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CIRCUIT COURT OF THE STATE OF OREGON

FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
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September 20, 2007

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COUNTY COUNSEL FOR
MULTNOMAH COUNTY, OR

RE: Elinor Wiley v. Multnomah County
Multnomah County Circuit Court Case Nos. 0702-01428 and 0704-04735

Dear Counsel:

These matters came before this Court on August 30, 2007 for hearing on Petitioner's Writ of Review in Case No. 0702-01428 and on cross-motions for summary judgment in Case No. 0704-04735. Petitioner appeared through counsel M. Christie Helmer. Respondent appeared through counsel Stephen L. Madkour. The matters were fully submitted on that date, and this Court took the matters under advisement.

Case No. 0702-01428 is a Writ of Review action brought by Petitioner to review the Multnomah County Board of Commissioners ("Board") Order denying her Measure 37 claim. Case No. 0704-04735 is an action for Just Compensation Under Measure 37 arising out of the same Board denial.

As set forth at the end of this letter, this Court requires further briefing on the cross-motions for summary judgment in Case No. 0704-04735. Therefore, this letter only constitutes this Court's findings and rulings on Petitioner's Writ of Review in Case No. 0702-01428.

Facts

Measure 37 became effective on December 2, 2004 and has been codified at ORS 197.352. To prevail on a Measure 37 claim, the present owner of the property must show that a new land use regulation: (1) "restricts the use of private real property or any interest therein," and (2) "has the effect of reducing the fair market value of the property, or any interest therein." ORS 197.352(1). If the owner presents a valid Measure 37 claim, then "the owner of the property

shall be paid just compensation.” *Id.* However, in place of just compensation, the governing body may elect to “waive” the land use regulations to “allow the owner to use the property for a use permitted at the time the owner acquired the property.” ORS 197.352(8).

Petitioner owns 103.04 acres of land (“property”) located on Sauvie Island in Multnomah County. Petitioner acquired her property on September 7, 1955 and has maintained continuous ownership of her property. Petitioner’s property is currently designated as Exclusive Farm Use (“EFU”) and has been designated as EFU since 1977. Prior to the EFU designation, Petitioner’s property was designated as F-2. Petitioner filed a Measure 37 claim form on July 6, 2006 seeking to “divide the property into at least 5 lots, and to develop at least 4 of these lots for residential home sites.” Return of Writ of Review Record (“Rec.”) at 84. Although Petitioner’s claim form listed the amount of her claim as \$1,050,000 to \$1,600,000, the appraisal she relied on estimated her property’s diminution of value as \$250,000 to \$1,000,000. Rec. at 84, 88. Petitioner’s claim form indicated her preferred resolution of the claim was waiver of the applicable regulations. Rec. at 84.

Petitioner’s claim was presented to the Multnomah County Board of Commissioners (“Board”) on December 7, 2006 and December 14, 2006. The Board issued Order No. 06-207 (“Board Order”) on December 14, 2006 denying Petitioner’s claim.

The Board Order stated that its basis for denial was that: (1) “dividing property in itself is not a ‘use’ of land subject to the provisions of Measure 37 and that development rights gained through a waiver are personal to the claimant and will result in no restriction in use if transferred to a third party,” and (2) “a reduction in value has not occurred because development rights cannot be transferred.” Rec. at 30.

Petitioner timely filed her Petition for Writ of Review pursuant to ORS 34.030 in Case No. 0702-01428. The Writ was issued on February 7, 2007. Respondent timely filed the Return on February 28, 2007.

Issues

Petitioner’s Writ of Review sets forth four assignments of error in the Board’s Order: (1) the Board’s findings and Order were not based on substantial evidence in the whole record, (2) the Board improperly construed the applicable law, (3) the Board exceeded its jurisdiction, and (4) the Board’s decision was unconstitutional. This Court’s consideration of the Writ of Review is made pursuant to ORS 34.010 to ORS 34.100.

Analysis

A. The Board’s Findings and Order Were Based on Substantial Evidence in the Whole Record

Petitioner had the burden to plead and prove the elements of her Measure 37 claim to the Board. The Board found that Petitioner established that she was the current owner of the

property having continuous ownership since acquiring the property on September 7, 1955. Rec. at 29. The Board also found that Petitioner's property is currently designated as EFU, with a prior designation of F-2. *Id.* The Board agreed that EFU zoning requires "newly created properties from a land division to be at least 80-acres in size," and EFU zoning "generally limit[s] the establishment of new dwellings to those that are necessary for farm purposes." *Id.* However, the Board ultimately found that Petitioner did not present a valid Measure 37 claim because she failed to establish both a restriction in use and a reduction in fair market value of her property. Rec. at 31.

The Board found that Petitioner failed to establish a restriction in use of her property because dividing property in itself is not a use. Although Petitioner initially argued that Measure 37 identifies "land division" ordinances as a type of "land use regulation," Petitioner's counsel conceded in her oral argument before this Court that subdividing property is not a use (both Petitioner and Respondent use the terms "divide" and "subdivide" interchangeably; this letter will use the term "subdivide"). At the hearing before this Court, Petitioner argued that her plan was actually to subdivide and develop her property. However, Petitioner's presentation to the Board did not include any evidence of a specific plan to develop her property. The language in Petitioner's Measure 37 claim form was that the EFU land use regulations "restrict the owner's ability to divide the property into at least 5 lots, and to develop at least 4 of these lots for residential home sites," and the claim form indicated that "the attached appraisal and concept plan on page 35 of that documents shows the development concept anticipated at this time." Rec. at 84. However, the attached appraisal and concept plan did not contain any specific plan for development, but instead contemplated the transferability of "building sites" for "future homes" and "potential homesites." Rec. at 124. The concept plan on page 35 of the appraisal contained a map showing anticipated division of land without development and stated that "further subdivision of the property in compliance with the previous F-2 zoning will generate a number of potential, acreage, building sites." *Id.* The appraisal referred to the subdivided property as the "four lot configuration east to the Gilbert River, with the potential to convert to residential uses * * *." Rec. at 129.

At the hearing before this Court, Petitioner acknowledged the lack of a specific plan for development in her presentation to the Board. In addition, Petitioner conceded that her presentation to the Board was not meant to be read as a specific plan for development because she wanted the ability to consider a variety of future division and development scenarios once she received the requested Measure 37 waiver. In other words, Petitioner wanted to keep her options open. Petitioner claimed that she was not required to present a specific plan for development in her Measure 37 claim, but she failed to cite any authority as to why a specific plan for development would not be required. Without a specific plan for development, the Board could only read Petitioner's presentation as a plan to subdivide her property. Therefore, the Board's finding that Petitioner failed to establish a restriction in use of her property was supported by the evidence in the record.

This conclusion is made notwithstanding the statements in the Board Order and at the hearing before the Board that Petitioner's claim was "complete." The Board Order noted that Petitioner's claim constituted a "complete 'written demand for compensation' within the meaning of the measure." Rec. at 29. In addition, Mr. Ken Born, a Department of Community Services Planner, testified at the Board hearing on December 7, 2006 that Petitioner's claim was "the most complete, the most comprehensive" claim received at his office. Transcription of Proceedings ("Tr.") at 8. This Court agrees with Respondent that these statements reference only the fact that Petitioner had submitted the proper materials to allow the Board to review her claim. These statements do not speak to the validity of Petitioner's claim. This Court also agrees with Respondent that Petitioner's claim can only be read as a "complete" plan to subdivide property, and, as Petitioner conceded in oral argument before this Court, subdividing property is not a use.

The Board also found that Petitioner failed to establish a reduction in the fair market value of her property because development rights are not transferable. As an initial matter, this Court agrees with Respondent that an unacted upon Measure 37 waiver is not transferable. The statutory language only considers relief to the "owner" and defines "owner" as the "present owner of the property, or any interest therein." ORS 197.352(11)(C). In addition, this Court agrees with the other recent Oregon Circuit Court decisions finding that an unacted upon Measure 37 waiver is not transferable. See *Mathis v. State*, Yamhill County Circuit Court No. CV060308 (June 25, 2007 Letter Opinion); *Jackson County v. All Electors*, Jackson County Circuit Court No. 05-2993-E-3(2) (Jan. 19, 2007 Order); *Crook County v. All Electors*, Crook County Circuit Court No. 05CV0015 (Aug. 1, 2006 Letter Opinion). Petitioner argues that the fair market value analysis requires assumption of transferability, pointing to *Vanderzanden v. Land Conservation and Development*, Marion County Circuit Court Nos. 05C19565, 06C17267, 06C18036 (Jan. 8, 2007 Letter Opinion). The court in *Vanderzanden* held that "the public entity must consider what value the property might have if the requisite waiver were granted, and in making this determination must assume that the right to make the specified use of the property may be transferred to another party" under either the doctrine of nonconforming use or the vesting of a right. *Id.* at 4. This Court agrees that in order to conduct a fair market value analysis, one would need to be able to assume transferability. However, as *Vanderzanden* contemplates, when the doctrine of nonconforming use or the vesting of rights cannot be assumed, then transferability cannot be assumed, making the fair market value analysis impossible. *Id.* This is consistent with the notion that an unacted upon waiver cannot be transferred.

In the case at bar, transferability of development rights cannot be assumed for undeveloped subdivided lots. A plan to subdivide and transfer undeveloped lots with unacted upon development rights gained through waiver is invalid because unacted upon Measure 37 waivers are not transferable. In addition, as the Oregon Court of Appeals stated in *Parks v. Board of County Commissioners*, "[p]latted but undeveloped land is not normally regarded as a 'use' in zoning law for purposes of establishing a prior nonconforming use." 11 Or App 177, 196, 501 P2d 85, *reh'g den* (1972), *rev den* (1973). The vesting of rights involves a similar analysis. *Clackamas County v. Holmes*, 265 Or 193, 508 P2d 190 (1973). Therefore, neither the doctrine of nonconforming use nor the vesting of rights can be assumed for development rights transferred

with undeveloped subdivided lots. Because Petitioner's concept plan did not include a specific plan for development, it was properly read as a plan to subdivide and transfer the undeveloped property. Petitioner's appraisal erroneously assumed that development rights would be transferred with the undeveloped subdivided property and calculated the value of "building sites" for "future homes." Rec. at 124. It should be noted that the Board Order cites Mr. Bob Alcantara, Senior Appraisal Supervisor with the Multnomah County Division of Assessment and Taxation, as stating that the appraisal was "well written and the estimates of value well supported." Rec. at 30. However, the crucial point is that Mr. Alcantara ultimately concludes that the estimates are based on the invalid assumption that the development rights would be transferable. *Id.* This Court agrees with Respondent that transferability of development rights cannot be assumed for undeveloped subdivided lots. Therefore, the Board's finding that Petitioner failed to establish a reduction in the fair market value of her property was supported by the evidence in the record.

B. The Board Properly Construed the Applicable Law and Did Not Exceed Its Jurisdiction.

Petitioner argues that the Board improperly construed the applicable law and exceeded its jurisdiction because it considered the transferability of Petitioner's requested waiver. However, in order to conduct a fair market value analysis, one must be able to consider and assume transferability. *Vanderzanden* at 4. If transferability cannot be assumed, the fair market value analysis cannot be completed. The Board properly construed the applicable law and did not exceed its jurisdiction by considering the transferability of Petitioner's requested waiver. Moreover, as stated above, this Court finds that the Board correctly analyzed the issue of transferability in finding that Petitioner failed to establish a reduction in the fair market value of her property.

C. The Board's Actions Were Constitutional.

Petitioner's briefing broadly stated that the Board denied Petitioner her "property rights in violation of the federal and state constitutions" but did not specify which constitutional provisions were violated nor offer any argument on those contentions. Petitioner's Reply to County's Memorandum in Support of Board Order No. 06-207 at 15 (June 7, 2007). When the Court questioned Petitioner's counsel at the hearing about her constitutional argument, counsel briefly stated that the Board's action violated Petitioner's equal protection rights. Because Petitioner did not specify nor cite any authority, it is unclear whether she was referring to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or to the similar Privileges and Immunities Clause in Article I, section 20 of the Oregon Constitution, or to both.

Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, "[n]o state shall * * * deny to any person within its jurisdiction the equal protection of the laws." Under Article I, section 20 of the Oregon Constitution, "[n]o law shall be passed

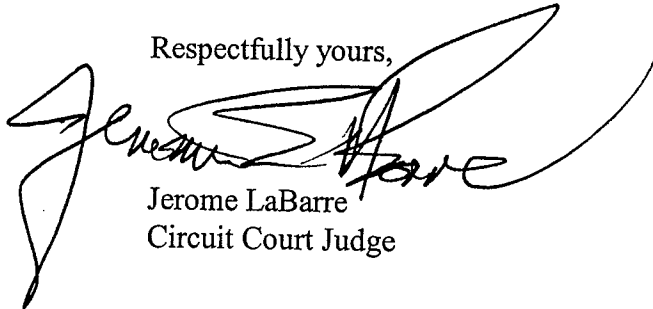
granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.” Although each constitutional provision requires a different analysis, both require a showing in the record that Petitioner was treated differently than those similarly situated. See *Jones v. Helms*, 452 US 412, 423-24, 101 S Ct 2434, 69 L Ed 2d 118 (1981); *In re Marriage of Crocker*, 157 Or App 651, 655-61, 971 P2d 469 (1998), *aff’d*, 332 Or 42, 22 P3d 759 (2001). The record before this Court does not contain such a showing, and Petitioner has failed to persuade this Court that the Board’s actions in this matter were unconstitutional.

Conclusion

Based upon the foregoing analysis, this Court concludes that the Board’s findings and Order were based on substantial evidence in the whole record, the Board properly construed the applicable law and did not exceed its jurisdiction, and the Board’s actions were constitutional. Therefore, this Court concludes that in Case No. 0702-01428, Board Order No. 06-207, dated December 14, 2006, should be affirmed. Mr. Madkour, please prepare an Order.

Supplemental briefing is needed on the cross-motions for summary judgment in Case No. 0704-04735 to discuss the effect of this decision on that case and on such motions. My Judicial Clerk, Katie Jo Johnson, will be contacting counsel shortly to set up a time for a telephone conference with this Court to establish a briefing schedule.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Jerome LaBarre", with a large, sweeping flourish extending to the right.

Jerome LaBarre
Circuit Court Judge

JLB/kjj