

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

In the Matter of Claim No. CL 06-14)
for Compensation under Measure 37)
submitted by James A. Smejkal) Order No. 42-2006

WHEREAS, on October 24, 2005 Columbia County received claims under Measure 37 and Order No. 84-2004 from James A. Smejkal, Banks, Oregon, for property having Tax Account Number 5533-000-00501; and

WHEREAS, on October 15, 2005, the Circuit Court for Marion County declared Measure 37 unconstitutional in a decision entitled *McPherson v. State of Oregon*; and

WHEREAS, the claimant's representative stipulated to an extension of time until May 26, 2006 to for the county to address this claim; and

WHEREAS, according to the information presented with the Claim, Mr. Smejkal has continuously owned an interest in the property since September 30, 1977, and is currently the sole fee owner of the property; and

WHEREAS, in 1977 Columbia County had not yet zoned the subject property; and

WHEREAS, the subject parcel is currently zoned Primary Forest (PF-76) pursuant to the Columbia County Comprehensive Plan; and

WHEREAS, pursuant to Columbia County Zoning Ordinance (CCZO), Section 506.1 and 1504, the minimum size for new parcels is 76 acres; and

WHEREAS, Mr. Smejkal claims that the county's general zoning provisions and the PF-76 zoning requirements for new land divisions has restricted the use of the property and has reduced the value of the property by \$1,142,000.00; and

WHEREAS, Mr. Smejkal desires to subdivide the property into approximately 22 lots; and

WHEREAS, pursuant to Measure 37, in lieu of compensation the Board may opt to not apply (hereinafter referred to as "waive" or "waiver") any land use regulation that restricts the use of the Claimant's property and reduces the fair market value of the property to allow a use which was allowed at the time the Claimant acquired the property;

NOW, THEREFORE, it is hereby ordered as follows:

1. The Board of County Commissioners adopts the findings of fact set forth in the Staff Report for Claim Number CL 05-14, dated May 12, 2006 which is attached hereto as Attachment 1, and is incorporated herein by this reference.
2. In lieu of compensation, the County waives CCZO 200 through 222, 502, 503 and 506.1 to the extent necessary to allow the Claimant to subdivide the property into 22 lots.
3. This waiver is subject to the following limitations:
 - A. This waiver does not affect any land use regulations promulgated by the State of Oregon. If the use allowed herein remains prohibited by a State of Oregon land use regulation, the County will not approve an application for land division, other required land use permits or building permits for development of the property until the State has modified, amended or agreed not to apply any prohibitive regulation, or the prohibitive regulations are otherwise deemed not to apply pursuant to the provisions of Measure 37.
 - B. In approving this waiver, the County is relying on the accuracy, veracity, and completeness of information provided by the Claimants. If it is later determined that Claimants are not entitled to relief under Measure 37 due to the presentation of inaccurate information, or the omission of relevant information, the County may revoke this waiver.
 - C. Except as expressly waived herein, Claimants are required to meet all local laws, rules and regulations, including but not limited to laws, rules and regulations related to subdivision and partitioning, dwellings in the forest zone, and the building code.
 - D. This waiver is personal to the Claimants, does not run with the land, and is not transferable except as may otherwise be required by law.
 - E. By developing the parcel in reliance on this waiver, Claimants do so at their own risk and expense. The County makes no representations about the legal effect of this waiver on the sale of lots resulting from any land division, on the rights of future land owners, or on any other person or property of any sort. By accepting this waiver, and developing the property in reliance thereof, Claimants agree to indemnify and hold the County harmless from and against any claims arising out of the division of property, the sale or development thereof, or any other claim arising from or related to this waiver.

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4. This Order shall be recorded in the Columbia County Deed Records, referencing Tax Parcel number 5533-000-00501 without cost.

Dated this 23rd day of May, 2006.

BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

Approved as to form

By: John K. Hyde
County Counsel

By: Joe Corsiglia
Joe Corsiglia, Chair

By: Rita M. Bernhard
Rita Bernhard, Commissioner

By: Anthony Hyde
Anthony Hyde, Commissioner

After recording please return to:
Board of County Commissioners
230 Strand, Room 331
St. Helens, Oregon 97051

COLUMBIA COUNTY LAND DEVELOPMENT SERVICES

Measure 37 Claim

Staff Report

DATE: May 12, 2006

FILE NUMBER: CL 06-14

CLAIMANT: James A. Smejkal
42142 NW Palace Drive
Banks, OR 97016

**CLAIMANTS'
REPRESENTATIVE:** Robert A. Smejkal PC
696 Country Club Road
Eugene, OR 97401

SUBJECT PROPERTY

PROPERTY LOCATION: South of Keasey Road and east of Rock Creek

TAX ACCOUNT NUMBER: 5533-000-0501

ZONING: Primary Forest-76 (PF-76)

SIZE: 32.15 acres

REQUEST: To subdivide the property in approximately 22 lots for residential development

CLAIM RECEIVED: October 24, 2005

REVISED 180 DAY DEADLINE: May 26, 2006 (per claimant's written extension)

NOTICE OF RECEIPT OF CLAIM: Mailed April 18, 2006
As of May 12, 2006, the following request for hearing has been filed:

Violet G. Polos
12336 Keasey Road
Vernonia, OR 97064

I. BACKGROUND:

The subject property is an undeveloped 32.15 acre parcel acquired by the claimant in 1977. Necia DeWitt submitted testimony in opposition to the claim, arguing that the area is not suited for high density residential development, particularly because of traffic impacts. Violet G. Polos requested a hearing in order to obtain more information about the claim.

I. APPLICABLE CRITERIA AND STAFF FINDINGS:

MEASURE 37

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this act.

A. PROPERTY OWNER AND OWNERSHIP INTERESTS:

1. **Current Ownership:** According to information supplied by the claimant, the property is owned by the

James A. Smejkal.

2. **Date of Acquisition:** The subject property was acquired by the claimant on September 30, 1977. According to assessor's records and a title report supplied by the applicant, the property was conveyed into a trust in December 1983 with Kenneth Smejkal and Robert A. Smejkal as trustees. However, in a letter dated November 29, 2005, Robert A. Smejkal explains that the trust documents were never executed, so the transfer to the trust was not effective. A bargain and sale deed, dated September 1, 2005, recorded in the deed records of the Columbia County Clerk at 2005-015401, conveys any remainder interests in the subject property as a result of the December 1983 conveyance. Accordingly, staff concludes James A. Smejkal is the fee owner of the subject property, and that his interest dates back to 1977.

3. **Acquisition by Predecessor in Interest:** The claim is not based on acquisition by a predecessor in interest.

B. LAND USE REGULATIONS IN EFFECT AT THE TIME OF ACQUISITION

The property was unzoned in 1977. The parcel subject to the claims was zoned PF-76 in August 1984, and that zoning has remained on the property to date.

C. LAND USE REGULATION(S) APPLICABLE TO SUBJECT PROPERTY ALLEGED TO HAVE REDUCED FAIR MARKET VALUE/EFFECTIVE DATES/CLAIMANT ELIGIBILITY

The claimant alleges that the general zoning provisions that prevent uses of land not permitted by the zoning ordinance and the PF-76 zoning prevents the claimant from subdividing the property. The PF-76 zoning designation was applied to the subject property in 1984.

To the extent claimant alleges a valid claim, it appears that the county standard that clearly prevents the claimants from developing their property as desired is:

- CCZO 200 through 222 General Provisions
- CCZO 502 Uses permitted in the forest zone
- CCZO 503 Uses conditionally allowed in the forest zone
- CCZO 506.1 limiting substandard parcel divisions to uses that do not include non-forest dwellings

D. CLAIMANT'S ELIGIBILITY FOR FURTHER REVIEW

Claimant acquired an interest in the property before CCZO Sections 200-222 (General Provisions) and 500 et. seq., (PF-76 zoning provisions) became effective and therefore the Claimant may be eligible for compensation and/or waiver of the cited regulations under Measure 37.

E. STATEMENT AS TO HOW THE REGULATIONS RESTRICT USE

The Claimant states that he cannot subdivide his property as proposed due to the county's 76-acre minimum parcel size standard. Staff concedes that CCZO 501, 502 and 506.1 can be read and applied to "restrict" the use of claimants' property within the meaning of Measure 37.

F. EVIDENCE OF REDUCED FAIR MARKET VALUE

1. Value of the Property As Regulated.

The claimant's representative submitted copies of assessor's tax records showing that the property has an estimated fair marked value of \$14,850 as of October 2005. That value does not include the value of the timber located on the property.

2. Value of Property Not Subject To Cited Regulations.

Claimant alleges that if the property is subdivided, the developed property would be worth more. Based on the information submitted, it appears that the claimant alleges that if Tax Lot 501 is subdivided into approximately 22 lots, the property is worth \$1,156,850.

3. Loss of value indicated in the submitted documents is:

The claimant's representative asserts the difference in value between the value of the property with the PF-76 zoning, and the value as subdivision lots is \$1,142,000.

Staff notes that this value assumes that the resulting lots will be developed with dwellings prior to sale to third parties. If the subject property is merely subdivided and then sold as undeveloped lots, there is a significantly lower value, as the attorney general opinion concludes that while the claimant himself may avail himself of the benefits of Measure 37 and develop the property according to the regulations in place at the time of acquisition, that benefit is not transferable.

While staff does not agree that the information provided by the claimant is adequate to fully establish the current value of the property or the value of the property if it was not subject to the cited regulation, staff concedes that it is more likely than not that the property would have a higher value if subdivided for residential development.

G. COMPENSATION DEMANDED

Claimant claims the following compensation, per page 1 of the Measure 37 claim form: \$1,142,000.

(3) 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

(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.

CCZO Sections 200 through 222, 501, 502, 506.1 do not qualify for any of the exclusions listed.

Staff notes that other siting standards, including fire suppression requirements, access requirements and requirements for adequate domestic water and subsurface sewage, continue to apply as they are exempt from compensation or waiver under Subsection 3(B), above.

(4) Just compensation under subsection (1) of this act shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.

Should the Board determine that the that the Claimant has demonstrated a reduction in fair market value of the property due to the cited regulations, the Board may pay compensation in the amount of the reduction in fair market value caused by said regulation or in lieu of compensation, modify, remove, or not apply CCZO sections 200 through 222, 502, 503 and 506.1.

(5) For claims arising from land use regulations enacted prior to the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the effective date of this act, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after the effective date of this act, written demand for compensation under subsection (4) shall be made 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.

The subject claim arises from the minimum lot size provisions of the PF-76 zoning regulations, which were enacted prior to the effective date of Measure 37 on December 2, 2004. The subject claim was filed on October 24, 2005, which is within two years of the effective date of Measure 37.

(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this act, in lieu of payment of just compensation under this act, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

Should the Board determine that the that the Claimant has demonstrated a reduction in fair market value of the property due to the cited regulations, the Board may pay compensation in the amount of the reduction in fair market value caused by said regulation.

III. STAFF RECOMMENDATION:

Based on the above findings, staff concludes that the claimant has met the threshold requirements for proving a Measure 37 claim.

The following table summarizes staff findings concerning the land use regulations cited by the Claimant as a basis for the claim. In order to meet the requirements of Measure 37 for a valid claim the cited land use regulation must be found to restrict use, reduce fair market value, and not be one of the land use regulations exempted from Measure 37. The highlighted regulations below have been found to meet these requirements of a valid Measure 37 claim:

LAND USE CRITERION	DESCRIPTION	RESTRICTS USE?	REDUCES VALUE?	EXEMPT?
CCZO 200 through 222	General Provisions	Yes	Yes	No
CCZO 502	Permitted Uses in the PF-76 zone	Yes	Yes	No
CCZO 503	Conditional Uses in the PF-76 zone	Yes	Yes	No
CCZO 506.1	Land division requirements for non-forest parcels	Yes	Yes	No

Staff recommends the Board of County Commissioners take action to determine the amount, if any, by which the cited regulations reduced the value of the Claimant's property, and act accordingly to pay just compensation in that amount, or, in the alternative, to not apply CCZO Sections 200 through 222, 502, 503 and 506.1.