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AGENDA COVER MEMO

DATE: March 14, 2006
March 21, 2006 Board Meeting Date

TO: BOARD OF COUNTY COMMISSIONERS

FROM : KENT HOWE, PLANNING DIRECTOR
LAND MANAGEMENT DIVISION

AGENDA ITEM TITLE: Work Session to Review Lane County Requirements for
Measure 37 Claims (LC 2.700 – 2.770)

I. MOTION:

Following the Board discussion, recommend Lane Code amendments that further clarify the process for evaluating M37 claims filed with Lane County.

II. ISSUE OR PROBLEM

On December 1, 2004, less than one month after the passage of Ballot Measure 37 the Board enacted Ordinance No. 18-04 establishing the Lane Code provisions setting out the application process for Measure 37 claims filed with Lane County. With a little over a year's experience in processing Measure 37 claims and the recent Oregon Supreme Court decision upholding the constitutionality of the Measure, the Board requested a work session to review the process and determine if revisions are warranted to be clearer about what is needed for the County to determine whether a claim is valid. Some of the concerns raised when the Board adopted Ordinance No. 18-04 may also warrant revision.

III. DISCUSSION

A. BACKGROUND

Since Measure 37 did not set forth a specific process for review of applications for compensation, the Board adopted Lane Code 2.700 – 2.770 to establish such a process in order to evaluate claims involving Lane County land use regulations in a timely manner.

The purpose of the Lane Code M37 claims process provisions are to implement the requirements of Ballot Measure 37 and to provide an open, thorough and consistent process that: enables property owners to have a fair opportunity to present their claims to the County; will preserve and protect limited public funds; and will establish a record of decision capable of appellate review.

B. ANALYSIS

Fundamentally, M37 provides a process for property owners to be compensated when a land use regulation reduces the fair market value of the property. The following section discusses the claim application process in Lane Code (LC 2.700 – .770). These sections of Lane Code explain the purpose of the application process, definitions of words used in this section of the Code, the type of land use regulations exempt from a M37 Claim, the materials needed to submit an application for a M37 claim and the review, notice, hearing and decision process. The final section explains the effect of the Board decision, leaving open the possibility that future court decisions may invalidate or otherwise affect the Board's action.

1. Application Requirements for M37 Claims

The section which seems to be the most problematic is LC 2.720. It describes the application and materials needed to evaluate a specific claim. An abbreviated description of the required application materials is as follows:

- 1) A completed application form;
- 2) Contact information and description of ownership interests of the property owner and anyone with an interest in the property;
- 3) A legal description, street address and tax lot number of the subject property;
- 4) A recent title report or a copy of the deed(s) showing title history and the dates of acquisition by all existing ownership interests of the owner(s) of the subject property.
- 5) The specific section of Lane Code that allegedly restricts the use of the property and allegedly causes a reduction in the value of the subject property including the date it was first made applicable;
- 6) An appraisal by an Oregon certified and licensed appraiser addressing the requirements of M37 and indicating the amount of the alleged reduction in the fair market value of the property by showing the difference in the fair market value of the property before and after application of the challenged regulations;
- 7) A written statement addressing the following criteria:
 - a) The County has adopted or enforced a land use regulation that restricts the use of the subject property;
 - b) The restriction on use has the effect of reducing the fair market value of the property;
 - c) The challenged regulation was adopted, enforced or applied after the current owner of the property became the owner; and
 - d) The challenged regulation is not an exempt regulation as defined in LC 2.710.
- 8) A written statement specifying the amount of the claim, and the fair market value of the property before and after application of the challenged land use regulations; and
- 9) Copies of any leases or covenants, conditions and restrictions applicable to the subject property if any exist that impose restrictions on the use of the property.

The County Administrator may waive the submission of any materials if not deemed helpful to the evaluation of the specific claim. Unless waived by the County

Administrator, an application shall also include the application fee of \$750 plus a deposit for notice costs of \$100.

2. Determination of Claim Validity

A claim is only valid if the property owner can demonstrate that they have a right under M37 to just compensation. In other words, the property owner must establish that the property is subject to a land use regulation adopted or enforced by Lane County (since they or family members acquired the property) that restricts the use of the property in a manner that reduces its fair market value on the date the claim is filed. Several pieces of information are necessary to get to the conclusion that a valid claim has been filed and the property owner is eligible for compensation consideration or a “waiver” of restrictive land use regulations. One of the more difficult issues considered by the County Administrator and the Board is the determination of value reduction and several questions arise.

How should Lane County determine that an applicant has demonstrated that the current fair market value of the property has been reduced as a result of the current restrictive county land use regulations in effect since the owner acquired the property? Is an appraisal required? Would comparable sales or assessed value be sufficient? What should be considered sufficient evidence in the reduction in fair market value of the property resulting from the enforcement of restrictive county land use regulations?

3. Survey of County M37 Claims Process Appraisal Requirements

Below is a summary of the result of a survey of the M37 Claims process appraisal requirements in the Willamette Valley counties and other counties adjacent to Lane County. Only four of the thirteen surveyed counties require an appraisal.

Benton County – appraisal required only for compensation.

Clackamas County – appraisal required but allows Administrator to waive if other evidence.

Deschutes County - written evidence required, an appraisal is preferred, but optional.

Douglas County - appraisal prepared by an Oregon certified or licensed appraiser required.

Jefferson County - written evidence required, appraisal is optional.

Klamath County - written evidence required, appraisal is optional.

Lincoln County - appraisal prepared by an Oregon certified or licensed appraiser required.

Linn County - appraisal prepared by an Oregon certified or licensed appraiser required.

Polk County - written evidence required, appraisal is optional, but County reserves right to require if necessary to determine fair market value.

Marion County - written evidence required, appraisal is optional.

Multnomah County – written evidence required for a single dwelling, appraisal **required** for all other claims.

Washington County - written evidence required, appraisal is **optional**.

Yamhill County - written evidence required, appraisal is **optional**, but County reserves right to require if necessary to determine fair market value.

Pursuant to the language of Measure 37, “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...” Finding that there has been a reduction in value is important to establish that the claim is valid. Determining the specific amount of the reduction in value may not be necessary, if the local government has no funds available for compensating M37 Claims. Many of the appraisals have not made a clear connection between the current value, the restrictive regulation, and the reduced value.

Since many appraisals are not providing the Board with information that addresses the requirements of M37 and there are not funds available for compensating M37 Claims, the Board may be able to identify other forms of evidence that will establish a reduction in value has occurred, even if the specific amount of the reduction in value cannot be determined.

4. Other Evidence to Determine the Validity of a Claim

If an appraisal is not required, what other evidence may be used to demonstrate that the current fair market value of the property has been reduced by the current restrictive land use regulations applicable to the owner of the property?

- Benton County requires a market study analysis filed by a licensed real estate broker or agent whose primary place of business is in Benton County.
- Clackamas County allows, at the Administrator’s discretion, other evidence than an appraisal such as sales of comparable properties in the area or fair market values established by the County Department of Assessment and Taxation for comparable properties in the area.
- Deschutes County requires appraisals to include an opinion of fair market value of real property made by an appraiser in the office of the Deschutes County Assessor. Any reduction in value evidence must demonstrate that the desired use is feasible on the subject property, including evidence that domestic water, sanitary sewage disposal and road access are feasible for the desired use.
- Marion County allows market studies, economic feasibility studies, development schemes, environmental assessments or similar studies relating to the property.
- Multnomah County allows detailed sales information verified by a real estate broker of comparable properties or other evidence of a value reduction.
- Polk County requires the value reduction evidence to expressly note all existing infrastructure limitations and value of the real property without an assumption that any public infrastructure or services are present or that any such infrastructure will be

improved or sustained at governmental or taxpayer expense or through discretionary governmental action.

The Board could establish a process that allows the claimant to submit a “statement of reduced value” issued by an appraiser, that provides a competent standard of evidence establishing the reduction in value as a result of the restrictive land use regulation much like was proposed in Senate Bill 1037 and amendments developed for inclusion in House Bill 3120 during the 2005 Legislative Assembly. While the details or requirements of a “statement of reduced value” were never completed, the focus of such a statement or the required evidence of value reduction could be on the desired use, the feasibility of that use and how the restrictive land use regulations have reduced the fair market value of the property.

5. Other Sections of the Lane Code M37 Claims Process

The Board’s discussion on the Lane Code M37 Claims process is not limited to the appraisal issue. The Board may also want to discuss any of the following listed issues or any others that come to mind. The analysis of a M37 claim generally covers three general topics: Ownership, Applicable Regulations and Fair Market Value Reduction. The County Administrator has made LMD staff responsible for reviewing each claim and verifying that the ownership, applicable regulations and reduction value are accurate. Some changes to Lane Code 2.700 as suggested below could increase the efficiency of the claim review process to resolve some of the processing issues.

- **Format of Staff Report**

Over the last year the Board has seen various types of staff reports from repetitive detail to more limited discussion of the pertinent issues of the specific claim. Does the Board have a preference of more or less detail?

- **Trust Ownership, Chain of Title**

A M37 claim requires the County to determine: *Who is the current land owner? When did the current owner acquire the property? Has the current land owner had a continuous interest in the property since the date of acquisition? Are there any other owners of the property?*

When the applicant is a trust, the trust is revocable and the trustees are the same as the grantor that created the trust, the county can find the claim is valid and the date of acquisition occurs when the grantor and trustee originally acquired the property.

The date of acquisition becomes much more difficult to determine when a land sale contract is involved, however, especially when that contract is transferred multiple times. When a land sale contract is involved, the code could require the applicant to:

- identify the original land owner and demonstrate that person entered into a land sale contact with a specific person, and

- identify each person who assumed the contract prior to the current owner and submit a copy of the document that transferred the contract to each subsequent person who assumed the contract, and
- state when the current owner fulfilled the contract and submit a copy of the deed that finally conveyed legal title to the property.

At the very least, an applicant could be required to submit a copy of the Department of Assessment and Taxation description card for the subject property and submit a copy of each relevant deed described on the applicable description card.

- Value Reduction

What is reasonable evidence that demonstrates a current land use regulation has caused a reduction in fair market value?

A claim must identify three things to show a reduction in value from a land use regulation:

- the desired use that can be made of the property and was allowed on the date of acquisition by the current owner or family member,
- the current land use regulation that prohibits or restricts the desired use, and
- the value reduction resulting to that use from the restrictive regulation.

Instead of an appraisal as currently required, the applicant could provide a “statement of reduced value” issued by an appraiser, that provides a competent standard of evidence establishing the reduction in value as a result of a land use regulation.

- Processing Fee/Notice Costs

The initial fee of \$750 and \$100 for notice costs remains an issue for some claimants. Revenue from fees collected for processing M37 claims is \$33,750. Staff costs for processing M37 claims exceeds \$100,000. To-date, the processing of M37 claims is being subsidized by land use application fees.

- Transferability of “Waivers”

Lane Code 2.770(2) states that any modification, removal or discontinued application of a regulation shall be in effect during such time as the owner owns the subject property and shall automatically cease when the property is owned by a new owner. Some jurisdictions simply indicate a “waiver” can be transferred or is transferable only to the extent permitted or authorized by M37 or applicable law. The courts will have to resolve the issue of transferability.

- Effect on Neighbor/Private Cause of Action

Waiving land use regulations on a claimant’s property may have an effect on neighboring properties that results in a private cause of action. Some jurisdictions have created private rights of action for affected property owners but the authority and effect of those provisions is uncertain. The courts will have to resolve the competing claims over resulting effects of a “waiver” on neighboring properties.

- Role of Lane County in future legislative efforts
With our experience in processing M37 claims, county staff may be valuable in assisting legislative efforts that clarify the application of Measure 37. Is the Board supportive of staff providing assistance if asked to participate in developing clarifying language in the next legislative session?

C. ALTERNATIVE/OPTIONS

1. Amend Lane Code requirements to:
 - Require a copy of the applicable Assessment & Taxation description cards and a copy of every relevant deed listed on the cards for the subject property.
 - State more clearly what is required if a land sales contract is involved (identify the original land owner, all person who assumed the contract, when contract was fulfilled, etc.)
 - Allow applicants to provide a “statement of reduced value” as competent evidence to demonstrate a reduction in fair market value resulting from the restrictive land use regulation effect on feasible desired uses, but reserve the right to require an appraisal, if necessary.
 - If the County Administrator will retain the authority to waive a submittal requirement, state more clearly when and how that waiver will occur.
2. Do not amend the Lane Code requirements and address issues raised by each claim.

RECOMMENDATION

Alternative 1.

IV. ATTACHMENTS:

- A. Lane Code 2.700 – 2.770
- B. Ballot Measure 37
- C. Senate Bill 1037 – 02 (2005), Summary – May 9, 2005