City of Sherwood Oregon

*Home of the Tualatin River National Wildlife Refuge*

BEFORE THE CITY COUNCIL
CITY OF SHERWOOD, OREGON

| | |
|---|---|
| IN THE MATTER OF A CLAIM FOR COMPENSATION UNDER ORS 197.352 (MEASURE 37)<br><br>Leroy and Delores Moser, CLAIMANTS | **FINAL ORDER 2007-001** |

Claimant(s): Leroy and Delores Moser

Property: 2S133BC01700; 22900 SW Murdock, Sherwood.

Relief sought: Claimants seek a waiver of the current zoning designation on the Property in order to develop a residential subdivision with a density of up to 7 units per acre.

## FINDINGS

Based on the evidence and testimony in the record and presented to the City Council, the City Council makes the following findings of fact and conclusions of law:

1. Claimants entered into a land sale contract in 1964 and obtained legal title to the Property in 1966.

2. The Property was under the jurisdiction of Washington County when purchased by the Claimants and was zoned R-20, permitting residential development on 20,000 square foot lots with connection to public sewer and water.

3. In 1987 the Claimants annexed to the City of Sherwood. In its order approving the annexation the Metropolitan Area Boundary Commission found that the Claimants "desire[ed] annexation to obtain municipal water service."

4. City zoning on the property pursuant to the annexation was Low Density Residential and permitted 7 units per acre. In 1991, as part of a Sherwood Comprehensive Plan update, the zoning was changed to Very Low Density Residential (VLDR) permitting 1 unit per acre. This change applied to the entire SE Sherwood area. The zone change reflected a desire by the City and residents of SE Sherwood to protect the scabland resource.

5. In 2006 the City worked with SE Sherwood property owners and a planning consultant to develop the SE Sherwood Master Plan. The Master Plan identifies a framework for orderly development of SE Sherwood that balances the area's environmentally sensitive characteristics with the right of the area's property owners to reasonably develop their properties.

6. Despite the area's VLDR zoning, through the City's existing Planned Unit Development (PUD) process and consistent with the SE Sherwood Master Plan a SE Sherwood property owner could double the permitted density on its property and achieve a density of 2 units per acre.

7. Obtaining 2 units per acre today through the PUD process is equivalent to the 2 units per acre with which the Claimants had the right to develop their property in 1964 and 1966.

8. The Claim was filed on September 21, 2006 with the City. Under ORS 197.352(4) compensation "shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand *for compensation.*" (Emphasis added). Under ORS 197.352(6) a property owner may file a lawsuit for compensation "[i]f a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand *for compensation.*" (Emphasis added).

   a. A review of the claim and its related materials does not reveal that the Claimants have specifically demanded compensation from the City. They have specifically requested "a waiver of the current zoning so they can develop a residential subdivision with a density of up to 7 units/acre."

   b. The Claimants suggest the property's fair market value is reduced by $1 million or more as a result of the VLDR designation but they do not demand this amount (or any other amount) in compensation for the alleged loss of value. They also do not demonstrate through an appraisal or another equivalent method how they arrived at this figure.

   c. The City Council is not convinced that the Claimants have actually made a claim under ORS 197.352, as that statute clearly requires a claim to demand compensation and this claim does not. However, the claim alludes to a loss of fair market value due to the VLDR designation and the City Attorney is unsure whether this reference would suffice for a compensation demand, given the myriad questions surrounding ORS 197.352's meaning and interpretation.

   d. In an abundance of caution the City Council assumes that a valid claim has been filed by the Claimants. However, the City does not waive any argument relative to the validity of this claim, including whether the failure to specifically demand compensation means no claim under ORS 197.352 was ever filed.

9. 180 days from September 21, 2006 is March 19, 2007.

10. The Claimants assert that the 7 units per acre permitted on their property when they annexed to the City in 1987, and not the 2 units per acre permitted when they acquired the property, is the baseline with which to determine whether the current VLDR designation restricts the use of their property and reduces the fair market value of their property. In the Claimants' view, there exists a loss of value to their property when comparing the 1 unit per acre now permitted with the 7 units per acre permitted in 1987. They further assert that ORS 197.352 entitles the City to "modify, remove, or not apply" (waive or waiver) the VLDR designation to permit them to develop the property with densities that were allowed at the time they annexed to the City.

11. The Council disagrees with the Claimants' assertions. The Council *does* agree that it may, at its sole option and "in lieu of payment of just compensation" under ORS 197.352, "modify, remove, or not apply" a land use regulation. However, if the Council decides to waive a regulation the waiver only entitles the property owner "to use the property for a use permitted *at the time the owner acquired the property*." ORS 197.352(8) (emphasis added). The statute is plain on its face that a waiver is intended to return an owner to the rights the owner had when it acquired the property. Nothing in the statute says or even suggests that an owner may choose the zoning designation it most preferred during its tenure of ownership and demand that the government permit development consistent with that preference. Nothing in the statute suggests that a city must (or even may) allow development consistent with the zoning in place when a property annexed to that city. If there is only one thing truly clear about ORS 197.352 it is that if the government exercises its option to waive a regulation, it must be to allow the property owner to use the property as permitted when the property owner took title and not at another time.

12. The ability to waive a regulation to a use permitted at the time an owner acquired the property necessarily effects how compensation should be measured under ORS 197.352. Because a government may "modify, remove or not apply" a regulation "*in lieu of* payment of just compensation" it is reasonable to assume that the voters intended waivers or payments to be equal remedies. It is therefore reasonable to measure a loss of fair market value under ORS 197.352 by (1) determining the fair market value of the property with uses permitted at the time the owner acquired the property (i.e. value without the subject land use regulation); (2) determining the fair market value of the property with the uses permitted at the time the claim is made (i.e. value with the subject land use regulation); and (3) calculating the difference. If the difference between (1) and (2) is a positive number then that is the amount due the claimant in compensation and if it is a negative number then no compensation is owed (i.e. a meritless claim has been filed).

13. In this instance the Council ultimately exercises its authority under ORS 197.352 to waive rather than pay compensation. While it is by no means certain, and it has not been quantified, a conservative analysis leads the City to conclude that there has likely been some loss of fair market value when outright permitted uses at the time the Claimants acquired the property (2 units per acre) are compared to outright permitted uses today (1 unit per acre).

14. The Council finds that its decision to waive necessarily excludes a remedy of compensation to the Claimants under ORS 197.352. Attached to this order is a recent Yamhill County Circuit Court opinion in *Smith v. State of Oregon, et al* (CV 060239) (February 6, 2007) that supports this finding.

15. The Council notes that the Claimants objected to this waiver at the February 6, 2007 hearing on the claim. They stated that after purchasing the property but prior to the 1987 annexation Washington County had increased the allowed density on their property to 6 units per acre. They argued through their legal counsel that the City in effect is waiving those County regulations adopted after 1966 through 1987 without the proper authority.

16. The Council finds that its waiver is entirely consistent with ORS 197.352's plain language and that it is only waiving exactly what the claimant asked to be waived – the City's VLDR zoning limitation of 1 unit per acre. The Council is powerless under ORS 197.352 to provide the remedy that the Claimant desires – a return to a density of 7 units per acre. By waiving the City's VLDR designation limiting development on the property to 1 unit per acre and permitting 2 units per acre it is not waiving any County standard and is strictly complying with the terms of ORS 197.352.

17. The Council notes that the Claimants indicated the City violated an agreement that would permit them to develop the Property at 7 units per acre. The Council denies that the City ever entered into such an agreement in the first place, much less violated one. First, no evidence of an agreement between the City and the Claimants was offered. Second, to the extent a previous employee of the City in 1987 stated that the Claimants could develop at that density level and that it would never change, that employee had no authority to bind the City to such a commitment. Third, if such an agreement did exist it would likely be void as against public policy as Oregon's land use program requires zoning to be based upon objective criteria contained in comprehensive plans and applied through a transparent public process - not based upon contracts. Finally, it is worth noting that prior to the Property being rezoned through a public process in 1991 the Claimants *had* the ability to develop their property at 7 units per acre and failed to exercise that ability. The Council finds that the Claimants' accusations with regard to "promises" made by the City are entirely without merit.

## ORDER

The Claim is approved as to certain regulations of the City of Sherwood subject to the following terms:

1. In lieu of compensation under ORS 197.352, the City of Sherwood will not apply the following regulation to Claimants' development of a subdivision on the Property: Sherwood Zoning and Development Code 2.101.04(A)(1) – Lot area (conventional). The City of Sherwood's waiver of this regulation is personal to the Claimants and without limitation cannot be transferred, assigned, sold or bargained away to any third party. This regulation will not apply to Claimants only to the extent necessary to allow them to use the property to achieve a density of 2 units per acre and only to the extent that use was permitted when they acquired the Property.

2. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the Property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the Property unless the Claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the Property imposed by private parties.

3. Any use of the Property by the Claimants under the terms of this order will remain subject to the following regulations: (a) those regulations not specified in (1) above; (b) any regulations enacted or enforced by a public entity other than the City of Sherwood; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

4. Without limiting the generality of the foregoing terms and conditions, in order for the Claimants to use the Property consistent with this order it may be necessary for them to obtain a decision under ORS 197.352 from another jurisdiction that enforces land use regulations applicable to the Property. Nothing in this order relieves the Claimants from the necessity of obtaining a decision under ORS 197.352 from a public entity that has jurisdiction to enforce a land use regulation applicable to the use of the Property by the Claimants.

This Order is entered by City of Sherwood City Council on this 6 day of March, 2007.

Attest:

Keith Mays, Mayor

Sylvia Murphy, City Recorder

CAROL E. JONES
CIRCUIT JUDGE

YAMHILL COUNTY COURTHOUSE
535 NE 5TH STREET
MCMINNVILLE, OREGON 97128

503-434-7486
FAX: 503-472-5805

February 6, 2007



Michael G. Gunn
Attorney at Law
P.O. Box 1046
Newberg, OR 97132

Darsee Staley
Senior Assistant Attorney General
1162 Court St., NE
Salem, OR 97301

Re: Smith v State of Oregon, et al CV060239

Dear Counsel:

This matter came before the Court on November 17, 2006, upon Petitioner's Petition For Judicial Review and Measure 37 Compensation Claim, and I took the matter under advisement. My ruling follows.

**Issue of ownership**

Petitioner argues that it is the trust which is the owner, not himself personally, that he filed the claim in his capacity as Trustee for the Trust, and thus, there was no change in ownership when Mary Smith passed away on April 1, 2000. The Record reflects that the Trust was a revocable trust. Earl and Mary Smith were the grantors and trustees, and could have, at any time during their lifetimes, revoked or modified the Trust, received any income derived from the property, sold the property and distributed the property in any way they deemed appropriate, and changed beneficiaries. When the last surviving grantor/trustee, Mary Smith died on April 1, 2000, Randy Smith acquired the property as successor trustee. Prior to that date, Randy Smith had no legal ownership or control of the property. All of the legal and equitable interest by Mary Smith was extinguished on that date, and it passed to Randy Smith.

There is substantial evidence in the record to support the finding that Randy Smith is the present owner of the subject property.

**Acquisition date when government opts to "waive" rather than compensate**

Petitioner urges this court to find that the agency's Final Order is in error in only waiving

those regulations enacted or applied after Petitioner's own acquisition of the property, rather than acquisition by his parents, Earl and Mary Smith; and that ORS 197.352 ("Measure 37") is ambiguous on this point in that it provides for *compensation* of property owners for regulations resulting in reduction in property value enacted after acquisition by a *family member* of the present owner, thus requiring the court to look to other historical sources of the measure to discern it's meaning.

As required by *PGE v. BOLI*, 317 Or 606 (1993), if the intent of the voters is clear from the text and context of the statute, other sources need not be considered. Only when the text and context are unclear does the court go on to discern intent from other sources. *Ecumenical Ministries of Oregon v. Oregon State Lottery Commission*, 318 Or 551 (1994); *Stranahan v. Fred Meyer, Inc.*, 331 Or 38 (2000). I find that the intent is clear on the face of the statute, and that it clearly provides that when the government opts to modify, remove or not apply ("waive") regulations, the option applies only to regulations which have come into effect since the present owner's date of acquisition. Nowhere does the statute require or even authorize waiver of regulations dating back to when the present owner's family member acquired the property.[1] This court cannot presume oversight or error on the part of the drafters of Measure 37. Had they wished to provide the date of acquisition by a family member as the relevant date for the waiver option, they surely would have done so. As the measure is written, it gives property owners one of two possible remedies, at the government's option, each with it's own effective date.[2] The real question, though, is not what the measure's proponents intended but what the voters intended; and where, as here, the language is clear, the court need go no further in an attempt to discern the voters' intent. The context of the statute as a whole lends further support to this conclusion. §10 provides that the government may choose compensation or waiver, despite the availability of funds. It goes on to provide that where a claim is not paid within 2 years, the owner may use the property "as permitted at the time the owner acquired the property." Thus, in any event, the owner is never allowed to use the property contrary to regulations imposed prior to the present owner's acquisition.[3]

---

[1] The statute does not *explicitly* even provide that compensation, when opted for, be paid for reduction in property value dating back to the acquisition by a family member. The only reference to "family member," other than it's definition in §11, is in §3, which lists regulations which are excepted from compensation provided for in §1. In other words, §3 lists regulations for which the government is *not authorized* to compensate, and the list includes regulations which were in effect prior to acquisition by the present owner or a family member of the present owner. In contrast, when waiver is the option, the statute explicitly provides that the relevant date is that of acquisition by the present owner.

[2] There are other rules which apply to one, but not the other, remedy. For example, it does not appear that anything contained in the list of exemptions in §3 would apply to the waiver remedy.

[3] Even if I were to find ambiguity in the statute with respect to this issue, and determine the voters' intent by a review of the history of Measure 37, I would reach the same conclusion; i.e. that the voters intended that when the governmental entity opts to waive regulations rather than compensate the owner for reduction in value, the waiver only applies to regulations enacted or applied after the present owner acquired the property. Petitioner attached as exhibits to his Memorandum of Points and Authorities the Ballot Title, Text of Measure, Explanatory Statement, and

**Petitioner's claim for compensation**

Petitioner further claims that, even though Respondent has elected to waive land use regulations, he is still due compensation, pursuant to §6 and §12, because the government has continued to apply land use regulations for more than 180 days after written demand for compensation. I find that the statute is also clear and unambiguous and that Petitioner's interpretation of it is incorrect. Specifically, the statute clearly gives the governmental entity the option to choose waiver or compensation. Waiver is "in lieu" of the compensation otherwise provided for by the statute. §1 and §6 clearly provide for compensation, but a subsequent section, §8 clearly gives the government the choice to waive, rather than compensate. Petitioner's position that the government first may choose to waive, but then is required to compensate for any remaining regulations not waived is not supported by a plain reading of the

---

supporting and opposing Arguments which were contained in the 2004 Oregon Voter's Pamphlet. All of these sources are appropriate sources for the court to consider when attempting to resolve ambiguity in the case of a voter-passed ballot initiative. In summary:

A) The Ballot Title appears to inform voters that there is a single acquisition date common to both the compensation remedy and the waiver remedy; that of an owner or family member. It states: "Applies to restrictions enacted after "family member" (defined) acquired property."

B) The Text of Measure sets forth separate acquisition dates depending upon whether the government chooses to compensate or waive regulations. §3 exempts governmental entities from compensating property owners for reduction in property value attributable to regulations enacted or applied since a "family member" acquired the property; while §8 allows the government, in lieu of compensation, to "modify, remove or not apply" regulations enacted or applied after the present owner acquired the property.

C) The Explanatory Statement does not specify which acquisition date applies when the government chooses to waive regulations. It does specify that the acquisition date by the owner or a family member is the pertinent date, when the owner is compensated.

D) Out of 43 arguments in favor of the Measure, *none* argue that compensation *or* waiver should apply to regulations pre-dating the present owner's acquisition of the property, or mention that the measure would require the government to do that. 30 of these arguments focus upon the unfairness to landowners when the rules change after they themselves acquired the property, thus depriving them of the expectations they had when they purchased it. Most of these arguments are by description of the circumstances of actual landowners. The other 13 arguments in favor do not address the issue of acquisition date. Three of the 40 arguments in opposition to the measure suggest that the effective date for both compensation and waiver is that of acquisition by a family member; the remaining do not address the issue. Notably, the Chief Petitioners predicted that courts might be faced with the task of interpretation: "This statement is provided in order to instruct and aid the Oregon courts in determining the legislative intent behind Ballot Measure 37, and avoid misinterpretation of the intent of this law, as Oregon courts are known to do. * * * Voters are being told that the definition of "owner" is ambiguous. The term "owner" includes the current owners of the property * * * [t]he provisions of Ballot Measure 37 apply using the date the current owner acquired the property * * * Again, any land use regulation . . . enacted after a property owner acquired the property that has the effect of reducing the fair market value of your home will trigger Ballot Measure 37's protections." [Arguments in Favor #'s 27 and 32, furnished by Dorothy English, Barbara Prete and Eugene Prete]. As the Chief Petitioners, providing advance guidance to the courts as to the correct interpretation of the measure, their arguments would have stood out to readers of the Voters' Pamphlet as astute. In sum, for a voter relying upon the arguments in the Voter's Pamphlet, the vast majority of the arguments which do address the issue would likely lead a voter to the conclusion that Measure 37 would apply only to regulations enacted or enforced since the present owner's date of acquisition.

statute. More specifically, the government can choose to waive regulations which have become effective since the present owners' acquisition of the property, or compensate for reduction in value due to regulations which have become effective since the present owner or a family members' acquisition of the property.

Finally, Petitioner argues that §12 of the statute must be interpreted to allow compensation even when the government has elected waiver; that compensation is a remedy that is not excluded by the grant of any other remedy. If there are remedies available to Petitioner in addition to what is provided for in ORS 197.352; certainly this subsection provides that Petitioner is not excluded from availing himself of them. "The remedy" referred to in §12, however, is whichever remedy is elected by the government, i.e. compensation or waiver. The statute provides for but one remedy; either compensation or waiver. The election to waive, then, necessarily excludes the remedy of compensation. The Final Order waives regulations since the present owner's acquisition; therefore, the remedy of compensation is not available to Petitioner.

Respondent's Final Order is supported by substantial evidence in the record, and correctly applies the law. The Final Order is therefore affirmed.

Yours truly,

Carol E. Jones
Circuit Judge