

Memo Date: April 30, 2007
Hearing Date: May 22, 2007



TO: Board of County Commissioners

DEPARTMENT: Public Works Dept./Land Management Division

PRESENTED BY: BILL VANVACTOR, COUNTY ADMINISTRATOR
KENT HOWE, PLANNING DIRECTOR

AGENDA ITEM TITLE: In the Matter of Considering a Ballot Measure 37 Claim and Deciding Whether to Modify, Remove or Not Apply Restrictive Land Use Regulations in Lieu of Providing Just Compensation (PA06-7296, Lemert)

BACKGROUND

Applicant: James M. Lemert

Current Owner: Lemert Family Limited Partnership

Agent: Frederick A. Batson, Gleaves Swearingen Potter & Scott, LLP

Map and Tax lot(s): 16-04-23 tax lots 1001 and 1101
16-04-26 tax lots 300 and 500

Acreage: Approximately 218 acres in total

Current Zoning: E30, LC 16.212 (Exclusive Farm Use), /FP, LC16. 244 (Floodplain Combining Zone), LC 16.254 (Greenway Development Permit),

Date Property Acquired by Current Owner:

- January 6, 1998, tax lots 1001, 1101, 300 and 500 (WD #9802073)

Date Property Acquired by Family:

- October 27, 1967, tax lots 300 and 1001 (MLSC #2939 / WD #92371)
- January 9, 1969, tax lot 1101 (WD #50953)
- December 23, 1975, tax lot 500 (WD #7803139)

Date claim submitted: December 1, 2006

180-day deadline: May 30, 2007

Land Use Regulations in Effect at Date of Acquisition: E30, LC 16.212 (Exclusive Farm Use), /FP, LC16. 244 (Floodplain Combining Zone), LC 16.254 (Greenway Development Permit),

Restrictive County land use regulation: Minimum parcel size of thirty acres and limitations on new dwellings in the E30 (Exclusive Farm Use) zone (LC 16.212).

ANALYSIS

To have a valid claim against Lane County under Measure 37 and LC 2.700 through 2.770, the applicant must prove:

1. Lane County has enacted or enforced a restrictive land use regulation since the owner acquired the property, and

The subject property is comprised of 4 tax lots. The Lemert Family Limited Partnership is the current owner of the subject property. The Partnership acquired the property on January 6, 1998 (WD #9802073). On that date, the property was zoned E30 and is still zoned as such.

The "partners" are James M. Lemert and Dorothy V. Lemert (Claimants) who originally acquired an interest in the property through three different transactions during the 1967-1975 time period:

- October 27, 1967, tax lots 300 and 1001 (MLSC #2939 / WD #92371)
- January 9, 1969, tax lot 1101 (WD #50953)
- December 23, 1975, tax lot 500 (WD #7803139)

During the 1967-1975 time period, the subject property carried a zoning designation of AGT (Agriculture, Grazing and Timber Raising District).

2. The restrictive land use regulation has the effect of reducing the fair market value of the property, and

The applicant has submitted a Valuation of Potential Sand & Gravel Operation on Lemert Property (Rasmussen, November 30, 2006) which offers an evaluation of the properties is operated as a sand and gravel operation. The claimant alleges the potential value of the sand and gravel operation would be \$10,300,000 to \$12,100,000, and represents the lost of fair market value under the current E30 restrictive zoning that limits such operations.

The applicant has also provided a restricted use appraisal report alleged reduction in fair market value for the properties if used for residential development would be approximately \$7,260,000.

This valuation information appears competent and is similar to evidence of valuation that the County Commissioners have accepted on previous claims. Because of this, the County Administrator has waived the requirement for an appraisal.

The applicant is also claiming that the following sections of Lane Code have restricted the use of the subject property:

LC Chapter 10 (entire chapter), LC Chapter 12 (entire chapter), LC Chapter 13 (entire chapter), LC Chapter 14 (entire chapter), LC Chapter 15 (entire chapter), LC Chapter 16 (entire chapter) - No evidence has been provided that specifically demonstrates how these regulations have lowered the fair market value of the property.

3. The restrictive land use regulation is not an exempt regulation as defined in LC 2.710.

The minimum lot size and restrictions on new dwellings in the E30 zone do not appear to be exempt regulations.

The regulations found within the /FP (Floodplain Combining Zone) of LC16.244 are exempt regulations as defined by LC 2.710 (2) and cannot be waived.

CONCLUSION

It appears this is a valid claim. However, the minimum lot size and dwelling restrictions can only be waived for the current owner to the date of acquisition.

RECOMMENDATION

The County Administrator recommends the Board adopt the attached order to waive the restrictive land use regulations of the E30 zone to the date of acquisition by Lemert Family Limited Partnership on January 6, 1998.

**BEFORE THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY,
OREGON**

ORDER No.

) IN THE MATTER OF CONSIDERING A BALLOT
) MEASURE 37 CLAIM AND DECIDING
) WHETHER TO MODIFY, REMOVE OR NOT
) APPLY RESTRICTIVE LAND USE
) REGULATIONS IN LIEU OF PROVIDING JUST
) COMPENSATION (PA06-7296, Lemert)

WHEREAS, the voters of the State of Oregon passed Ballot Measure 37 on November 2, 2004, which added provisions to Oregon Revised Statutes (ORS) Chapter 197 to require, under certain circumstances, payment to landowner if a government land use regulation restricts the use of private real property and has the effect of reducing the property value; and

WHEREAS, the Board of County Commissioners of Lane County enacted Ordinance No. 18-04 on December 1, 2004, to establish a real property compensation claim application process in LC 2.700 through 2.770 for Ballot Measure 37 claims; and

WHEREAS, the County Administrator has reviewed an application for a Measure 37 claim submitted by James L Lemert as partner in the Lemert Family Limited Partnership (PA06-7296, Lemert), the owner of real property described in the records of the Lane County Assessor as map 16-04-23, tax lots 1001 and 1101 and map 16-04-26 tax lots 300 and 500, consisting of approximately 218 acres in Lane County, Oregon; and

WHEREAS, the County Administrator has determined that the application appears to meet all of the criteria of LC 2.740(1)(a)-(d), appears to be eligible for just compensation and appears to require modification, removal or not applying the restrictive land use regulations in lieu of payment of just compensation and has referred the application to the Board for public hearing and confirmation that the application qualifies for further action under Measure 37 and LC 2.700 through 2.770; and

WHEREAS, the County Administrator has determined under LC 2.740(4) that modification, removal or not applying the restrictive land use regulation is necessary to avoid owner entitlement to just compensation under Ballot Measure 37 and made that recommendation to the Board; and

WHEREAS, the Board has reviewed the evidence and confirmed the application appears to qualify for compensation under Measure 37 but Lane County has not appropriated funds for compensation for Measure 37 claims and has no funds available for this purpose; and

WHEREAS, on May 22, 2006, the Board conducted a public hearing on the Measure 37 claim (PA06-7296) of James L. Lemert as partner in the Lemert Family Limited Partnership and has now determined that the restrictive E30 (Exclusive Farm Use) zone dwelling and land division requirements of LC 16.212 were enforced and made applicable to prevent the Lemert Family Limited Partnership from developing the property as might have been allowed at the time it was originally acquired by James M. Lemert and Dorothy V. Lemert, on October 27, 1967 (tax lots 300 and 1001), January 9, 1969 (tax lot 1101) and December 23, 1975 (tax lot 500), and that the

public benefit from application of the current E30 dwelling and division land use regulations to the applicants' property is outweighed by the public burden of paying just compensation; and

WHEREAS, James L. Lemert as partner in the Lemert Family Limited Partnership request up to \$12,100,000 as compensation for the reduction in value of the property, or waiver of all land use regulations that would restrict the division of land into multiple lots and placement of a dwelling on each lot, uses that could have otherwise been allowed at the time James M. Lemert and Dorothy V. Lemert acquired the property; and

WHEREAS, the Board finds that under LC 2.760(3) the public interest would be better served by modifying, removing or not applying the challenged land use regulations of the E30 zone to the subject property in the manner and for the reasons stated in the report and recommendation of the County Administrator incorporated here by this reference except as explicitly revised here to reflect Board deliberation and action to allow the Lemert Family Limited Partnership to make application for development of the subject property in a manner similar to what the Partnership could have been able to do under the regulations in effect when the Partnership acquired an interest in the property; and

WHEREAS, this matter having been fully considered by the Lane County Board of Commissioners.

NOW, THEREFORE IT IS HEREBY ORDERED that the applicant James L. Lemert as partner in the Lemert Family Limited Partnership made a valid claim under Ballot Measure 37 by describing the use being sought, identifying the county land use regulations prohibiting that use, submitting evidence that those land use regulations have the effect of reducing the value of the property, showing evidence that James M. Lemert and Dorothy V. Lemert acquired an interest in the property before the restrictive county land use regulations were enacted or enforced and the Board hereby elects not to pay just compensation but in lieu of payment, the request of the Lemert Family Limited Partnership shall be granted and the restrictive provisions of LC 16.212 that limit the development of dwellings and the division of land in the E30 (Exclusive Farm Use) zone shall not apply to the Lemert Family Limited Partnership, so the Partnership can make application for approval to develop the property described in the records of the Lane County Assessor as map 16-04-23, tax lots 1001 and 1101 and map 16-04-26 tax lots 300 and 500, consisting of approximately 218 acres in Lane County, Oregon, in a manner consistent with the land use regulations in effect when the Partnership acquired an interest in the property on January 6, 1998.

IT IS HEREBY FURTHER ORDERED the Lemert Family Limited Partnership still needs to make application and receive approval of any division of the property or placement of a dwelling under the other land use regulations applicable to dividing the property or placing a dwelling that were not specifically identified or established by James L. Lemert or the Lemert Family Limited Partnership as restricting the division of the property or placement of a dwelling, and it would be premature to not apply those regulations given the available evidence. To the extent necessary to effectuate the Board action to not apply the dwelling or division restrictions of the applicable zone described above, the claimant shall submit appropriate applications for review and approval of a new dwelling to show the specific development proposals and in the event additional county land use regulations result in a restriction of those uses that have the effect of reducing the fair market value of the property, the County Administrator shall have the authority to determine

those restrictive county land use regulations that will not apply to that development proposal to preclude entitlement to just compensation under Measure 37, and return to the Board for action, if necessary. All other Lane Code land use and development regulations shall remain applicable to the subject property until such time as they are shown to be restrictive and that those restrictions reduce the fair market value of the subject property.

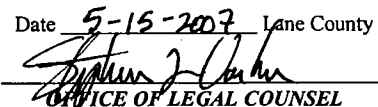
IT IS HEREBY FURTHER ORDERED that this action making certain Lane Code provisions inapplicable to use of the property by the Lemert Family Limited Partnership not constitute a waiver or modification of state land use regulations and does not authorize immediate division of the subject property or immediate construction of a dwelling. The requirements of state law may contain specific standards regulating development of the subject property and the applicants should contact the Department of Administrative Services (DAS - State Services Division, Risk Management - Measure 37 Unit, 1225 Ferry Street SE, U160, Salem, OR 97301-4292; Telephone: (503) 373-7475; website address: <http://www.oregon.gov/DAS/Risk/M37.shtml>) and have the State of Oregon evaluate a Measure 37 claim and provide evidence of final state action before seeking county land use approval.

IT IS HEREBY FURTHER ORDERED that the other county land use regulations and rules that still apply to the property require that land use, sanitation and building permits be approved by Lane County before any development can proceed. Notice of this decision shall be recorded in the county deed records. This order shall be effective and in effect as described in LC 2.770 and Ballot Measure 37 to the extent permitted by law. This order does not resolve several questions about the effect and application of Measure 37, including the question of whether the right of applicant to divide or build dwellings can be transferred to another owner. If the ruling of the Marion County Circuit Court in *MacPherson v. Dept. of Administrative Services*, (Marion County Circ. Ct. Case No. 00C15769, October 14, 2005) or any other court decision involving Ballot Measure 37 becomes final and that decision or any subsequent court decision has application to Lane County in a manner that affects the authority of this Board to grant relief under Ballot Measure 37 and LC 2.700 through 2.770 then the validity and effectiveness of this Order shall be governed by LC 2.770 and the ruling of the court.

DATED this _____ day of _____, 2007.

Faye Stewart, Chair
Lane County Board of County Commissioners

APPROVED AS TO FORM

Date 5-15-2007 Lane County


OFFICE OF LEGAL COUNSEL