

**CITY OF BEND
BALLOT MEASURE 37 (2004) CLAIM FOR COMPENSATION**

Staff Report and Recommendation to the City Council

DATE OF REPORT: April 25, 2007

CLAIM NUMBER: 06-824

CLAIMANT(S): Central Electric Cooperative
PO Box 846
Redmond, OR 97756

CLAIMANT(S) ATTORNEY(S): Michael H. McGean
Francis, Hansen & Martin LLP
1148 NW Hill Street
Bend, OR 97701

SUBJECT PROPERTY: The claim encompasses numerous properties within the Holiday Park subdivision, as the claim is attached to an easement that serves the purposes of Central Electric Cooperative.

DATE CLAIM RECEIVED: December 1, 2006

180-DAY DEADLINE: April 30, 2007
Note: The last regular City Council Meeting before the end of the 180 day time limit is April 18, 2007.

I. CLAIM

Claimant seeks compensation in the amount of \$2,600,000 per lineal mile (1.79 within the City of Bend, which equates to a claim of \$4,654,000 for alleged reduction in fair market value. The claim is based on City of Bend land use regulations that were adopted on August 7, 2006, which are claimed to restrict the claimant's use of the property to construct transmission lines, thereby reducing the value of the subject property. Specifically, the claimant has identified the City's section 2.1 of the Development code NS-2016, in which it states that "Utilities (above ground) and Radio/Television Transmission" require a conditional use. The applicant has further argued that the conditional use criteria still amount to substantive restrictions. As an alternative, the claimant is seeking a waiver of the regulations imposed upon CEC by the Development code and its predecessors, including City conditional use standards, site plan review standards and restriction on the alteration, modification or expansion of

nonconforming uses. The property is located east of 27th Street along Neff Road to the City Limits.

PROJECT MANAGER: Craig Chenoweth, 388-5563.
cchenoweth@ci.bend.or.us

II. SUMMARY OF STAFF RECOMMENDATION

Staff finds below that the submitted claim is not complete according to the City of Bend Ordinance No. NS-1966, Section 1.950. The claim can not be accepted as submitted.

Based on the findings made under the provision of Measure 37, Staff recommends that the City Council conduct a public hearing on this matter and adopt a motion to deny the claim. In the alternative, the City Council may elect to apply regulations that were in affect at the time the easement was created in 1975, back to the date the present owner acquired the property.

III. COMPLETENESS

The City of Bend Ordinance No. NS-1966, Section 1.950 entitled "Review of Demands for Compensation under Oregon Revised Statutes Chapter 197 as amended by Ballot Measure 37 Passed November 2, 2004" requires certain information for the filing of a complete claim.

1.950(4) Demand Requirements.

(a) *Form, Completeness, Completeness Review, Extension and Tolling of 180-Day Period under Measure 37.*

(1) *A Demand shall only be submitted and accepted for review upon forms established by the Manager. A Demand shall consist of all materials required by Section 1.950. A Demand will not be accepted until found to be complete by the Manager after all materials required by Section 1.950 have been submitted.*

STAFF FINDING: The City of Bend has adopted an official form for submitting a Measure 37 demand. The applicant has submitted the form. However, the demand has been submitted as a separate narrative. Staff finds that the narrative serves a supplement to the form meeting the criterion.

(2) *The Manager shall conduct a completeness review within 15 days after submittal of the Demand and shall advise the*

Owner, in writing, of any material remaining to be submitted. The Owner shall submit the material needed for completeness within 30 days of the written notice that additional material remains to be submitted. If the Owner fails to provide the materials necessary to make the Demand complete within the 30 day period the Demand shall not be accepted for filing.

STAFF FINDING: Staff conducted a completeness review and has found that the claim is incomplete. Numerous information items required by the City's Ballot Measure 37 Demand Form are missing or inadequate. There was no indication whether the claimant was making the demand pursuant to the City of Bend Ordinance No. 1966. Therefore, Staff has not informed the claimant of the incompleteness status of the claim.

(3) The 180-day period required to pass prior to any cause of action being available to Owner in circuit court specified Measure 37, shall only commence on the date the Manager deems the Demand complete, and accepts it for filing. The Manager shall note the date of completeness and filing, in writing, upon the Demand.

STAFF FINDING: Based on the above findings, and the incomplete status of the claim, under this ordinance the 180 day time period has not commenced.

Based on the submitted demand, the claimant would assert that the 180 day time period began on May 30, 2007.

(b) The Owner may request an extension for filing a complete Demand. A request for an extension or continuance shall be deemed to extend the 180-day period required to pass prior to any cause of action being available to the Owner in circuit court specified in Measure 37, and this Section 1.950.

STAFF FINDING: The owner, claimant or the claimant's representative have not requested a time extension for filing a complete demand. Based on the above findings and the City's ordinance, the 180 day time clock has not begun.

(c) Information and Other Matters Required to be Submitted as Part of the Demand. A Demand shall be for a single Property and shall be submitted on forms established by the Manager, and shall consist of all materials required by this Section 1.950.

Except as provided in Section 1.950(4)(c)(17), a Demand will not be accepted for filing without all of the following information:

STAFF FINDING: The submitted claim is for an easement that as determined serves a private real property. Nonetheless, based on findings above, the claim has not been accepted as complete.

- (1) *Fee. An application fee to be paid in advance of acceptance for filing to cover the costs of completeness review and Demand processing. The City shall record its actual costs for processing the Demand, and, in the event that the advance payment is not sufficient to cover all of the City's costs, then the Owner shall pay the balance owed, if any, upon receipt of an appropriate billing statement from the City. The City may send the Owner periodic billing statements. If the Owner does not pay on the billing statements when due, the Owner will be deemed to have abandoned the Demand. If the advance fee is more than the amount of the City's actual costs in processing the claim, then the excess shall be returned to the Owner. This fee shall be established by council resolution. In the event that the fee is not paid in full, the City of Bend shall have a lien against any Property owned by the Owner(s), and the City may take any enforcement actions to collect such fee as provided by law.*

STAFF FINDING: The claimant has paid the \$50.00 application fee.

- (2) *Form. A completed Demand form.*

STAFF FINDING: As mentioned that the claimant has NOT submitted the demand on the City's Measure 37 Demand form. However, the actual demand was specified in a separate narrative that was submitted with the demand form.

- (3) *Identification of Owner. Identification of the name, physical address, street address, and phone number of the Owner. If the applicant is not the Owner, this information must also be provided for the Owner and authorization to act on behalf of the Owner must be provided*

STAFF FINDING: The claimant's demand submittal included the information required by this provision. Therefore, Staff finds that this provision has been satisfied.

- (4) *Property Description. A legal description of the Property as well as a common address for the Property.*

STAFF FINDING: The claimant's demand submittal includes a description of the property (the tax map and lot number). Therefore, Staff finds that this provision has been satisfied.

- (5) *Proof of Present Property Ownership. Proof, acceptable to the Manager, that the Property is in the exclusive fee simple Ownership of the Owner or that the Owner has the consent of all Owners in the Property. The name and mailing address of all Owners other than the Owner making the Demand must be provided.*

STAFF FINDING: The information submitted by the claimant does not sufficiently demonstrate the applicant's ownership in the said easement. The information submitted is unclear and vague and does not demonstrate compliance with the requirement.

- (6) *Title Report. A title report, including the title history, a statement of the date the Owner acquired Ownership of the Property, and the Ownership interests of all Owners. The title report must also specify any restrictions on use of the Property unrelated to the land use regulation including, but not limited to, any restrictions established by Covenants, Conditions and Restrictions (CC&Rs), other private restrictions, or other regulations, restrictions or contracts.*

STAFF FINDING: The claimant has not submitted a Title Report for the property. Therefore, Staff finds this provision has not been satisfied.

- (7) *Copy of Existing Regulation. A copy of the land use regulation that the Owner making the Demand claims restricts the use of the Property, or interest therein, that has had the effect of reducing the fair market value of the Property, including the date the Owner claims the land use regulation was first enacted, enforced or applied to the Property.*

STAFF FINDING: The claimant has not provided a copy of the regulations that the owner claims restricts the use of the property. However, he has indicated that the requirements prescribed in Chapter 2.1 of the Bend Development Code restrict the use of the property.

- (8) *Copy of Prior Regulations. A copy of the land use regulation in existence, and applicable to the Property, when the Owner became the Owner of the Property, and a copy of the land use regulation in existence immediately before the regulation that was enacted or enforced or applied to the Property, that the Owner claims restricts the use of the Property and, the Owner claims, caused a reduction in fair market value due to the land use regulation in question being more restrictive.*

STAFF FINDING: No prior regulations have been provided with the application. Therefore, this provision has not been satisfied.

- (9) *Appraisals. A copy of a written Appraisal or Appraisals by an appraiser, qualified as such in the State of Oregon, 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 enactment, enforcement or application of the land use regulation in question, and explaining the rationale and factors leading to that conclusion. If the Demand is for more than \$10,000, copies of two Appraisals by different appraisers must be included. If the Demand is for \$10,000 or less, one Appraisal must be provided.*

STAFF FINDING: The applicant has not provided an appraisal or any other documentation in accordance with this provision indicating the claimed devaluation of the property. Staff finds that the submitted application is incomplete based on the above provision not being met, and can not be accepted as complete or evaluated based on the merits of the claim without the required appraisal information.

- (10) *Narrative. The Owner shall provide a narrative describing the history of the Owner and/or Family Member's Ownership in the Property, the history of the relevant land use regulations applicable to the Demand, and how the enactment, enforcement or application of the land use regulation restricts the use of the Property, or any interest therein, and has the effect of reducing the fair market value of the Property, or any interest therein.*

STAFF FINDING: The claimant has provided a narrative detailing the history of ownership of the subject property and a statement of the relevant land use regulations applicable to the demand that have allegedly had the effect of reducing the fair market value of the property.

- (11) *A statement Regarding Exceptions. A statement by the Owner making the Demand of why the land use regulation in question is not an “Exempt land use regulation” as defined in Section 1.950(2)(c).*

STAFF FINDING: There is no statement made by the claimant in regard to exceptions.

- (12) *A statement regarding date of acquisition of the Property by the Owner. The statement must explain how the subject land use regulation was enacted after the date of the acquisition of the Property by the Owner, or after acquisition by a Family Member of the Owner who owned the subject Property prior to the acquisition or inheritance by the Owner [if “Family Member” status is claimed it must also be addressed in the title report required by item (8) of this subsection].*

STAFF FINDING: A statement indicating how the alleged land use regulations were enacted after the date of acquisition has been submitted by the claimant.

- (13) *Statement of the Owner’s Understanding of the Effect of Any Modification, Removal or Non-Application of Land Use Regulation. A statement by the Owner explaining their understanding of what effect a modification, removal or non-application of the land use regulation would have on the potential development of the Property, stating the greatest degree of development that the Owner believes would be permitted on the Property if the identified land use regulation were modified, removed or not applied.*

STAFF FINDING: The statement required by subsection (13) has been provided as part of this claim. However, Staff finds that the applicant’s narrative does not fully address the above requirement, specifically the greatest degree of development that the Owner believes would be permitted on the Property if the identified land use regulation were modified, removed or not applied. Therefore, the claim is incomplete

- (14) *Copies of Prior Permit Applications and Description of Enforcement and/or Application Actions by the City. Copies of any land use actions, development applications or other relevant applications for permits that have previously been filed in connection with the Property and the action taken.*

Any such actions that represent the required “enforcement” and/or “application” of the land use regulation that are prerequisites to making a Demand must be described and identified as such.

STAFF FINDING: The claimant has not provided the required copies of prior applications of land use actions in connection with the subject property. The claimant has provided a reference to a previous land use approval on the subject property. However, there is no copy or description of the previous land use actions or development applications filed for the subject property.

Staff finds that this criterion has not been satisfied.

- (15) *Site Plan and Drawings. A copy of the site plan and drawings related to the expected use of the Property should the land use regulation be modified, removed or not applied in a readable/legible 8 ½ by 11-inch format.*

STAFF FINDING: The claimant has not provided any plans or drawings related to the expected use of the property. Therefore, this criterion has not been satisfied.

- (16) *Statement of Relief Sought. A statement of the relief sought by the Owner.*

STAFF FINDING: The claimant’s demand letter states that regulations limiting the ability of claimant to develop the property have caused the fair market value of the property to decrease by resulting in a claim that demands a compensation of \$2,600,000 per lineal mile.

As discussed above, the claim of diminished value has not been supported by an appraisal as required by this ordinance.

- (17) *The Manager may deem an application to be complete where the application lacks one or more of the items listed in Section 1.950(4)(c)(1-16) if the missing item(s) are clearly not necessary to prove the Measure 37 claim. The completeness statement provided for in Section 1.950(4)(a)(2) will specifically explain why any missing item is not considered necessary to prove the Measure 37 claim. Unless so specified, a claim that is missing information required by Section 1.950(4)(c)(1-16) will not be deemed to be complete.*

STAFF FINDING: The above criterion allows the City Manager to proceed with negotiations and discussions of a settlement even if the demand lacks one or more items are required by this ordinance. Staff has found above that the demand lacks many of the items as listed in the submittal requirements section of this Ordinance. The Manager has not found that any of the items listed in Section 1.950(4)(c)(1-16) are not necessary.

STAFF CONCLUSION IN REGARD TO COMPLETENESS OF CLAIM

Based on the above findings, Staff finds that the submitted demand, City of Bend File #06-824, does not constitute a complete claim under the City of Bend Ordinance No. NS-1966, Section 1.950.

IV. TIMELINESS OF CLAIM

Requirement

Ballot Measure 37 (2004), Section 5, requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of the measure (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of the measure (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings

This claim was submitted to the City of Bend on December 1, 2006. The claim's statement of the relief sought by this application is to allow the claimant to develop property as it could have been in 1975.

It appears that all land use regulations adopted by the City since 1975 are intended as the basis for this claim.

Conclusions

The claim has been submitted in a timely manner based on the claim being made within two years from the effective date of Measure 37 becoming effective on December 2, 2004.

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V. ANALYSIS OF CLAIM

1. Whether the claimant is an owner of the property and whether the claimant's request for compensation is based on the prior ownership of a family member.

Ballot Measure 37 provides for payment or compensation or relief from specific laws for "owners" as that term is defined in the Measure. Ballot Measure 37 (2004), Section 11(C) defines "owner" as "the present owner of the property, or any interest therein."

Findings

The applicant has contended that the easement is indeed private real property in which they have rights to. According to the information submitted it has been partially demonstrated that Central Electric cooperative has the rights to the easement in question. However, the timing of ownership is in question.

2. Whether the land use regulation is exempt under Section 3 of Measure 37.

Ballot Measure 37 (2004) does not apply to certain land use regulations. In addition, under Section 3 of the Measure, certain types of land use regulations are not subject to a claim for compensation.

Section 3 of the measure states that,

Subsection (1) of this act shall not apply to land use regulations:

(A) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this act;

(B) Restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;

(C) To the extent the land use regulation is required to comply with federal law;

(D) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or

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(E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

Findings

The claimant has referenced specific regulations that are claimed to devalue the property. The claimant specifically cites the City of Bend General Plan, Chapter 2.1. The claimant also states that all land use regulations enacted since 1975 that reduce the value of the land should be waived.

Without a specific proposed use or a specific listing of regulations that are the basis of the claim, it is not possible for Staff to determine what regulations apply to a particular use of the property, or whether those regulations may fall under one or more of the exemptions under Measure 37.

It appears that the general regulatory restrictions on utilities apply to the owner's anticipated use to the property, and for the most part these laws would not come under any of the exemptions in Measure 37. There may be other specific regulations that continue to apply under one or more of the exemptions in the Measure, or because they are regulations that are not covered by the Measure to begin with.

3. Whether the current land use regulation restricts the use of the property permitted at the time the owner or family member acquired the property.

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a land use regulation restrict the current use of private real property, or any interest therein, from how the property could have been used at the time the owner(s) or family member(s) acquired the property and has the effect of reducing the fair market value of the private real property.

Findings

The ordinance that was in effect at the time the applicant acquired the property did not specifically list utilities as a permitted use or conditional use in the zone. Furthermore, the subsequent ordinance (NS-1178) only allowed for public utilities to be permitted in any zone

However, in part, the submitted claim states,

“Central Electric Cooperative of Redmond Oregon (“CEC”) has been one of the primary suppliers of electricity to its members in Deschutes County since 1940. CEC is a Private Member-Owned Cooperative organized under Oregon Revised Statutes Chapter 6. CEC is not a “public” utility under Oregon law. ORS 757.005”

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Therefore, given the applicant's description, Staff cannot come to a determination that would allow the use, as suggested, to be allowed under the codes that were in effect at the time of ownership. In short, reverting back to the old codes would not assist the applicant in achieving the goals for utility construction.

The code as it exists lists "Utilities" as a conditional use under section 2.1 200. Staff finds that the new code includes a provision to potentially allow for the contemplated use to continue operation in the zone, while the prior ordinances did not provide any exceptions for private utilities to be allowed in the residential zones, resulting in a nonconforming use.

Therefore, it can be found that the zoning requirements regulations enacted after the current owner acquired the subject property have not resulted in greater restrictions on the use of the subject property.

4. Whether a land use regulation has the effect of reducing the fair market value of the property and the amount of any such reduction.

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any land use regulation described in Section V(3) of this report "has the effect of reducing the fair market value of the property, or any interest therein."

Findings

The applicant has not provided an appraisal substantiating the claimed devaluation of the property. The claim states that the just compensation figure is \$2,600,000 per lineal mile. No written estimate from any real estate professional has been submitted.

As discussed in the findings above, Staff finds that the new regulations, or any other land use regulations, have not been shown to have reduced the fair market value of the property.

Conclusions

Without an appraisal based on the value of the land that compares the old regulations with the new regulations, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Therefore a conclusion cannot be made as to the devaluation of the property. Further, Staff finds that it is likely that the new regulations may have actually increased the property value by providing a procedure in which the applicant may apply for land use approval for the use sought.

The City's Legal Counsel advises, however, that defending a Measure 37 claim in court carries with it the possibility of paying the attorney's fees for the claimant,

if the claimant is successful. In that a decision to not apply the current regulations back to the time the current owner acquired the property may still have a limited impact on the City. Therefore, the most legally defensible position for the city under these circumstances is to “not apply” the current (ordinance No. 2016) back to the time that the current owner acquired the property.

VI. STAFF CONCLUSIONS AND RECOMMENDATION FOR JUST COMPENSATION AND WHETHER TO MODIFY, REMOVE OR NOT APPLY A LAND USE REGULATION

Based on the preliminary findings and conclusions set forth above, it is not possible to determine if the claim is valid based on the amount of compensation requested.

Section 1 of Measure 37 requires payment of compensation to an owner of private real property if the City has enacted or enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the City may choose to not apply a law to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property.

Findings

Based on the findings and conclusions set forth in this report, Staff finds that the land use laws that have been enacted or enforced by the City since the date that the claimant acquired the subject property do not restrict the current use of the subject property more than the land use laws that were in effect at when the claimant first acquired the property.

Ballot Measure 37 authorizes the City to modify, remove or not apply one or more land use regulations to allow the claimant to use the subject property for a use permitted at the time he acquired the property.

Conclusions

Based on the record currently before the City and the findings stated above, the claimant has not established that he is entitled to relief. Therefore, Staff concludes that the claim should be denied.

However, Staff further finds that the Council, after conducting a public hearing, could find that the claimant’s arguments are valid, and therefore Staff would recommend that the current code requirements not be applied to the subject property to the extent necessary to allow the claimant’s use of the property permitted at the time he acquired it. Specifically, staff in this case would recommend not applying the current provisions of section 2.1.200 of the development code and instead allowing the regulations to be enforced as

permitted during the time the current owner acquired and owned the property that is the subject of this claim. As a result, the claimant's use of his property would be subject to the land use laws and regulations that were in effect in 1975 until August 7, 2007. Any use of the property by the claimant would remain subject to the following laws: (a) those laws not specified in this claim; (b) any laws enacted or enforced by a public entity other than the City; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under section (3) of the Measure.

Staff recommends that the City Council conduct a public hearing on this claim and consider any additional testimony received during the hearing. Staff recommends that the City Council adopt a motion to deny the claim. In the alternative, after conducting a public hearing, the City Council may find that the claimant's arguments are valid and therefore could adopt a motion to not apply the current regulations listed in section 2.1.200 of the Development Code to the subject property.

Recommended Motion:

Motion: *The City hereby denies the claim for compensation based on findings contained in the Staff Report dated April 25, 2007.*

Alternate Motion: *That the City hereby shall not apply (or remove) the current regulations listed in section 2.1.200 in the Development Code to the property that is subject to the claim, subject to the following provisions:*

The City of Bend's decision to not apply (or remove) the regulations stated in section 2.1.200 on the property subject to the claim shall have the effect of requiring the subject property to be subject to the regulations in place at the time the present owner of the property acquired the property until August 7, 2006..

Based upon when this claim was received by the Planning Division, the 180 day time clock began on December 1, 2006. The City Council has until May 29, 2007 to act on the claim under Measure 37, before the claimant can take action in circuit court against the City.

Note: The last regular City Council Meeting before the end of the 180 day time limit is May 16, 2007.

VII. List of EXHIBITS to the STAFF REPORT

Exhibit A – Claim letter dated November 30, 2006 and attachments

Exhibit 1A – Descriptions of properties included in the easement