

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

September 8, 2005

**STATE CLAIM NUMBER:** M120172

**NAME OF CLAIMANTS:** Thomas Gilbert and Gloria Center-Gilbert

**MAILING ADDRESS:** 16092 South Holcomb Boulevard  
Oregon City, Oregon 97045

**IDENTIFICATION OF PROPERTY:** Township 2S, Range 2E, Section 26C  
Tax Lot 7000  
Clackamas County

**DATE RECEIVED BY DAS:** March 16, 2005

**180-DAY DEADLINE:** September 12, 2005

**I. CLAIM**

The claimants, Thomas Gilbert and Gloria Center-Gilbert, seek compensation in the amount of \$650,000 for a 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 their seven-acre property into 30,000 square-foot buildable lots. The property is located at 16092 South Holcomb Boulevard, near Oregon City in Clackamas County. (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 that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimants use of their property to allow them to subdivide the subject property into 30,000 square foot buildable lots: the applicable provisions of Statewide Planning Goal 14 (Urbanization), and OAR 660, division 4, in effect when each claimant acquired the property. These laws will not apply to Thomas Gilbert only to the extent necessary to allow Mr. Gilbert a use of the property permitted at the time he acquired the subject property on June 21, 1973; and will not apply to Gloria Center-Gilbert only to the extent necessary to allow her a use of the property permitted at the time she acquired the subject property on July 9, 2001. The department

acknowledges that the relief recommended in this report will not allow Ms. Gilbert to use the property in the manner set forth in the claim. (See the complete recommendation in Section VI of this report.)

### **III. COMMENTS RECEIVED**

On March 22, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, no written comments, evidence or information was received in response to the 10-day notice.

### **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 March 16, 2005, for processing under OAR 125, Division 145. The claim identifies Clackamas County's RRFF-5 zone that restricts the use of the property as 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 has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulation 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 of relief from specific laws for “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**

Claimant Thomas Gilbert acquired the subject property on June 21, 1973 as reflected by a Deed provided with the claim. He purchased the property on contract with Lani Gilbert, who no longer has an interest in the property. On July 9, 2001, Thomas Gilbert deeded the property to himself and his wife, Ms. Gloria Center-Gilbert, by a statutory Warranty Deed. A 2004–05 Tax Statement indicates that Mr. Thomas Gilbert and Ms. Gloria Center-Gilbert are current owners of the subject property.

### **Conclusions**

The claimants, Thomas Gilbert and Gloria Center-Gilbert, are “owners” of the subject property, as that term is defined by Section 11 (C) of Ballot Measure 37. Thomas Gilbert acquired an ownership interest in the property on June 21, 1973. Gloria Center-Gilbert acquired an ownership interest in the property on July 9, 2001. Mr. Gilbert is a “family member” as to Ms. Center-Gilbert as that term is defined in Section (11) (A) of Ballot Measure 37.

### **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 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 claim states that Clackamas County’s RRF-5 zone, restricts the building lots to five-acres rather than the 30,000 square feet lots allowed under the zoning when Mr. Gilbert acquired the property. The RRF-5, adopted by the County in 1979, requires a minimum of five-acres for the creation of a new lot or parcel (Clackamas County Zoning Ordinance, Section 3.083).

The RRF-5 zone is in accord with Statewide Planning Goal 14 (Urbanization), which became effective January 25, 1975 and generally required that land outside of urban growth boundaries be used for rural uses. In 2000, as a result of a 1986 Oregon Supreme Court decision<sup>1</sup>, the Commission amended Goal 14 and adopted OAR 660-004-0040, Application of Goal 14 to Rural Residential Areas, which became effective October 4, 2000. The rule provides that after October 4, 2000, an exception to Goal 14 is required to create a lot or

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<sup>1</sup> *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or App 447 (1986).

parcel in a rural residential zone that is smaller than the County's minimum lot size standard. For rural residential land within one mile of the Portland metropolitan area urban growth boundary (UGB), that minimum lot size is 20-acres (OAR 660-004-0040(8) (e)). This standard applies to the subject property because it is located within one mile of the UGB, and it does not allow the subject seven-acre property to be divided without a Goal 14 exception. (See OAR 660-004-0040(7) and (8).) Thus, current land use regulations, particularly Goal 14 and OAR 660-004-0040, do not allow the subject property to be divided into lots or parcels smaller than 20-acres without a Goal 14 exception.

Mr. Gilbert acquired the property in 1973, prior to the adoption of the Statewide Planning Goals. The County zoning at the time was R-30, a residential zone that had a 30,000 square-foot minimum lot size.

### **Conclusions**

OAR 660-015-0000(2) and OAR 660-004-0040, adopted since Mr. Gilbert acquired the property in 1973, restrict the use of the property relative to uses allowed when he acquired it.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the use(s) that the claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

### **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**

The claim states that the fair market value of the subject property has been reduced by \$650,000 as a result of land use laws enacted after the property was acquired in 1973. The claimants supplied a "competitive market analysis" demonstrating market values for homes sites from 10,000 square feet to 34,000 square feet within 1.5 miles of the subject property. There is no certified appraisal to substantiate the claimed values either before or with state land use regulations.

### **Conclusions**

As explained in section V.1 of this report, Thomas Gilbert is a current owner of the property since June 21, 1973, and Ms. Gloria Center-Gilbert is a current owner as of July 9, 2001. Thus, under Ballot Measure 37, the claimants are due compensation for land use regulations that

restrict the use of the subject property in a manner than reduces its fair market value. Based on the findings and conclusions in section V.(2) of this report, laws adopted since Mr. Gilbert acquired the property in 1973 restrict the subdivision and residential development of the subject property. The claim asserts the reduction in value due to the restriction to be \$650,000.

Without an appraisal 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, 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 claim is based on Goal 14 and OAR 660-004-0040, the state's rules addressing the application of Goal 14 to rural residential areas. The specific state land use regulations cited in the claim were enacted after Mr. Gilbert acquired the property in 1973, and are not exempt under subsection 3(E) of Ballot Measure 37, which exempts laws enacted prior to the claimants' or family members' acquisition of the property.

#### **Conclusions**

Without a specific development proposal for the property, it is not possible 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 statutory, goal and rule restrictions on residential development and use of farm land apply to the claimants' use of the property, and for the most part these laws are not exempt under section 3(E) of Measure 37.

Laws in effect when the claimants acquired the property are exempt under Section 3(E) of Measure 37, and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the property that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under subsections 3(A) to 3(D) of Measure 37.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the use(s) that the claimants have identified. Similarly, this report only addresses the exemptions provided for under section (3) of Measure 37 that are clearly applicable given the information provided to the department in the claim. Claimants

should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the property.

## **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 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 the 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 conclusions in this report, laws enforced by the Commission or the department, restrict the subdivision of the seven-acre parcel into the desired 30,000 square-foot buildable lots. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$650,000. However, because the claim does not provide an appraisal or other substantiating documentation to establish 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 laws on which the claim is based likely 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 just compensation, Measure 37 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow Mr. Gilbert to use the subject property for a use permitted at the time he acquired the property on June 21, 1973, and to allow Ms. Center-Gilbert to use the property for a use permitted at the time she acquired it on July 9, 2001. At the time Ms. Center-Gilbert acquired it, the property was subject to the current regulations in effect under OAR 660-004-0040.

### **Conclusions**

Based on the 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 claimants' division of the seven-acre property into 30,000 square foot buildable lots: applicable provisions of Statewide Planning Goal 14 and OAR 660, Division 4, enacted after each claimant acquired the property. Thus, these land use regulations will not apply to Mr. Gilbert's use of his property only to the extent necessary to allow him a use permitted at the time he acquired the property on June 21, 1973; and will not apply to Ms. Center-Gilbert's use of the property only to the extent necessary to allow her a use permitted

at the time she acquired the property on July 9, 2001. The department acknowledges that the relief recommended for Ms. Center-Gilbert in this report will not allow a use as set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to Mr. Gilbert to use the property subject to the standards in effect on June 21, 1973; and to Ms. Center-Gilbert to use the property subject to the standards in effect on July 9, 2001. On July 9, 2001, the property was subject to the provisions of OAR 660-004-0040 currently in effect.

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 215.402 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 them 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 August 9, 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.