

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

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

July 19, 2005

STATE CLAIM NUMBER: M119476

NAME OF CLAIMANTS: Joe R. Holt and Barbara Nadine Holt

MAILING ADDRESS: 1679 Highway 35
Hood River, Oregon 97031

IDENTIFICATION OF PROPERTY: Township 2N, Range 10E, Section 12,
Tax Lot 900
Hood River County

OTHER INTERESTS IN PROPERTY: Mt. Hood Railroad Company
(Right of way for railroad purposes)

William S. Rayburn and Edna V. Rayburn
(Right of way for roadway and irrigation
pipeline)

DATE RECEIVED BY DAS: January 26, 2005

180-DAY DEADLINE: July 25, 2005

I. CLAIM

Joe R. Holt and Barbara Nadine Holt, the claimants, seek compensation in the amount of \$1,122,000, 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 the 18.69 acre property for residential development. The property is located at 1679 Highway 35, in Hood River County, Oregon. (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 the claim is valid. Department staff recommends, in lieu of compensation, that the requirements of the following laws enforced by the Land

Conservation and Development Commission (the Commission) or the department, not apply to the Holts to allow them to subdivide the property into seven (7) lots of approximately 2.5 plus acres each and to establish a residential use on each lot or parcel created: applicable provisions of Statewide Planning Goals 3 and 14, ORS 215.263, 215.283, 215.284, 215.705, and 215.780, and OAR 660, division 33. These laws will not apply to the claimants' use of the property only to the extent necessary to allow them a use of the property permitted at the time they acquired an interest in it on January 11, 1966. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 21, 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, there were five written comments, evidence or information received by DAS in response to the 10-day notice. Surrounding property owners expressed concerns about the date of ownership in relation to the enactment date of applicable land use laws. Neighbors also expressed concerns about steep slopes and landslide hazards on the subject property. If applicable, comments are discussed in the following sections of this report. Because no funds have been made available for payment of compensation, comments regarding the possible impact of the proposed or intended development of the claimants' property are not relevant to the evaluation and determination of the claimants' Ballot Measure 37 claim.

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

The claim was submitted to DAS on January 26, 2005 for processing under OAR 125, division 145. The claim is based on Exclusive Farm Use (EFU) zoning. 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. Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimants, Joe R. Holt and Barbara Nadine Holt, acquired the property on January 11, 1966, as indicated on a title report dated January 2005, and provided with the claim. (See the department’s claim file.)

Conclusions

The claimants, Joe R. Holt and Barbara Nadine Holt are “owners” of an interest in the subject property, as that term is defined by Section 11(C) of Ballot Measure 37 as of January 11, 1966.

2. The Laws that are the Basis for this Claim

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

The claimants desire to subdivide for development the 18.69-acre property into seven (7) lots of approximately 2.5 plus acres each. As stated by the claimants: “Exclusive Farm Use (EFU) Zoning as of 1980” prohibited subdivisions “for single-family, duplex, tri-plex, and four-plex dwellings” or “to develop a mobile home park under conditional use permit under Residential R2 zoning... According to the Holts, local R-2 zoning in place in 1966 would have allowed many uses of the property that are not allowed under current law. The claimants state that “Residential R2 zoning as of September 8, 1965...allows single-family, duplex, tri-plex, & four-plex as uses permitted by right and trailer (mobile home) park as a conditional use.” (The claimant has since stated in a comment letter, “We believe we have a right, under this statute, to develop in

accordance with R-2 zoning that was in place when we acquired the property in 1966.” The agency agrees.

Under current law, the claimants’ property is 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. (See OAR 660-015-0000(3).)

Land that is zoned EFU also is subject to restrictions based on certain provisions of ORS 215, namely ORS 215.263, 215.283, 215.284, 215.705 and 215.780. These laws 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 215.705 and 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 establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone. It first became effective in 1973, along with other provisions that are now found in ORS 215.283 and 215.284.

Statewide Planning Goal 3 generally requires agricultural land to be used for farm uses. Statewide Planning Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses. As noted above, Goal 3 became effective on January 25, 1975, as did Goal 14. The administrative rules implementing these goals that restrict residential development of EFU land are OAR 660-033-0135 (applicable to farm dwellings), which 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.)

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 the claimants acquired ownership of the subject property in 1966, and do not allow the division of the property for residential development or for other uses, thereby restricting the use of the property relative to the uses allowed when the claimants acquired it in 1966.

3. Effect of Regulations on Fair Market Value

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

A 2004 Tax Statement attached to the claim values the land at \$351,926 and the improvements at \$178,117 for a total of \$530,043 assessed value. A market analysis from a Consulting Land Use Planner, attached to the claim, places the value of a similarly located 2.5-acre parcel in the Hood River Valley with comparable views at \$250,000. The claimants could, under R2 Zoning applicable at the time of purchase (January 11, 1966), subdivide the land into seven parcels. At \$250,000 per lot, according to the consultant's analysis, the divided property would be valued \$1,750,000. Deducting the current assessed value from this total, the claimants estimate the reduction in fair market value as \$1,122,000.

Conclusions

As explained in section V. (1) of this report, the claimants, Joe R. Holt and Barbara N. Holt, have owned the property since January 11, 1966. Thus, under Ballot Measure 37, the Holts are due compensation for land use laws restricting the use of the property in a manner reducing its fair market value.

Without an appraisal, based on the value of the subject property without restrictions or other substantiating documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, including the comparative market analysis, 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 laws enforced by the Commission or the department.

4. Exemptions under Section 3 of Measure 37

Ballot Measure 37 does not apply to certain laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

The claim is based on EFU zoning and the related provisions of state law that have restricted use of the property and reduced its fair market value. These are Statewide Planning Goals 3 ("Agricultural Lands") and 14 ("Urbanization"), ORS 215 and OAR 660, division 33. All of the regulations upon which the claim is based were enacted after the claimants acquired the property in 1966, and do not appear to be exempt. Some provisions of ORS 215 in effect in 1966 could apply to the property and would be exempt under Ballot Measure 37(3)(E), and one law that was in place in 1966 when claimants acquired the property was ORS 227.110. This statute required that cities approve subdivisions within six miles of the city's limits. This law may still apply to the property. However, most laws that qualify as "land use regulations" under the Measure were adopted after 1966.

Conclusions

It appears that the general statutory, goal and rule restrictions on the division, residential development and use of agricultural land that apply to the owners' use of the property, do not come under any of the exemptions in Measure 37. Provisions of ORS 215 in effect in 1966 that may apply to the claimants' property would not be exempt. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure, particularly laws for the protection of public health and safety, or because they are laws that are not covered by the Measure.

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 department 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 to allow the present owner to carry out a use of the property allowed at the time the present owner acquired the property. The Commission has by rule 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 restricts subdivision and development of housing on the Holt's property. The laws enforced by the Commission or department reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$1,122,000. This amount is based on a land use consultant's market analysis of comparable surrounding properties. No appraisal or other substantiating documentation regarding the subject property has been provided, and therefore a specific amount of compensation cannot be determined. 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 laws enforced by the Commission or the department.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Joe R. Holt and Barbara N. Holt, the claimants, to use the subject property for a use permitted at the time he acquired the property on January 11, 1966.

Conclusion

Based on the current 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 Holt's division of their property into 7 lots of approximately 2.5 acres each, or to the establishment of a residential use on each lot: applicable provisions of Statewide Planning

Goals 3 and 14, ORS 215.263, 215.283, 215.284, 215.705 and 215.780 , and OAR 660-033-0130 and 660-033-0135.

2. The action by the State of Oregon provides the state's authorization to the claimants to divide their property into seven (7) lots of approximately 2.5 acres each and to establish a residential use on each lot, subject to the standards in effect on January 11, 1966, including any applicable provisions of ORS 215 or 227 in effect at that time.

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 215.412 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 him to obtain a decision under Measure 37 from a city and/or county and/or metropolitan service district that enforces 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 June 24, 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.