

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT  
Final Staff Report and Recommendation**

September 2, 2005

**STATE CLAIM NUMBER:** M120089  
Report B

**NAME OF CLAIMANTS:** O. Keith Cyrus and Conida E. Cyrus

**MAILING ADDRESS:** 16850 Jordan Road  
Sisters, Oregon 97759

**PROPERTY IDENTIFICATION:** Township 15S, Range 10E, Section 12,  
Tax Lots 500 and 700<sup>1</sup>  
Deschutes County

**OTHER CONTACT INFORMATION:** Edward P. Fitch  
P.O. Box 457  
Redmond, Oregon 97756

**DATE RECEIVED BY DAS:** March 10, 2005

**180-DAY DEADLINE:** September 6, 2005

**I. SUMMARY OF CLAIM**

The claimants, O. Keith and Conida Cyrus, seek compensation in the amount of \$21,000,000 for the 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 subdivide and develop the two tax lots into 5-acre parcels. Tax lot 500 is 80-acres and tax lot 700 is 118.8-acres. The property is located at 16580 Jordan Road, Sisters. (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

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<sup>1</sup> In a letter dated August 8, 2005, the claimants' attorney indicated that the original claim incorrectly "lumped together" tax lot 700 and tax lot 100 of Township 15S, Range 10E, Section 13, referring to both tax lots as tax lot 700 of Section 12. This report addresses only tax lot 700. Tax lot 100, which the attorney now asserts to be 312.2 acres, is not a part of this claim and is not considered in this report. The State of Oregon will consider the August 8, 2005 letter to be a new claim for compensation under Ballot Measure 37 for tax lot 100 as of the date it was received, August 10, 2005.

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 O. Keith and Conida Cyrus' division and development of the properties for residential purposes: Statewide Planning Goals 3 (Agricultural Lands), ORS 215 and applicable provisions of OAR 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow the Cyrus' a use of tax lot 700 permitted at the time they acquired it in February, 1965 and a use of tax lot 500 permitted at the time they acquired it on July 1, 1974. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On March 17, 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, one written comment was received in response to the 10-day notice. The comment is relevant to whether the law(s) that are the basis for the claim are exempt under section 3 of Measure 37, in that it questions whether the soils involved can handle the septic systems required by the density of the development, and whether the resulting septic systems will threaten subsurface water supplies. The comment has been considered by the department in preparing this report.

### **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 10, 2005, for processing under OAR 125, division 145. The claim identifies "all state land use goals and guidelines and every ordinance of Deschutes County adopted since 1971/72 that restricts ability to divide and develop the property." 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, O. Keith and Conida Cyrus, acquired tax lot 700 on February 12, 1965, as reflected by a Warranty Deed included with the claim. They acquired tax lot 500 on July 1, 1974, as reflected by a Warranty Deed included with the claim. Copies of Title Reports dated February 24 and February 25, 2005, indicate that O. Keith and Conida Cyrus are the current owners of the subject properties.

## **Conclusions**

The claimants, O. Keith and Conida Cyrus are “owners” of the subject property, as that term is defined by Section 11(C) of Ballot Measure 37.

### **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**

| Tax Lot      | Acreage | Current zoning    | Acquisition Date     | Zoning at date of Acquisition |
|--------------|---------|-------------------|----------------------|-------------------------------|
| 15-10-12 500 | 80      | EFU               | July 1, 1974         | A-1                           |
| 15-10-12 700 | 116     | EFU<br>High value | February 12,<br>1965 | none                          |

The claim identifies “All state land use goals and guidelines and every ordinance of Deschutes County adopted since 1971/72 that restricts ability to divide and develop properties.” The claim indicates that the claimants intend to divide the properties into 5-acre parcels. Tax lots 500 and 700 are currently zoned Exclusive Farm Use (EFU).

The claim is based on Deschutes County’s current EFU Zone and the applicable provisions of state law that require such zoning. Tax lots 500 and 700 are zoned EFU as required by 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 parcel(s) 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.)

The claimants acquired tax lot 700 in February, 1965, prior to the establishment of the Statewide Planning Goals and their implementing statutes and rules. No Deschutes County zoning applied to the subject property in 1965.

The claimants acquired tax lot 500 on July 1, 1974. In 1974 County zoning was A-1, an Exclusive Agricultural zone which allowed buildings and uses customarily provided in conjunction with farm use. The minimum lot size was 5-acres, with some exceptions. However, because the claimants acquired tax lot 500 after the adoption of SB 100 (chapter 80, Oregon Laws 1973, effective October 5, 1973) but before the adoption of the Statewide Planning Goals effective January 25, 1975, the property was also subject to the Statewide Interim Goals. Under the Interim Goals, ORS 197.175(1) and 197.280 (1973 edition) required, in addition to any local plan or zoning provisions, the application of interim land use goals set forth in ORS 215.515 (1973 edition) to the preparation, revision, adoption or implementation of any comprehensive plan prior to the effective date of the Statewide Planning Goals (see *Petersen v. Klamath Falls*, 279 Or 249 (1977)).

## **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 O. Keith and Conida Cyrus acquired ownership of tax lot 700 in February 1965, and do not allow the division and development of the properties, thereby restricting the use of the property relative to the uses allowed when the property was acquired by them in 1965.

OAR division 33 and provisions of ORS 215 were enacted after O. Keith and Conida Cyrus acquired ownership of tax lot 500 in 1974, and do not allow the division and development of tax lot 500. While the extent of development permitted on July 1, 1974 is not clear, it may have been possible to divide and development the property to some extent under provisions in effect in July, 1974, in accordance with the Interim Planning Goals set forth in ORS 215.515 (1973 edition).

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 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 \$21,000,000 as the reduction in the property's fair market value as a result of regulations enacted after the claimants acquired the subject property. This estimate is based on the claimants' "information and belief." The calculation (gross developed value minus current value and development costs) for loss of fair market value for each property is estimated at \$3 million for tax lot 500 and \$18 million for tax lot 700.

## **Conclusions**

As explained in section V.(1) of this report, the current owners are O. Keith and Conida Cyrus who acquired the properties on February 12, 1965, and July 1, 1974. Under Ballot Measure 37, O. Keith and Conida Cyrus 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, land use regulations adopted since the claimants

acquired the properties in 1965 and 1974 restrict the use of the properties. The claimants estimate the reduction in value due to the land use restrictions to be \$21,000,000.

Without an appraisal based on the value of five-acre parcels or other 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 a general reference to any state land use regulation that restrict the use of the property after 1971 or 1972. These provisions include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Deschutes County has implemented through its EFU zone. With the exception of provisions of ORS 215 in effect on July 1, 1974 as to tax lot 500, none of these laws appear to be exempt under Section 3(E) of Ballot Measure 37, which exempts laws in effect when the claimants acquired the property.

A comment on this claim by a neighbor raises questions of harm to well water supplies and soils based on the density of proposed development and septic system requirements for same. Public healthy and safety regulations are exempt under Section 3(B) of Measure 37.

#### **Conclusions**

Without a specific development proposal for the properties, it is not possible for the department to determine what laws may apply to a particular use of the properties, 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 properties, and for the most part these laws are not exempt under section 3(E) of Measure 37. Provisions of ORS 215 in effect when the claimants acquired tax lot 500 in 1974 are exempt under section 3(E) of the Measure and will continue to apply to the property.

Laws in effect when the claimants acquired the properties 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 properties 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 properties 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. Some of those laws may be exempt under subsections 3(A) to 3(D) of Measure 37. In particular,

in addition to others that have not yet been identified, some regulations may be exempt under Section 3(B) of Measure 37, based on public health and safety requirement including those related to siting septic systems and protection for drinking water required in conjunction with residential development.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the properties based on the use 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 division of the subject properties into parcels or lots, and the use of the property for residential purposes. The claimants cannot create the desired five-acre parcels out of the subject properties, or develop those lots because laws enacted after the claimants acquired the properties prohibit lot sizes that small, and establishment of residential dwellings. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$21,000,000. 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, and because the level of development permitted in 1974 when the claimants acquired tax lot 500 is not clear, 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 O. Keith and Conida Cyrus to use the subject property for a use permitted at the time they acquired tax lot 700 in 1965 and tax lot 500 in 1974.

As stated above, the claimants acquired tax lot 500 after the adoption of SB 100 (chapter 80, Oregon Laws 1973, effective October 5, 1973) but before the adoption of the Statewide Planning

Goals effective January 25, 1975. As such, ORS 197.175(1) and 197.280 (1973 edition) required, in addition to any local plan or zoning provisions, the application of interim land use goals set forth in ORS 215.515 (1973 edition) to the preparation, revision, adoption or implementation of any comprehensive plan prior to the effective date of the Statewide Planning Goals (see *Petersen v. Klamath Falls*, 279 Or 249 (1977)).

### **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 the Cyrus' division and development of the 198.8-acre property into 5-acre parcels: for tax lot 700 applicable provisions of Statewide Planning Goals 3, ORS 215, and OAR 660, division 33, enacted after February 12, 1965; and, for tax lot 500, applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, enacted after July 1, 1974.

These land use regulations will not apply to the Cyrus' use of their property only to the extent necessary to allow the claimants a use permitted at the time they acquired tax lot 700 on February 12, 1965, and tax lot 500 on July 1, 1974.

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 February 12, 1965, for tax lot 700 and July 1, 1974, for tax lot 500. On July 1, 1974, tax lot 500 was subject to the Interim Planning Goals, as discussed in Section V(2). Tax lot 500 may also have been subject to provisions of ORS 215.213.

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 enforce 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 15, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's 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.