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OTHER Supplemental for May 22



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Stephanie Schulz
Lane County Land Management
125 East 8th Avenue
Eugene, OR 97401

May 16, 2007

Re: PA 06-7224 (Kester)

Dear Ms. Schulz:

This letter is to address your report and recommendations to the Board of Commissioners with regards to the above referenced Planning Action. As I presented at the May 8, 2007 hearing, the Kesters take notable exception to your recommendation of denial for the claim to the Commissioners.

The three criteria for evaluation of a valid Measure 37 claim are: 1.) Continuous ownership by the present owner or family members and the county has enacted or enforced a restrictive land use regulation since the property was acquired. 2.) The restrictive land use regulation has the effect of reducing the fair market value of the property. 3.) The restrictive land use regulation is not an exempt land use regulation as defined in LC 2.710.

Item 1. Your report that the Kester Family Trust acquired Tax Lot 20-04-05-301 on December 9, 1981 is correct. Your report that the Kester Family Trust acquired Tax Lots 20-04-05-300 and 302 on January 8, 1982 is also correct. Your report does not discuss Tax Lot 20-05-01-200. This parcel was acquired on January 8, 1982 by the Kester Family Trust.

Your report discussing Tract 2 states Linde G. Kester and Sharon K. Kester acquired Tract 2 on June 13, 1983 and March 1, 1996. This portion of your report is in error. Tax Lot 20-04-06-200 and Tax Lot 20-05-12-200 were acquired under a land sale contract dated June 13, 1983, a memorandum of which was recorded under Recorder's Reception Number 83-20996. Upon the payment in full of the terms of the land sale contract a deed was recorded conveying fee title to the Kesters. The deed was executed March 1, 1996 and recorded March 26, 1996 under Recorder's Reception Number 96-19345. The date the Kesters acquired the ownership interest is established as June 13, 1983.

You are correct in noting the property is presently zoned E40.

Stephanie Schulz
May 16, 2007
Page 2

The above conveyances were discussed in the Measure 37 Lot Book Searches provided by First American Title Insurance Company of Oregon and included in the application submitted on behalf of Mr. and Mrs. Kester. I would ask you to review page 2 of the "Evaluation for Linde and Sharon Kester," dated November 25, 2006, prepared by our company, which outlines in detail each of the conveyances of the subject property and ties those conveyances to the specific referenced parcels in the Lot Book Searches. Copies of the respective instruments were also included in our application, however, if you need additional copies please let me know.

At the May 8 hearing the reason for denial of the claim was listed as "ownership." Upon questioning, it was discussed that while Tract 1 of the request is in the Kester Family Trust, it was possible that Mr. and Mrs. Kester were no longer living. At the hearing I introduced Mr. and Mrs. Kester to the Commissioners and staff. I trust this question is addressed and set aside.

Item 2. The alleged reduction in market value is set forth as \$1,217,000. Your report establishes that the documentation provided in the application is sufficient to meet the standard of "competent evidence of valuation." The market analysis providing the alleged reduction in market value is based on the ability to divide the property into 15 lots of between 80 and 110 acres, with the right to place a dwelling on each parcel when compared to the limited ability to place such dwellings under current code provisions. The current E40 zoning, while allowing divisibility of the property into the desired parcels, would clearly not allow the placement of dwellings as the property will not meet the current income standards established for dwelling approval. This point was acknowledged by the Commissioners at the hearing

The primary point of contention seems to be the request of Mr. and Mrs. Kester to have the zoning provisions of February 29, 1984 applied to their property, that zoning being the initial establishment of the E40 zoning, at which time no income standards were included for dwelling approval. As noted in your report, the property was zoned Forest Management (FM) at the time of the Kester acquisition. This zoning would have allowed division into parcels as small as 40 acres with the ability to place a dwelling on each parcel, again without having to meet an income requirement.

County Counsel made the point at the hearing that the application of the February 29, 1984 zoning code would be contrary to a previously established policy with regards to Measure 37 applications. While Mr. and Mrs. Kester believe such a request is in conformance with state statute and county code provisions they are not seeking to establish legal precedence. The Kesters want the right to place additional dwellings on their ranch, they are not seeking a moral victory.

The Kesters have instructed me to amend their application and ask to have the Forest Management zoning that was applicable to their property at their acquisition applied to them at this time, waiving the current provisions of the E40 zoning as provided under Measure 37. Based on the testimony of County Counsel at the hearing my clients are of the opinion that this request will be approved.

Stephanie Schulz

May 16, 2007

Page 3

The Kesters have made no changes with regard to their proposed development, intending still to develop up to 15 parcels between 80 and 110 acres in size, with the ability to place a dwelling on each parcel. Such parcel sizes would have been allowed under the FM zoning. As the development plan remains unchanged the calculated reduction in value when the property is considered developed under such a plan and then compared to the opportunities available under current zoning remains an accurate depiction of loss of market value.

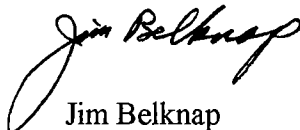
Item 3. The restrictive land use regulation, the application of the E40 zoning, is not an exempt regulation as defined in LC 2.710. These regulations are substantially more restrictive than the FM zoning that was applicable at the time the Kesters acquired the property.

I will be out of the state from May 18 through May 28. If you need to speak with me please call my cell phone, the number is 954-2944. Mr. and Mrs. Kester have retained Michael J. Farthing to represent them in my absence, and to pursue any further legal recourse that may develop as a result of a continuing denial of their Measure 37 claim. Mr. Farthing will be asking to meet with you and Kent Howe in the coming week to address the request of Mr. and Mrs. Kester to amend their application to apply the FM zoning. In addition, Mr. Farthing is authorized to negotiate any further issues you may feel that adversely affect your ability to recommend approval of the Kester Measure 37 claim.

Our next hearing is scheduled for June 5, 2007. I hope that any confusion around the dates of acquisition or ownership by the Kesters have been addressed. With the modification of the claim to seek the application of the FM zoning and the waiver of the E40 zoning my belief is that this file should be forwarded to the Board of Commissioners with a recommendation for approval of the waiver.

Please let me know if you need additional information or have any further questions.

Sincerely,



Jim Belknap
Principal Broker

cc: Linde and Sharon Kester
Michael J. Farthing

Memorandum

PA06-7224, Linde and Sharon Kester and the Kester Family Trust (A revocable trust)
Tax Lots 20-04-05-300, 301 & 302, 20-05-01-200
20-04-06-200, 20-05-12-200

A. History.

Linde and Sharon Kester acquired the above parcels in three transactions:

December 9, 1981 for Tax Lot 20-04-05-301

January 8, 1982 for Tax Lots 20-04-05-300 & 302, and Tax Lot 20-05-01-200

June 13, 1983 for Tax Lot 20-04-06-200 & 20-05-12-200

The parcels total approximately 1,248 acres

At the time of their acquisition all of the parcels were zoned Forest Management, FM, allowing for 40 acre parcels with a dwelling placed on each parcel.

On February 29, 1984 the parcels were all re-zoned to Exclusive Farm Use, varying between E25 and E40. At this time farm related income requirements were not part of the approval process for obtaining the right to place a dwelling.

Currently all of the property is zoned Exclusive Farm Use, E-40. The applicable code provisions for the property today were enacted in 1993 and provide for the proof of farm related income to qualify for placement of a dwelling as follows:

The current standard specifies in Lane Code 16.212(6) "Allowable Residential Uses On High Value Farmland," (a) "A dwelling customarily provided in conjunction with farm use is allowed subject to compliance with the following requirements: (i) The subject tract is currently employed for the farm use, as defined in LC 16.090, that produced at least \$80,000 in gross annual income from the sale of farm products in the last two years or three of the last five years;..."

A significant portion of the property does not qualify as "High Value Farmland" soils, however, under Lane Code 16.212(7) the income test in such areas is \$32,000 or limited to dwellings placed on parcels of 160 acres or greater.

The effect of these code provisions has been to severely limit the ability to place any additional dwellings on any portion of the property.

B. Erroneous Staff Report

1. The staff report errs in the date of acquisition for Tax Lot 20-05-12-200, setting forth in their report that the date the Kesters acquired the property was March 1, 1996, under deed recording number 9619345. This deed is a deed of conveyance used to satisfy the terms of a land sale contract. The Kesters, in fact, acquired the referenced tax lot on June 13, 1983 under a land sale contract a memorandum of which was recorded under recorder's reception number 8320996.

Copies of these instruments as well as a title report from First American Title Company were enclosed with the application.

2. The staff report sets out:

“The claimant has not demonstrated that the provisions of the E-40 zone preclude the use of the property as it could have been used under the FM zone when the claimants acquired the property.”

Additionally, the staff report states:

“The minimum lot size, gross farm income requirements, and other EFU restrictions on new dwellings in the E40 zone do not appear to be exempt regulations. The Kester family has not, however, identified how any of these restrictive land use regulations that allegedly reduce the fair market value of the property when compared to uses allowed under regulations applicable when they acquired the property.”

Concluding “it appears this is not a valid claim.”

This summary is not the claim of Linde and Sharon Kester.

After receiving this staff report last Friday, May 4, I called the staff representative handling this file who said the county's requirement of the Kesters was to seek a waiver of land use regulations back to their date of acquisition, a time when the zoning was Forest Management, FM, allowing for 40 acre parcels, with the right to place a dwelling on each parcel.

The Measure 37 Application is to seek enforcement of the original Exclusive Farm Use zoning, applied February 29, 1984. The specific intent of the Kester family is to divide the property into 15 parcels of 80 to 110 acres each, with the right to place a dwelling on each parcel under provisions of the 1984 EFU zoning code.

If we are to accept the staff position then the only available recourse under Measure 37 for the Kesters is to seek a waiver of the current EFU zoning code and the application of the Forest Management zoning provisions.

Please allow me to recite Oregon Revised Statute 197.352 (1).

If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, 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.

Lane Code 2.710 defines "Land Use Regulation" as

"(a) Any statute regulating the use of land or any interest therein."

The section further defines "Valid Claim" as "A claim submitted by the owner of real property that is subject to a land use regulation adopted or enforced by Lane County that restricts the use of the private real property in a manner that reduces the fair market value of the real property."

The staff report acknowledges the owners submitted evidence of an alleged reduction in fair market value amounting to \$1,217,000 based on the comparative market analysis provided. The primary basis in that report was the loss of the ability to place dwellings on the respective parcels.

No where in County Code or State Statute is there a requirement to base the loss of value on a comparison of the current zoning to the zoning applicable to the property at the date of acquisition. The specific elements of proof are "a land use regulation enacted prior to December 2, 2004" and "any statute regulating the use of land or any interest therein."

The transition from zoning A to zoning B, with a subsequent re-writing of the code provisions of zoning B establishes a claim under Measure 37 for either of those changes when those original code provisions are compared to the limitations to the current zoning code.

If we are to accept the staff position then the following scenario must be considered

- a. The owners can subdivide the property as the desire into 15 lots of 80 to 110 acres each. We concur.
- b. The owners can apply for placement of a dwelling on each of the unimproved lots under provisions of a special use permit as set out in current code.
- c. The response to that application will be to require the owners to present a Schedule F of their tax return and show between \$32,000 and \$80,000 in annual farm related income.
- d. The owners will be unable to meet that requirement and their application to place a dwelling will be denied.
- e. We will return to this venue with a Measure 37 application requesting the waiver of the current EFU zoning code as the original code would not have required such a demonstration of income.

C. Measure 37 waiver request.

Mr. and Mrs. Kester have submitted an application for waiver under Measure 37 of the current EFU zoning code and the application of the EFU zoning that was placed into effect on February 29, 1984. That is a valid claim. At that time income standards were not a requirement for approval of placement of a dwelling.

D. Corrective actions requested.

Staff needs to review the application and re-read the enclosures, as well as the narrative of the report submitted on behalf of Mr. and Mrs. Kester, with attention to their development request and the zoning regulation for which a waiver is being requested.

Staff needs to re-draft their report and accurately reflect dates of acquisition and applicable zoning.

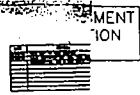
Staff needs to re-draft their order to conform to the waiver request submitted by Mr. and Mrs. Kester.

Proposal at this time is for a continuance to allow additional time for corrective actions by the staff

In the alternative, if staff is unwilling to acknowledge the applicability of the February 29, 1984 zoning code provisions, the owners are asking for the opportunity to amend their application seeking the imposition of the Forest Management zoning that was applicable at the date of acquisition.

ASSESSMENT
TAXATION
ONLY

SEC. 6 T.20S. R.4W. W.M.
LANE COUNTY
SCALE 1" = 400'



SEC. 5 T.20S. R.4W. W.M.
LANE COUNTY
SCALE 1" = 400'

