Statute, "interest therein" is not limited to a present possessory interest in property. There is no support in the text or context for the staff's interpretation that an "interest" in property is restricted to a present use of the property. *PGE* at 610-612, and ORS 174.010[2]. Under the clear and unequivocal law of this state, the Claimant became an owner of an interest in the property, as provided in the Statute, on December 31, 1989.

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[1] First, examine the text in context to determine whether the disputed statutory phrasing is ambiguous. If the statute is unambiguous, that is the end of the inquiry. Second, if the statute is ambiguous, examine the legislative history. If the legislative history resolves the ambiguity, then that is the end of the inquiry. Third if the ambiguity persists, then resort to substantive canons of construction. *PGE*, 317 Or. at 610-612.

[2] "In construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all". ORS 174.010.

2. Regulations have restricted use of property.

Section 3 of the Analysis asserts that: (a) being allowed to divide property (in this case smaller than 20 acres within one mile of the UGB under a regulation adopted in 2000) is not a "use" of land and therefore is not subject to Measure 37; (b) development rights under Measure 37 are personal to the Claimant, not transferable and, therefore will result in no restrictions in use if transferred to a third party insofar as the property would be subject to the same regulations which prohibited land divisions under 40 acres in size since 2000; and (c) regulations pertaining to Significant Environmental Concern overlay, land divisions, and definitions are moot since the County finds that the property was acquired in 2005 after such regulations were adopted.

Regarding (a) above, the staff is incorrect that a land division smaller than the minimum lot size (MLS) for land within the UGB is not subject to Measure 37. Presumably, in claiming that a land division regulation is not a regulation that restricts the use of property, the Staff Analysis is relying upon ORS 197.352(1) which requires just compensation be paid if a "land regulation" is adopted or enforced that "restricts the use of private real property or any interest therein." However, such an interpretation is clearly contrary to the text and context of the Statute, which defines "land use regulation" to include "local government . . . land division ordinances." ORS 197.352(11)(B)(iii). Under the County staff's interpretation, a land division ordinance would be a land use regulation but it could never be subject to Measure 37 because it would not restrict use. Such a reading would render the definition of land use regulations as including land division meaningless, and therefore would fail to give effect to all provisions in the Statute where it is possible to do so by reading ORS 197.352(1) and ORS 197.352(11)(B)(iii) together so as to give meaning to them both. *See*, ORS 174.010. Moreover, the land division ordinance applies the MLS for the zone (which was a 5 acre MLS for the Rural Residential zone until 2000 when it became a 20 acre MLS for land within one mile of the UGB) The MLS controls the density or the number of dwellings per acre allowed in the zone. It is difficult to conceive of a land division ordinance being applied without consideration of the MLS and the number of dwellings which will be permitted. To claim that the land division ordinance does apply restrictions on the size of parcels (MLS), and that a restriction on the size of parcels is not a restriction on the number of dwellings (use of land), is absurd.

Regarding (b), the argument that development rights under Measure 37 are personal to the Claimant and not transferable and therefore results in no restrictions in use if transferred to a third party, must fail for several reasons.

First, a waiver of regulations under Measure 37 must be transferable; that is, a waiver must "run with the land" in order to comport with the purpose of the Statute which requires the governing body to "compensate" property owners for reduction in the "fair market value" of their property

due to regulations adopted after they acquired the property, either by payment of just compensation or waiver of those regulations.

The Statute provides for just compensation to be paid equal to the reduction in the fair market value of the property resulting from the regulation. ORS 197.352(2). Fair market value is what a willing buyer would pay a willing seller. If the governing body has the option of waiver of regulations "in lieu of just compensation" as a statutory substitute for just compensation under ORS 197.352(8), then that waiver must be worth the equivalent of just compensation, which means that waiver must be something that can be transferred from a willing seller to a willing buyer. But if the waiver of regulations is not transferable to a subsequent buyer (like a personal license) then it would have little or no fair market value, and as such, would not be equivalent to the amount of just compensation which would otherwise be required to be paid for the reduction in the fair market value due to the regulations. An appraisal takes into account the restrictions on development of the property. A nontransferable waiver, which would, in effect, not remove the restrictions on development of the property for the buyer, would therefore be of no value between a willing seller and a willing buyer. In section 4, County staff acknowledges as much when it argues that there is no reduction in fair market value because, among other reasons, "development rights cannot be transferred." Such an interpretation effectively defeats the underlying purpose of the Statute, which is to "compensate" property owners, either through payment of just compensation or waiver of regulations.

The purpose of the Statute can only be given meaningful effect if there is symmetry between just compensation and waiver of regulations. But if waiver does not run with the land then waiver does not restore the Claimant to the position the Claimant was in before the regulations were enacted or applied, when Claimant could have transferred the property to a buyer without the property being subject to the yet to be adopted or enacted regulations. The staff's interpretation of the Statute that the waiver is personal to the present owner would render the Statute a fiction--that is, a hollow promise, which is utterly useless and provides no meaningful relief to the property owner. Instead, the Statute must be read to give effect to its purpose and all of its parts, if possible.

Second, the language relied upon by staff's interpretation does not support an interpretation that waiver is personal to the present owner. It is recognized that the staff's narrow reading of the Statute relies upon language in the waiver section, ORS 197.352(8), which states that in lieu of just compensation the governing body may modify, remove or not apply the land use regulations "to allow the owner to use the property for a use permitted at the time the owner acquired the property." Staff claims this makes waiver nontransferable because it only mentions uses permitted at the time the owner acquired the property. However, that is an unusually strained reading of the Statute. There is nothing inherently restrictive about the quoted language; it simply means the owner who makes the claim is entitled to waiver of regulations to allow use of

the property for uses permitted at the time that owner acquired the property. It says nothing about subsequent transfers, and does not say that the waiver is not transferable, or that once the present owner obtains waiver of the regulations, that the waiver cannot be used by a purchaser of the property, or that a subsequent owner must make a new claim. For example, in a typical land use entitlement application, the owner applies for entitlements and once those entitlements are obtained, the owner can transfer the property with those entitlements to a willing buyer, i.e., the entitlements run with the land. An examination of typical state land use statutes reveals that although one must be an owner to apply for a permit, the permit approvals granted to "owners" are transferable. The development rights under such approvals clearly run with the land although such statutes do not expressly state that they do. For examples of statutes which contain similar language and grants rights which are transferable, *see:* ORS 215.416 (1) and ORS 337.175(1) ("an owner of land may apply . . .for a permit"); and ORS 215.427(3) and ORS 227.178(3)(b) ("approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted"). Although nothing in ORS 214.402 to 215.438 expressly states that an approval runs with the land, in practice it is well accepted that unless the permit says it is personal to the applicant, the entitlements are considered to be transferable.

Third, for the sake of argument, even if a waiver under the Statute without exercise of development rights were personal to the Claimant, if the development rights are exercised by the Claimant by substantial construction of dwellings (with or without a land division), then development of the property would become a non-conforming use (or a vested right), which then could be transferred and allowed to continue under ORS 215.130[3]. Therefore, a waiver under the Statute effectively establishes the regulatory approval criteria ("freezes the goalposts") as of the date of acquisition by the present owner and the lawful establishment of a non-conforming use At the time of establishment by the present owner with a waiver under the Statute, the nonconforming use of the building, structure or land is lawful, and is allowed to continue after a change in ownership. Under ORS 215.130, a change in ownership does not cause the regulations which are waived to "spring back" to render the lawful establishment of the use of the land unlawful and prohibit continuation of the non-conforming use by the new owner. Thus, staff is wrong when staff asserts that no restriction in use would occur for the third party because they would be subject to the same regulations which prohibited land divisions smaller than 20 acres since 2000.

Regarding (c), the argument that the property was acquired in 2005 after such regulations were adopted, the staff again bases its conclusions on the erroneous assumption that the Claimant first acquired an interest in the property in 2005. As demonstrated above, that assumption is not

[3] ORS 215.130(5) provides in part: "The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued . . . A change in ownership or occupancy shall be permitted."

accurate and is contradicted by myriad State, county and city statutes, ordinances and regulations, as well as title law and the common law of real property. Since December 31, 1989 Cecelia Hunziker has been the owner of a vendee's interest in the subject real property, which is an interest within the definitions of the Statute.

3. Regulations have reduced the fair market value of the property

Section 4 of the Analysis acknowledges that Claimant submitted appraisal data to substantiate her claim of a reduction in value due to regulations. But the Analysis erroneously asserts that a reduction in value has not occurred because a right to use the property was not acquired until 2005, after the adoption of the regulations, and that development rights cannot be transferred.

Staff again bases its conclusions on the erroneous assumption that the Claimant first acquired an interest in the property in 2005. As demonstrated above, that assumption is not accurate and is contradicted by myriad State, county and city statutes, ordinances and regulations, as well as title law and the common law of real property. Since December 31, 1989 Cecelia Hunziker has been the owner of a vendee's interest in the subject real property, which is an interest within the definitions of the Statute.

The discussion within this section of the Analysis refers to the various restrictions on use of the subject property that existed at the time of filing of the Claimant's claim. These restrictions were adopted after Claimant acquired an interest in the property in 1989, and reduced the fair market value of the property.

Conclusions

The conclusions of the Analysis are incorrectly based on the assumption that the Claimant acquired her interest in the property in 2005. As demonstrated above, she acquired an equitable, legally cognizable interest in the property on December 31, 1989.

As noted above, it is black letter law that the vendee under a contract for the sale of real property has an equitable interest in that real property that is recognized by all title companies, government entities and courts in the state of Oregon. It is undisputed that Ms. Hunziker acquired that interest on December 31, 1989. The various restrictions described in the claim of Ms. Hunziker were adopted after that date and, accordingly, Ms. Hunziker is entitled to relief under the Statute.

The Analysis incorrectly asserts that the holder of a remainder interest after a life estate does not have a compensable interest in real property. We have demonstrated both that, the Claimant obtained an interest in the real property in 1989, and that her interest could have been sold,

assigned or otherwise conveyed by her. We have further demonstrated that she had an interest since 1989 that would have been compensable in a condemnation proceeding, the type of proceeding (i.e., compensation for property taken by government) upon which the Statute is premised.

In addition, the conclusions of the Analysis are almost entirely based upon incorrect interpretations and applications of the Statute. The Analysis incorrectly asserts that a land division ordinance is not subject to a Measure 37 claim, contrary to the text and context of the Statute for the reasons stated above. Moreover, the Analysis incorrectly asserts that a waiver under the Statute is personal to the Claimant and is non-transferable, which is an interpretation unsupported by the text and context of the Statute for the reasons explained above.

As the entire Analysis is based on the erroneous concepts discussed, we respectfully request that staff withdraw the Analysis and replace it with one that more closely follows the black letter law of real property and estates in land.

Very truly yours,

LANE POWELL PC

John C. Pinkstaff

JCP:jcp
cc: Ms. Cecelia Hunziker
Mr. Al Nordgren
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