

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT  
Final Staff Report and Recommendation  
September 8, 2005**

**STATE CLAIM NUMBER:** M120173

**NAME OF CLAIMANTS:** Stephan and Sandra Key

**MAILING ADDRESS:** 26575 South Highway 170  
Canby, Oregon 97013

**PROPERTY IDENTIFICATION:** Township 4S, Range 1E, Section 15,  
Tax Lots 1600 and 1701  
Clackamas County

**DATE RECEIVED BY DAS:** March 16, 2005

**180-DAY DEADLINE:** September 12, 2005

**I. SUMMARY OF CLAIM**

The claimants, Stephan and Sandra Key, seek compensation in the amount of about \$600,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of private real property. The claimants desire compensation or the right to subdivide their 12-acre property into one 5.5-acre parcel on which an existing dwelling and barn are located; and five one-acre parcels and one 1.68-acre parcel, and to develop a dwelling on each of these six parcels. The property is located at 26575 S. Highway 170, near Canby, in Clackamas 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 the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimants' division of the property into one 5.5-acre parcel on which an existing dwelling and barn are located; and five one-acre parcels and one 1.68-acre

parcel, and to develop a dwelling on each of these six parcels: Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215.263, 215.284, 215.780, and applicable provisions of OAR 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow Mr. and Ms. Key a use of the property permitted at the time they acquired it in 1984. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On March 22, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the 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 16, 2005, for processing under OAR 125, division 145. The claim identifies “401.06,” “401.10” and “EFU”, as laws 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 regulations 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**

The claimants, Stephan and Sandra Key, acquired the subject property on December 15, 1984 as reflected by a real estate contract included with the claim. The claimants acquired the subject property from Mr. Key’s uncle, Mr. Edward Lemons, who acquired it from Mr. Key’s grandparents, Homer and Sadie Lemons, in 1965. Homer and Sadie Lemons acquired the subject property in August 2, 1945. (See Deed in department’s claim file.)

### **Conclusions**

The claimants, Stephan and Sandra Key, are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37, as of December 15, 1984. The property has been owned by “family members” as that term is defined by Section 11 of Ballot Measure 37 since 1945.

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

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a law must restrict the claimant’s 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 claimant or a family member acquired the property.

### **Findings of Fact**

The claim indicates that the county’s Exclusive Farm Use (EFU) zoning precludes them from developing their property as desired. The claim cites “401.06” and “401.10” (the Clackamas County zoning Code sections for the County EFU zone) and “EFU” as the laws that have restricted the 12-acre property so that it cannot be subdivided into one 5.5-acre parcel, on which an existing dwelling and barn are located; and five additional one-acre parcels and one 1.68-acre parcel and developed with dwelling on each of these six parcels.

The claim is based, in part, on Clackamas County’s current Exclusive Farm Use (EFU Zone) and the applicable provisions of state law that require such zoning. The claimants’ property is zoned EFU as required by Statewide Planning Goal 3 in accord with OAR 660, division 33 and ORS 215 because the claimants’ property is “Agricultural Land” as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that Agricultural Lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660 division 33 as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80-acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

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.)

Statewide Planning Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses. Goal 14 became effective on January 25, 1975.

The claimants' family acquired the subject property in 1945. At that time the property was not subject to state or local zoning laws.

### **Conclusions**

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33 were all enacted after Mr. Key's grandparents acquired the subject property in 1945, and do not allow the division or development of the property, thereby restricting the use of the property relative to the uses allowed when the claimants' family acquired the property. In 1945, the property was not subject to state or local zoning laws.

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. 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 land use regulation 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 includes an informal estimate of \$600,000 as the reduction in the property’s fair market value as a result of regulations that restrict the use of the property. This amount is based on the claimants’ estimate of the market value of small lots in the area (about \$75,000 per-acre).

#### **Conclusions**

As explained in Section V. (1) of this report, the current owners are Stephen and Sandra Key, whose family member acquired the property in 1945. Under Ballot Measure 37, Mr. and Ms. Key are due compensation for land use regulations 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 1945 restrict the claimants’ use of the subject property.

Without an appraisal or other substantiating documentation, 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 includes some general references to certain state and local land use regulations that restrict the use of the property relative to what would have been allowed in 1945 when the property was acquired by the claimants’ family. These provisions include Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its EFU zone. None of these laws are exempt under Section 3(E) of Measure 37, which exempts laws enacted before the claimants or their family members acquired the property.

## **Conclusions**

Without more specific development information 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 residential development and use of farm land apply to the claimants' use of the property, and for the most part these laws are not exempt under Section 3(E) of Measure 37.

Laws in effect when the claimants' family 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 other 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. And, in some cases, some of these 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 in order to allow the present owner to carry out a use of the property permitted at the time the current 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 set forth in this report, laws enforced by the Commission or the department restrict the claimants from subdividing and developing the property as requested. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$600,000. However, because the claim does not provide an appraisal or other specific documentation to establish how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on

which the claim is based likely 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, Ballot Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow the claimants to use the subject property for a use permitted at the time they acquired the property on December 15, 1984.

The claimants acquired the subject property on December 15, 1984, when it was subject to Clackamas County's acknowledged EFU-20 zone (Clackamas County Court Order 82-889 dated May 14, 1982) consistent with applicable implementing statutes and rules. The County's acknowledged EFU zone allowed for the creation of new farm and non-farm parcels and dwellings on such parcels pursuant to the provisions of Goal 3, Goal 14, OAR 660, division 5 and ORS 215.<sup>1</sup> Although some division of the subject property may have been allowed in 1984, division of the property into one-acre parcels was not allowed under laws that applied to the subject property in 1984.

### **Conclusion**

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 Mr. and Ms. Keys' division of the 12-acre property into one 5.5-acre on which an existing dwelling and barn are located; and five additional one-acre parcels and one 1.68-acre parcel and development of a dwelling on each of these six parcels: applicable provisions of Statewide Planning Goals 3 and 14, ORS 215.263, 215.284 and 215.780, and OAR 660, division 33 enacted after December 15, 1984. These land use regulations will not apply to Mr. and Ms. Keys' requested use of the property only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on December 15, 1984.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property subject to the standards in effect on December 15, 1984. On that date, the property was subject to Clackamas County's acknowledged EFU-20 zone and provisions of Statewide Planning Goals 3 and 14, ORS 215, and OAR 660, division 5 in effect at that time. The department acknowledges that although some division of the subject property may have been allowed in 1984, division of the property into one-acre parcels was not allowed under laws that applied to the subject property in 1984.

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<sup>1</sup> The Clackamas County comprehensive plan and land use regulations were acknowledged by the Commission on January 27, 1983 (Acknowledgment Order dated February 9, 1983, 83-ACK-014). The County's EFU-20 zone was determined to comply with the applicable provisions of Goal 3 on December 11, 1981 (Continuance Order dated December 31, 1981).

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 19, 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.