

**BALLOT MEASURE 37 (CHAPTER 1, OREGON LAWS 2005)  
CLAIM FOR COMPENSATION**

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

September 1, 2005

**STATE CLAIM NUMBER:** M120106

**NAME OF CLAIMANTS:** Leonard and Cheryl Keenon

**MAILING ADDRESS:** 40244 Crawfordsville Drive  
Sweet Home, Oregon 97386

**IDENTIFICATION OF PROPERTY:** Township 14S, Range 1W, Section 15  
Tax Lot 100  
Linn County

**DATE RECEIVED BY DAS:** March 11, 2005

**180-DAY DEADLINE:** September 7, 2005

**I. CLAIM**

The claimants, Leonard and Cheryl Keenon, seek compensation in the amount of \$180,000 for a reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide their 21.33-acre property into four, approximately five-acre parcels for residential home sites. The property is located on the south side of Crawfordsville Drive, southwest of Sweet Home, in Linn County. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that this claim is valid. Department staff recommends, in lieu of compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimants to allow them to divide their property into four, approximately five-acre lots for residential home sites: Statewide Planning Goals 3 and 4 and applicable provisions of ORS 215 and OAR 660, divisions 6 and 33. These laws will not apply to Leonard and Cheryl Keenon only to the extent necessary to allow Leonard Keenon a use of the subject property permitted at the time he acquired the property on April 19, 1972; and only to the extent necessary to allow Cheryl Keenon a use of the subject property permitted at the time she acquired it on March 19, 1979. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS RECEIVED**

On March 18, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, no written comments, evidence or information were received in response to the 10-day notice.

### **IV. TIMELINESS OF CLAIM**

#### **Requirement**

Ballot Measure 37, 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 of Fact**

This claim was submitted to DAS on March 11, 2005, for processing under OAR 125, division 145. The claim identifies Linn County's Farm/Forest (F/F) Zoning District and ORS 197 that restrict the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

#### **Conclusions**

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulation adopted prior to December 2, 2004, and is therefore timely filed.

### **V. ANALYSIS OF CLAIM**

#### **1. Ownership**

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

## **Findings of Fact**

Leonard Keenon initially acquired the subject property by a Land Sale Contract signed on April 19, 1972. Cheryl Keenon acquired an interest in the property by Warranty Deed on March 19, 1979. (See documents in the department's claim file.)

On September 11, 2003, Leonard and Cheryl Keenon transferred ownership of the subject property into a Revocable Living Trust, with themselves as trustees. (See deed in the department's claim file.) For the purpose of establishing ownership under Measure 37, transfer of the subject property into a revocable trust does not constitute a transfer of ownership from Leonard and Cheryl Keenon. A Tax Statement from the Linn County Assessor's office, included in the claim, indicates that the Leonard and Cheryl Keenon Revocable Living Trust remains the current owner of the subject property as of March 2, 2005.

## **Conclusions**

The claimants, Leonard and Cheryl Keenon, are "owners" of the subject property as that term is defined in Section 11(C) of Ballot Measure 37. Leonard Keenon first acquired an interest in the subject property on April 19, 1972, and Cheryl Keenon first acquired an interest in the subject property on March 19, 1979. Leonard Keenon is also a "family member" as to Cheryl Keenon, as that term is defined in Section 11(A) of Measure 37, as of April 19, 1972.

## **2. The Laws that are the Basis for the Claim**

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a law must restrict the claimants' use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants or a family member acquired the property.

## **Findings of Fact**

The claimants desire to create four, five-acre parcels with one residential home site on each newly created parcel. The property is currently developed with one single-family dwelling. The claim states that Linn County Ordinance ORD 80-335 changed the zoning on the subject property from Agricultural, Residential, Timber (ART-5) to Farm/Forest (F/F), which precluded the establishment of any other homes or lots on the 21.33-acre property.

The claim also states that ORS 197 "allows either compensation for loss in value due to ORD 80-335 or reverts zoning to ART, at time of purchase." Contrary to the claimants' characterization, in general, ORS 197 provides authorization to cities and counties to adopt comprehensive land use plans and establishes the procedural requirements for administering, enforcing and reviewing such plans. ORS 197 does not directly restrict the use of land and does not reduce the value of property.

The claim is based, in part, on Linn County's Farm/Forest Zoning District (F/F) and the applicable provisions of state law that require such zoning. The claimants' property is

zoned F/F, as required by Statewide Planning Goals 3 and 4, and in accord with OAR 660, divisions 6 and 33, because the claimants' property is "Agricultural Land" as defined by Goal 3 and "Forest Land" as defined by Goal 4. Statewide Planning Goals 3 and 4 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned for Exclusive Farm Use (EFU) and that Forest Lands be zoned for Forest Conservation.

Land that is designated EFU and/or Forest Conservation is also subject to restrictions based on certain provisions of ORS 215. Current land use regulations, particularly ORS 215.263, 215.284, 215.700-750 and 215.780, along with Statewide Planning Goals 3 and 4 and OAR 660, divisions 6 and 33, do not allow the subject property to be divided into parcels smaller than 80-acres and establish standards for the placement of farm and non-farm dwellings.

Under OAR 660-006-0050, related to mixed farm-forest zones, all the uses permitted under Statewide Planning Goals 3 and 4 are allowed except that for dwellings, either the Goal 3 or the Goal 4 standards are applicable based on the predominant use of the tract on January 1, 1993. Information was not provided in the claim showing the predominant use of the property in 1993. Aerial photos of the subject property, however, indicate that the property is primarily vacant with one dwelling and outbuildings. An aerial photo included in the claim shows that the parcel contains several mature conifers but that the parcel is predominantly vacant. Department staff concludes that the parcel is most likely under farm use.<sup>1</sup>

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. Subsequent amendments to comply with HB 3326, (Chapter 704, Oregon Laws 2001, and effective January 1, 2002) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

When Leonard Keenon acquired the property on April 19, 1972, before the adoption of the Statewide Planning program through Senate Bill 100 in 1973, it was zoned Agricultural, Residential, Timber (ART-5) 5-acre minimum by Linn County. Under the ART-5 zone, single-family dwellings were permitted with a 5-acre minimum parcel size for the creation of new lots or parcels. The property was also subject to applicable provisions of ORS 215, enacted in 1963, which applied to properties zoned for agricultural use.

---

<sup>1</sup> The standards for establishment of a dwelling on resource lands found under Goals 3 and 4 and in ORS 215 vary according to the predominant use of the property. For clarification of the standards for establishment of dwellings in a "mixed use" Farm/Forest zone, see the applicable statutory and goal restrictions in Statewide Planning Goals 3 and 4, OAR 660, divisions 6 and 33, and in ORS 215.

## **Conclusions**

Lot size and dwelling standards established by Statewide Planning Goals 3 and 4, ORS 215, and OAR 660, divisions 6 and 33, adopted since Mr. Keenon acquired the property in 1972 do not allow the division of the property into parcels smaller than 80-acres or allow the approval of dwellings as may have been possible in 1972. The County's F/F zone is based on the standards required by Statewide Planning Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33. Land use laws adopted since 1972 restrict the use of the property from what could have been done when the property was acquired by Leonard Keenon in 1972.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the use that the claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any laws described in Section V.(2) of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

### **Findings of Fact**

The claim states that the fair market value of the subject property has been reduced by \$180,000 as a result of land use laws enacted after Leonard Keenon acquired the property in 1972. The claim indicates that the subject property is valued at approximately \$88,720 under current land use regulations. A limited real estate market analysis submitted with the claim indicates that, without the current regulations, the property could be valued at approximately \$95,000 per five-acre parcel for a total of \$390,000. It is not clear from materials submitted with the claim how the claimants calculated the alleged \$180,000 reduction in value based on these figures. The claim does not include an appraisal to substantiate the alleged reduction in value.

## **Conclusions**

As explained in section V.(1) of this report, Leonard Keenon and Cheryl Keenon are the current owners of the subject property, and have established family ownership as of April 19, 1972. Thus, under Ballot Measure 37, Mr. and Ms. Keenon are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in section V.(2) of this report, laws adopted since Mr. Keenon acquired the property restrict division and development of the subject property. The 21.33-acre parcel cannot be divided as the claimants indicate was allowed when Mr. Keenon acquired the property in 1972.

The claim asserts these restrictions reduce the fair market value of the property by \$180,000. However, without an appraisal or other substantiating documentation, and without verification of the uses allowed when the claimants acquired the property, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

#### **4. Exemptions under Section 3 of Measure 37**

Ballot Measure 37 does not apply to certain land use regulations. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

#### **Findings of Fact**

The claim is based on Linn County's F/F zone and the related provisions of state law that have restricted use of the property and reduced its fair market value. These laws include Statewide Planning Goal 3 (Agricultural Lands), Statewide Planning Goal 4 (Forest Lands), and applicable provisions of ORS 215 and OAR 660, divisions 6 and 33. The County's F/F zone, and state laws requiring such zoning, were enacted after Leonard Keenon acquired the property in 1972 and do restrict the use of the property in a manner that likely reduces its fair market value. With the exception of applicable provisions ORS 215 in effect when Mr. Keenon acquired the property, laws identified in the claim are not exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimant or the claimant's family members acquired the property.

The department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding Forest Lands. Section 3 (B) of Measure 37 specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes..." The department finds that siting standards for dwellings in forest zones in ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under subsection (3) of Measure 37.

#### **Conclusions**

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under Measure 37. It does appear that the general statutory, goal and rule restrictions on the division, residential development and use of Agricultural and Forest Lands apply to the claimants' use of the property, and for the most part these laws would not be exempt under Section 3(E) Measure 37. Applicable provisions ORS 215 in effect when Mr. Keenon acquired the property will continue to apply to the property.

Other laws in effect when Mr. Keenon acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. There may be laws

that continue to apply to the claimants' use of the property that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of the laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under section (3) of Measure 37 that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the property

## **VI. FORM OF RELIEF**

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

### **Findings of Fact**

Based on the findings and conclusions in this report, laws enforced by the Commission or the department prohibit the division of the subject property into four parcels with dwellings, restricting the use of the property relative to uses allowed when Mr. Keenon acquired the property in 1972. The claim asserts that these land use regulations reduce the fair market value of the subject property by \$180,000. The claim provides no appraisal or other substantiating documentation to establish how the specific restrictions reduce the fair market value of the property. Nevertheless, based on the information submitted, the department acknowledges that state land use laws have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow Mr. Keenon to use the subject property for a use permitted at the time he acquired the subject property on April 19, 1972, and to allow Mrs. Keenon to use the subject property for a use permitted at the time she acquired it on March 19, 1979.

As discussed above, when Leonard Keenon acquired the property, prior to the adoption of the Statewide Planning program in 1973, it was zoned Agricultural, Residential, Timber (ART-5) five-acre minimum by Linn County and was subject to applicable provisions of ORS 215 then in effect.

When Cheryl Keenon acquired the property on March 19, 1979, it was still zoned Agricultural, Residential, Timber (ART-5) five-acre minimum. However, the County's ART-5 zone that applied to the property at that time was not acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251. The Commission acknowledged the Linn County Comprehensive Plan and land use regulations as complying with the Statewide Planning Goals on June 20, 1985 (EFU zoning adopted locally on September 2, 1980). Since the Commission had not acknowledged Linn County's comprehensive plan and land use regulations, including the F/F zone, when Cheryl Keenon acquired the property, the Statewide Planning Goals applied directly to the property on the date of acquisition.<sup>2</sup>

At that time, the State standards for a land division involving "Agricultural Land" where the local zoning was not acknowledged required that the resulting parcels must be of a size that is "appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area" (Statewide Planning Goal 3). Further, ORS 215.263 (1977 edition) required that all divisions of land subject to the provisions for EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). Thus, the opportunity to divide the property when Ms. Keenon acquired it in 1979 was limited to land divisions done consistent with Goal 3, that required the resulting farm or non-farm parcels to be: (1) "appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area;" and (2) shown to comply with the legislative intent set forth in ORS 215.243.

As for dwellings allowed under Agricultural zoning, as required by Statewide Planning Goal 3 on Ms. Keenon's date of acquisition in 1979, farm dwellings were allowed if determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1975 edition). ORS 215.213(3) (1975 edition) authorized a non-farm dwelling only where the dwelling was compatible with farm uses, consistent with the intent of ORS 215.243, did not interfere seriously with accepted farming practices on adjacent lands, did not materially alter the stability of the land use pattern for the area, and was situated on land generally unsuitable for production of farm crops and livestock. Before a farm dwelling could be established on Agricultural Land, the farm use to which the dwelling relates must "be existing."<sup>3</sup> Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use.

---

<sup>2</sup> Statewide Planning Goal 3 became effective on January 25, 1975 and was applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the County's Goal 3 program in 1985 (*Sunnyside Neighborhood Assn. V. Clackamas County*, 280 Or 3 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, *rev. denied*, 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985)). After the county's plan and land use regulations were acknowledged by Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions, (*Byrd v. Stringer*, 295 Or 311 (1983)). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same in substance, the applicable rules must be interpreted and applied by the county in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

<sup>3</sup> *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) *affirmed without opinion*, 70 Or App 179 (September 14, 1984) and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33, (November 23, 1988).

## Conclusions

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to Leonard and Cheryl Keenon's division of the subject property into four, approximately five-acre parcels or to the establishment of a residential home site on each parcel created: applicable provisions of Statewide Planning Goals 3 and 4, ORS 215.263, 215.284, 215.700-750, 215.780; and OAR 660, divisions 6 and 33, enacted after each claimants acquired the subject property. These land use regulations will not apply to Leonard Keenon's use of the property only to the extent necessary to allow him a use permitted at the time he acquired the property on April 19, 1972; and will not apply to Cheryl Keenon's use of the property only to the extent necessary to allow her a use permitted at the time she acquired the property on March 19, 1979.
2. The action by the State of Oregon provides the state's authorization to Leonard Keenon to use the property subject to the standards in effect on April 19, 1972. On that date, the property was subject to applicable portions of ORS 215 (1971 edition).

The action by the State of Oregon provides the state's authorization to Cheryl Keenon to use the property subject to the standards in effect on March 19, 1979. As discussed above, on that date, the property was subject to Statewide Planning Goal 3 and the applicable portions of ORS 215 (1977 editions).

The claimants will also continue to be subject to ORS 215.730 and those provisions of Goal 4 and its implementing rules in OAR 660, division 6, related to siting standards for dwelling for the protection of public health and safety and to any other laws that are exempt under Section 3(e) of Measure 37.

3. 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.
4. Any use of the property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to Measure 37 including, without limitation, those laws exempted under section (3) of the Measure.
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the property, it may be necessary for them to obtain a decision under Measure 37 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the

necessity of obtaining a decision under Measure 37 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimants.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on August 2, 2005. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.