

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

June 3, 2005

**STATE CLAIM NUMBER:** M118911

**NAME OF CLAIMANTS:** John P. Cherry and  
Judy A. Cherry

**MAILING ADDRESS:** 2910 NW McDaniel Road  
Portland, Oregon 97229

**IDENTIFICATION OF PROPERTY:** 2910 NW McDaniel Road  
Township 1N, Range 1W,  
Section 26BC, Tax lot 2100,  
Multnomah County

**DATE RECEIVED BY DAS:** December 6, 2004

**180-DAY DEADLINE:** June 4, 2005

**I. CLAIM**

The claimants, John P. Cherry and Judy A. Cherry, seek compensation in the amount of \$500,000 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 develop their property as a residential subdivision. (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, in lieu of compensation, not applying a certain land use regulation enforced by the Land Conservation and Development Commission (the Commission) or the department, specifically, that the laws relating to the property's location within one mile of the Portland metropolitan area Urban Growth Boundary and the property's designation as rural residential, not apply in order to allow the claimants a use of the property permitted at the time they acquired it. Specifically, staff recommends not applying OAR 660-004-0040(8)(e) and OAR 660-021-0100(1)(d), which were

enacted and enforced after the claimants acquired the property on October 13, 1965. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS RECEIVED**

On April 26 and 27, 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, seven respondents provided general comments on the claimants' proposed land use that were not specific to the criteria required under Measure 37 to be used in the department's review of this claim. (See comment letters in the department's claim file.)

### **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 December 6, 2004 for processing under OAR Chapter 125. The claim identifies the designation of the subject property as "urban reserve" as the restriction on the use of the property that is 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 was 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 to “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, John P. and Judy A. Cherry, acquired the subject property on October 13, 1965 through a warranty deed. The property is located at 2910 NW McDaniel Road in Multnomah County and described by the County Tax Assessor as T1N, R1W Section 26 BC, Tax Lot 2100. A chain of title report shows John P. Cherry and Judy A. Cherry as the current property owners. (See claim.) Ownership is also substantiated by Multnomah County Tax Assessor records showing that John P. Cherry and Judy A. Cherry bought the subject property in 1965 and are the current owners.

### **Conclusions**

The claimants, John and Judy Cherry, are “owners” of the subject property as that term is defined by Section 11(C) of Ballot Measure 37, and have owned the property since 1965.

### **2. The Laws That Are the Basis for the Claim**

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

### **Findings of Fact**

The claimants state that they cannot subdivide their 2.94-acre property because of its designation as “urban reserve.”<sup>1</sup> The claimants desire to be included in the Portland metropolitan area urban growth boundary and to subdivide their property into smaller lots. The claim does not specify a desired lot size.

From 1955 to 1977, Multnomah County zoned the subject property R-10, a residential district with a minimum lot size of 10,000 square feet. In 1977, after the Commission adopted the Statewide Planning Goals, Multnomah County re-zoned the subject property

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<sup>1</sup> The urban reserve designation that the claimants cite is a restriction that the Metropolitan Service District (Metro) imposed in 1997 under authority of state law (ORS 195.145 and OAR 660, Division 21). The Oregon Court of Appeals subsequently declared this urban reserve designation invalid, and so it was never in effect.

Rural Residential (RR) with a five-acre minimum lot size. The property has been designated Rural Residential since 1977.

The state laws that restrict division of the subject property are OAR 660-004-0040(8)(e) and OAR 660-021-0100(1)(d), both enacted by the Commission in 2000. These laws prohibit the creation of any lot or parcel smaller than 20 acres within the areas that Metro designated urban reserve in 1997 (OAR 660-021-0100(d)), and require a minimum lot or parcel size of 20 acres for all rural residentially designated land less than one mile from the Portland metropolitan area UGB (OAR 660-004-0040(8)(e)). Multnomah County implemented these laws in its West Hills Plan Area, which includes the subject property (see Multnomah County Code, Chapter 33, Section 33.3155(A)).

### **Conclusions**

The limits on rural residential lot sizes, adopted by Multnomah County in response to OAR 660-004-0040(8)(e) and OAR 660-021-0100(1)(d) were adopted after the claimants acquired the property in 1965 and do not allow the division of the property into parcels smaller than 20 acres, thereby restricting the use of the property relative to the uses allowed when the property was acquired in 1965, when the minimum lot size was 10,000 square feet.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any laws 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**

According to the claimants, someone at Roundstone Properties told the claimants the subject property would sell on the open market for \$600,000. The claimants believe that the subject property would sell for \$500,000 under current land use regulations. According to Multnomah County Tax Assessor records, the 2003 real market value of the subject property was \$170,780. (See claim.)

As further evidence of the value of the property, the claim states that on or about October 28, 2004, Alan R. DeHarport of Roundstone Properties, LLC signed a real estate agreement to pay the claimants \$990,000 for the subject property. Claimants state that this offer was contingent on Roundstone Properties being able to obtain both the claimants’ property and the adjacent 3.08 acres located at 2930 NW McDaniel Road (See claim). Claimants were told that Roundstone would not buy only one of the two parcels without the other. It is presumed that this offer was contingent on the claimants acquiring the ability to subdivide the property.

## **Conclusions**

As explained in section V.(1) of this report, the current owners are John P. and Judy A. Cherry who acquired the property on October 13, 1965. Thus, under Ballot Measure 37, the Cherrys are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value.

The claim provides some evidence to demonstrate the reduction in fair market value of the property due to restrictions relating to state and County urban reserve laws. Without an appraisal based on the value of property when divided, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, including the information from Roundstone properties, LLC, 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 rural residential land use regulations regarding minimum lot size apply to this claim. All of these land use regulations were enacted after 1965. None of them, either on their face or as applied to the subject property, appears to be exempt under section 3 of Measure 37.

## **Conclusion**

Without a specific proposed use or a complete listing of laws that are the basis for the claim, it is impossible 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 rule restrictions related to the subject property's rural residential designation apply to the owner's anticipated use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure, because they were not identified in this claim, or because they are laws that are not covered by the Measure to begin with.

## **VI. FORM OF RELIEF**

Section 1 of Measure 37 requires 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 a law to allow the present owner to carry out a use of the property permitted at the time the present 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 conclusion set forth in this report, laws enforced by the Commission or the department restrict the division of the subject property into parcels or lots. The claimants cannot divide the subject property into the desired urban lots. The laws enforced by the Commission or the department reduce the fair market value of the property to some extent. The claim asserts this amount to be \$500,000 dollars. However, because the claim does not provide a specific explanation for 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 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 one or more land use regulations to allow the Cherrys to use the subject property for a use allowed at the time they acquired the property on October 13, 1965.

### **Conclusions**

Based on the record currently before the department, John and Judy Cherry have established that they are entitled to relief. Therefore, department staff recommends not applying land use regulations enforced by the Commission or the department since October 13, 1965, to the extent necessary to allow the claimants a use of the property permitted at the time they acquired it. Specifically, staff recommends not applying OAR 660-004-0040(8)(e) and OAR 660-021-0010((1)(d), which relate to the subject property's rural residential designation and location within one mile of the Portland metropolitan area UGB, and which were enforced after the claimants acquired the property in 1965.

Any use of the property by the claimants remains subject to the following laws: (a) those laws not specified in this claim to the State of Oregon, dated December 15, 2004 or identified in this report; (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.

## **VII. COMMENTS ON DRAFT STAFF REPORT**

The department issued its draft staff report and recommendation on this claim on May 12, 2005. OAR 125-145-0100 provides 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.