

BEFORE THE BOARD OF COUNTY COMMISSIONERS  
FOR COLUMBIA COUNTY, OREGON

In the Matter of Claim Number CL 07-39 and CL 07-40, )  
for Compensation Under Measure 37 Submitted by ) Order No. 48-2007  
Robert Kessi )

WHEREAS, on November 21, 2006, Columbia County received two claims under Measure 37 from Robert Kessi, (the "Claimant") related to two parcels of property on Lentz Road in Scappoose, Oregon, having Tax Account Numbers 6206-000-01300 and 6206-000-01600; and

WHEREAS, according to the information presented with the claim, Robert and Barbara Kessi are the current owners of the two parcels; and

WHEREAS, the current owners, most recently acquired an interest in the property in 1998; and

WHEREAS, the Claimant states that CCZO Section 506.1 restricts the use of the property and reduces its value; and

WHEREAS, CCZO 506.1 was enacted prior to the 1998 acquisition date for the Claimant;

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 Numbers CL 07-39 and CL 07-40, dated March 5, 2007, which is attached hereto as Attachment 1 and is incorporated herein by this reference.
2. The Board of County Commissioners finds that the Claimant is neither entitled to compensation under Measure 37, nor waiver of County regulations in lieu thereof.
3. The Board of County Commissioners denies Claim Number CL 07-39 and CL 07-40.

Dated this 11<sup>th</sup> day of April, 2007.

Approved as to form

By: Sara Letterson  
Assistant County Counsel

BOARD OF COUNTY COMMISSIONERS  
FOR COLUMBIA COUNTY, OREGON

By: Rita M. Bernhard  
Rita Bernhard, Chair

By: Anthony Hyde  
Anthony Hyde, Commissioner

By: Joe Corsiglia  
Joe Corsiglia, Commissioner

**COLUMBIA COUNTY LAND DEVELOPMENT SERVICES  
MEASURE 37 CLAIM  
STAFF REPORT**

DATE: March 5, 2007

FILE NUMBER(s): CL 07-39 & CL 07-40

CLAIMANT: Robert Kessi; 34172 SE Elm Street; Scappoose, OR 97056

PROPERTY LOCATION: On the east and west sides of property addressed as 71282 Lentz Road

TAX ACCOUNT NUMBER: 6206-000-01300 & 6206-000-01600

ZONING: Primary Forest - 76 (PF-76)

SIZE: Approximately 44.99 non contiguous acres; tax lots 1300 and 1600 are approximately 28.48 and 16.51 acres, respectively.

REQUEST: To divide property into lot/parcels ranging in size from 3 to 5 acres.

CLAIM RECEIVED November 21, 2006

REVISED 180 DAY DEADLINE: May 20, 2007

RECEIPT OF CLAIM NOTICE: February 16, 2007  
As of the date of this Staff Report, no request for hearing has been received.

**I. BACKGROUND:**

The subject property is undeveloped forest land. Tax lot 1300 and 1600 are not contiguous. They are separated by Lentz Road and property identified by tax account number 6206-000-01400. Tax lot 1600 abuts Lentz Road, while tax lot 1300 abuts no public right-of-way. However, tax assessor maps show a 50' wide easement from Lentz Road to tax lot 1300.

Claimant appears to have originally acquired the property in 1968, with his wife, Barbara Kessi. However, on July 2, 1973, Robert and Barbara Kessi transferred the property in fee to William, Robert and James Kessi, doing business as Kessi Bros., a partnership. Then, on August 21, 1998, the partnership conveyed the property back to Robert and Barbara Kessi.

**II. APPLICABLE CRITERIA & 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 & OWNERSHIP INTERESTS**

1. **Current ownership:** Based on the information provided, it appears the subject property is owned by Robert and Barbara Kessi.
2. **Date of Acquisition:** The property was most recently acquired by Robert and Barbara Kessi on August 21, 1998. While the current owners originally acquired an interest in the property in 1968, they transferred fee to the Kessi Bros. partnership in 1973 and did not reacquire an interest in the property until 1998. Robert Kessi is listed on the 1973 deed as a partner in the Kessi Bros. partnership. However, pursuant to ORS 67.050, a partnership is an entity distinct from its partners. Furthermore, pursuant to ORS 67.060, property acquired by a partnership is property of the partnership and not of the partners individually. Property is partnership property under ORS 67.065 if acquired in the name of the partnership or by a transfer to one or more partners in their capacity as partners in the partnership, if the name of the partnership is indicated in the instrument transferring title to the property. In 1973, the property was transferred to William, Robert, and James Kessi, doing business as Kessi Bros., a partnership. Therefore, the property was partnership property. Because the partnership is a distinct entity, the partners, including Robert Kessi, did not have an individual interest in the property. In 1998, when the partnership conveyed the property back to Robert and Barbara Kessi, Robert and Barbara Kessi re-acquired the property. Due to the break in ownership from 1973 to 1998, the date of acquisition for purposes of the Claim is 1998.

**B. LAND USE REGULATION(S) IN EFFECT AT THE TIME OF ACQUISITION**

The current County Zoning Ordinance was applied to the subject property on June 29, 1983, prior to the acquisition date of the current owners. The property was subject to County zoning regulations when it was acquired by Claimant in 1998.

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

The Claimant lists his intended use of the property as being division of the property and development of three to five acre parcels with a single family dwelling and accessory structures on each lot. In Exhibit C to the Claim, Claimant lists a slew of Zoning Ordinance, Subdivision and Partitioning Ordinance, and Comprehensive Plan provisions as restricting the use of the property and reducing its fair market value. Such provisions are addressed below:

**Columbia County Zoning Ordinance**

**Article II- General Provisions**

1. Section 209 requires that all requests for dwellings on resource land shall be reviewed in accordance with the provisions established in each district. Staff finds that such a review requirement does not restrict the use of the property, or reduce its use. Review is merely a process. One or more conditions may be imposed during the review process that may restrict use and reduce the property value. However, one cannot assume such an outcome.

2. Section 210 restricts the partition or subdivision of land into parcels smaller than the parcel size established in the zoning district. While this section is general in nature, it can be read to restrict the use of

the property.

3. Section 211 applies to lots of record and is irrelevant according to the information provided with the Claim. Claimant has failed to establish how this provision restricts the use of his property.

4. Section 213 provides a building setback exception/modification. Based on the information provided in the Claim, the County has no knowledge that any building to be built on the property cannot meet setbacks, or the exception/modification. Furthermore, setbacks are a matter of public safety and are therefore exempt from waiver under Measure 37.

#### Article III- Resource Districts, Sections 500-506.

Section 500 sets forth the zoning regulations for PF-76 zoned property. However, with the exception of Section 506.1, imposing the 76 acre minimum lot size, the regulations don't restrict the use of the property for residential development. Section 501 describes the general purpose of the PF-76 zone and does not restrict or prohibit the use of the property. Sections 502 and 503 describe the permitted and conditional uses in the PF-76 zone. These provisions do not restrict or prohibit the proposed subdivision for single family dwellings because non-resource dwellings are allowed in the PF-76 zone as a conditional use and other types of dwellings are allowed as permitted uses. CCZO Sections 504, 505 and 506 do not restrict or prohibit the proposed subdivision for development of single family dwellings because single family dwellings are allowed as conditional uses. During the hearing process on the proposed conditional use dwellings, conditions may be imposed that may restrict or prohibit the use. Some of those conditions may be exempt from waiver under Measure 37. However, the County cannot determine whether conditions will qualify for waiver under Measure 37 until the County knows what they are. CCZO Section 506.1 prohibits a division of land in the PF-76 zone below 76 acres. Staff concedes that this minimum lot size regulation restricts and prohibits the use of the property. However, the County does not have any information that the remaining standards set forth in Section 504, 505, and 506 cannot be met and thereby restrict the use of the property.

#### Article VI- Special Districts, Overlay Districts and Special Provisions.

1. Section 1401 requires offstreet parking and loading. The Claimant has provided no evidence that his desired use of the property would be inconsistent with the offstreet parking and loading requirements or that such provisions would restrict the use of the property and reduce its value. Staff finds that parking and loading space does not restrict the use of property or reduce its value. Furthermore, such provisions are related to health and safety and are therefore exempt from Measure 37 compensation or waiver.

2. Section 1402 requires a property owner to maintain off street parking and loading and does not restrict the use of the property or reduce its value. Furthermore, maintenance of parking and loading facilities is related to health and safety and are therefore exempt from Measure 37 compensation or waiver.

3. Section 1403 applies to how parking and loading facilities may be used. Claimant has provided no evidence that his desired use of the property would be inconsistent with parking and loading uses. Staff finds that such uses do not restrict the use of Claimants property or reduce its value. Furthermore, parking and loading are related to health and safety and are therefore exempt from Measure 37 compensation or waiver.

4. Section 1405 requires an applicant for a building permit to submit a plot plan. Staff finds that submitting a plot plan does not restrict the use of property or reduce its value. Submitting a plot plan is merely a process, and compliance with that process in no way effects the value of property.

5. Section 1416 requires two parking spaces per dwelling unit for single family dwellings. Staff finds that the applicant has provided no evidence that parking spaces would be inconsistent with his desired use of the property for residential development or that such parking spaces would restrict the use of the

property for residential development, or reduce its value. To the contrary, one would assume that a residence with parking would be worth more than a residence with no parking.

#### Article VII-Discretionary Permits

1. Section 1501 relates generally to the process for reviewing conditional use, and other permits. The Claimant fails to provide any evidence as to how this general reference to the process under 1600 restricts the use of the property and reduces its value.

2. Section 1503 sets for the Conditional Use Permit process. If the Claimant decides to develop conditionally permitted dwellings in the proposed subdivision, this process would apply. However, the process does not restrict the use of the property because the use is allowed, albeit subject to conditions. If conditions are imposed as a result of the process that restrict the use of the property, reduce the value and are not exempt, then the County can waive under Measure 37. However, without knowing what conditions will be imposed, the County cannot make that determination.

3. Section 1504 sets forth the Variance process. The Claimant fails to provide any indication as to how the variance process might apply to his property much less how it would restrict the use of the property and reduce its value.

4. Section 1505 allows for temporary permits under certain circumstances. The Claimant fails to provide any indication as to why the temporary permit process possibly applies to his property much less how it would restrict the use of the property and reduce its value. One would assume that the Claimant would seek permanent residential uses on the property.

#### Article VIII-Administration

1. Section 1601 provides for a process of staff approval. Claimant fails to provide any indication as to how a staff approval process possibly applies to his property much less how it would restrict the use of the property and reduce its value.

2. Section 1607 requires that all amendments to the zoning ordinance text and map be consistent with the Comprehensive plan. The Claimant fails to provide any indication that he proposes a zone change of any kind, or how, during a zone change, compliance with the comprehensive plan would restrict the use of the property or reduce its value.

3. Section 1618 provides for a design review board, which may attach conditions to a design review application. The Claimant fails to provide any indication why he would need a design review application or how proceeding before a design review board would restrict the use of the property or reduce its value. The design review process does not restrict the use of the property because the use is allowed, albeit subject to conditions. If conditions are imposed as a result of the process that restrict the use of the property, reduce the value and are not exempt, then the County can waive under Measure 37. However, without knowing what conditions will be imposed, the County cannot make that determination.

#### Columbia County Subdivision and Partitioning Ordinance

The Subdivision and Partitioning Ordinance does not restrict the use of the property, once the minimum lot size has been waived. The Ordinance merely sets forth the process to partition or subdivide property. Standards will be imposed during the process. The County has no information to suggest that the

Claimant cannot meet the subdivision standards. The Commission may impose reasonable conditions to approval of a partition or subdivision. However, without knowing what the conditions will be the County cannot make a determination that they restrict the use of the property, reduce the value of the property and are not exempt. The Claimant has not provided any information about what specific provisions he believes are subject to waiver under the Measure. Moreover, the Claimant fails to address how a properly subdivided property could possibly be worth less than property that does not go through a recognized subdivision process. Staff doubts that any financing would be available for such a development due to the uncertainty surrounding it. Furthermore, staff presumes that a potential buyer would pay more for a lot that can be shown to have been legally created than for a lot that cannot be shown to have been legally created.

#### Columbia County Comprehensive Plan

The Columbia County Comprehensive Plan is implemented through the Columbia County Zoning Ordinance and is not in and of itself applicable in a conditional use, subdivision or partition process other than the minimum lot size for the zone established on the Comprehensive Plan Map. However, if the County waives the minimum lot size for the Zone, the Comprehensive Plan Map has no effect on development. Therefore, the Comprehensive Plan does not restrict or prohibit the use of the property or reduce the value the property.

#### D. CLAIMANT'S ELIGIBILITY FOR FURTHER REVIEW

Claimant acquired an interest in the property after the minimum lot/parcel size standards of the PF-76 zone became effective. Therefore, the Claimant is not eligible for waiver of under Measure 37.

#### E. STATEMENT AS TO HOW THE REGULATIONS RESTRICT USE

Though the Claimant did not identify specific provisions of County land use regulations which they believe restrict use, they did state that County regulations generally restrict use by preventing the division of the property into approximately 3 to 5 acre lots or parcels for single-family dwelling development. As such, Staff understands that the property cannot be divided for development due to the 76-acre minimum lot size of the PF-76 zone. Staff concedes that CCZO 506.1 can be read and applied to "restrict" the use of Claimant's property within the meaning of Measure 37.

#### F. EVIDENCE OF REDUCED FAIR MARKET VALUE

1. **Value of property as regulated:** Based on County Assessor data the property's real market value for the land itself is \$5,700 (\$3,600 and \$2,100 for tax lots 1300 and 1600, respectively).
2. **Value of property not subject to cited regulations:** Claimant submitted a market analysis indicating that properties similar to those proposed may have a sale value ranging from \$90,000 to \$115,000 per lot or parcel, but did not provide a specific value of the subject property if it could be redeveloped to a three to five acre density.
3. **Loss of value as indicated in the submitted documents:** The claim alleges a total reduction in value of \$754,408 (\$480,086 and \$274,322 for tax lots 1300 and 1600, respectively).

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(s). Staff concedes, however, that it is more likely than not that the property would have a higher value if it could be divided for residential development.

**G. COMPENSATION DEMANDED**

As noted on page 1 of the Measure 37 Claim Form(s): \$754,408.

**(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 506.1 does not qualify for any exclusions listed.

Staff notes that other standards including but not limited to fire suppression/protection, access, adequacy of domestic water, subsurface sewage, erosion control and stormwater requirements 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 Claimant(s) has/have 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(s) or in lieu of compensation, modify, remove, or not apply CCZO Section(s) 202, 210, and 506.1 to allow the current owners a use that was allowed when the owner acquired the property in 1998. Because the 76 acre minimum lot size was in effect in 1998, the current owners are not entitled to waiver of CCZO Sections 202, 210 or 506.1 in lieu of compensation.

**(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/parcel size of the PF-76 zone, which was enacted prior to the effective date of Measure 37 on December 2, 2004. The subject claim was filed on November 21, 2006, 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 Claimant has demonstrated a reduction in fair market value of the property due to the cited regulation(s), the Board may pay compensation in the amount of the reduction in fair market value caused by said regulation(s) or in lieu of compensation, modify, remove, or not apply said regulations to allow the current owners a use of the property that was allowed when the current owner acquired the property in 1998. Because the current owners could not divide the property into lots having less than 76 acres in 1998, the current owners are not entitled to waiver of CCZO 506.1 under Measure 37.

### **III. STAFF RECOMMENDATION:**

The following table summarizes staff findings concerning the land use regulation(s) 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.

Staff recommends the Board of County Commissioners deny the Claims.