

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

September 7, 2005

**STATE CLAIM NUMBER:** M120178

**NAME OF CLAIMANTS:** James A. Holbert  
Merrie Z. Holbert

**MAILING ADDRESS:** 2163 Koos Bay Blvd.  
Coos Bay, Oregon 97420

**IDENTIFICATION OF PROPERTY:** Township 23S, Range 12W,  
Section 28  
Tax Lot 1000  
Coos County

**OTHER CONTACT INFORMATION:** Laura Johnson  
Adkins & Associates, P.C.  
Attorneys at Law  
P.O. Box 907  
Corvallis Oregon 97339

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

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

**I. CLAIM**

The claimants, James A. and Merrie Z. Holbert, seek compensation in the amount of \$210,000 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 further use the approximately 30-acre property for residential use. The subject property is located in Coos County, on Tenmile Lake. (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 certain state laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not

apply to the Holbert's residential use of the property: applicable provisions of Statewide Planning Goal 4 (Forest Lands), OAR 660 division 6, and ORS 215.700 through ORS 215.780. These laws will not apply to the claimants only to the extent necessary to allow James Holbert and Merrie Holbert a use of the property permitted at the time they acquired it on January 6, 1964. (See the complete recommendation in Section VI. of the 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 owners of surrounding properties. According to DAS, no written comments, evidence or information were 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 ORS 92, 94, 195, 197, and 215 as the state land use regulations that restrict the use of the property. 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, 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. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

### **Findings of Fact**

The claimants, James A. and Merrie Z. Holbert, acquired the subject property on January 6, 1964, as evidenced by a copy of the Warranty Deed provided with the claim. The 2004 Coos County Tax Assessments list the Holberts as the current owners of the subject property.

### **Conclusions**

The claimants, James A. and Merrie Z. Holbert are “owners” of the subject property as that term is defined by Section (11)(C) of Ballot Measure 37, and have been owners of the subject property since January 6, 1964.

### **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 lists state statutes ORS 92, 94,195, 197 and 215 and asserts: “Restricts development, including but not limited (to the) type of development, lot size, and use and any change in use based on zoning regulations established by (the) county after date of purchase” and “(restricts) decreases value by necessitating extensive and costly approval process.” (See Qualifying Statement by the claimants included as an attachment to DAS claim form.)

The claimants do not explain what was allowed in Coos County prior to the acquisition date of the property, but for the purposes of this review it is acknowledged that there were no state land use regulations in effect in 1964 restricting the use of the property when it was acquired, except as otherwise noted in this report. The subject property is Forest Land and is zoned as Forest (F) by Coos County’s comprehensive land use plan and zoning code. The local zoning implements Statewide Planning Goal 4 (Forest Lands), OAR 660-015-0000(4) and the provisions applicable to land zoned for forest use under ORS 215 and OAR 660, division 6, restrict the zoning, use and division of the subject properties. Goal 4 became effective on January 25, 1975, and required Forest Land, as defined by the Goal, to be zoned forest pursuant to ORS 215.316. (See citations to statutory and rule history under OAR 660-015-0000(4).)

Provisions of state law, generally cited by the claimants as ORS 215, establish the standards for the approval of dwellings on land zoned as forest. These requirements include 215.705 through ORS 215.755. ORS 215.780 became effective on November 4, 1993 (Chapter 792, Or Laws 1993), establishing an 80-acre minimum lot size for the creation of a new parcel in a forest zone. These state laws restrict the claimants' ability to develop the property as stated in the claim. Some provisions of ORS 215 were in effect when the claimants acquired the property in 1964, but those provisions do not appear to have restricted the use of the claimants' property at that time.

ORS 92.012, 92.016 and 92.025 generally prohibit the sale of property unless it is a lawfully created lot or parcel. The provisions of ORS 92 prohibiting the sale of land without the prior approval of a partition or subdivision plat, generally date from prior to 1964, the date the claimants acquired the subject property.

The claim also asserts other state statutes and rules that regulate the use of the claimants' property resulting in the reduction in its fair market value, specifically, ORS 94 (Real Property Development), ORS 195 (Local Government Planning Coordination), and ORS 197 (Comprehensive Land Use Planning Coordination). These statutes generally do not restrict the use of private real property or are otherwise not land use regulations as defined in Measure 37(11)(B). The statutory requirements embodied in these laws for the process, administration and coordination of land use planning generally, and the procedural requirements for implementation of local plans, do not reduce the value of specific properties. Without more information from the claimants as to how a specific statute restricts the claimants' use of the property, the department is not able to determine how any of these identified statutes may restrict the claimants' use of their property or provide the claimants a right to relief under Measure 37 .

The claimants do not explain what was allowed in Coos County prior to the acquisition date of the property, but for the purposes of this review it is acknowledged that there were no state land use regulations in effect in 1964 restricting the use of the property when it was acquired, except as otherwise noted in this report.

## **Conclusion**

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 4, and OAR 660, division 6, and ORS 215.705 through ORS 215.780, were all adopted after the claimants acquired the subject property, and restrict the use of the subject property. Except for the provisions of ORS 92 which were generally in effect when the claimants acquired the property, the land use laws identified above were adopted since 1964, and restrict the use of the property relative to the uses allowed when the property was acquired.

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 uses 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 this case, the claimants have provided almost no information concerning their intended use of the

property. As a result, it is likely that other state laws may restrict or prohibit a use of the property by the claimants. 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 and prohibit or restrict that use. If that is the case, the claimants will need to file another claim.

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

In order to establish a valid claim, Section (1) of Ballot Measure 37 requires that any law(s) 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 asserts a loss in value totaling \$210,000 based on the “Value of lots, capable of partition and buildable in the area, minus the value of the lot with EFU zoning.” This description does not provide a calculation based on the size of the prospective lots, what type or density of development is meant by “buildable,” or what the value of similar lots are in the area. The claim does not provide a description of the claimants’ intended use for the property, whether it be subdivision or for dwellings. Also, the subject property is not zoned EFU but rather (F) Forest.

### **Conclusions**

As explained in section V.(1) of this report, the current owners of the subject property are James and Merrie Holbert, who acquired the tax lot in 1964. Thus, under Ballot Measure 37, the Holberts are due compensation for land use regulations that restrict the use of the subject properties in a manner that reduces its fair market value.

Based on the findings and conclusions in section V.(2) of this report, laws adopted since the claimants acquired the property restrict division of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$210,000.

Without an appraisal based on the value of the proposed residential development and development for recreational vehicle use, 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 laws. In addition, under Section (3) of the Measure, certain types of laws are exempt from the Measure.

## **Findings of Fact**

The claim includes a list of certain sets of state statutes that are alleged to restrict the claimants' use of the property: ORS 92, 94, 195, 197 and 215. With the exception of provisions of ORS 92, and ORS 215 in effect on January 6, 1964, none of these laws appear to be exempt under Section 3(E) of Ballot Measure 37. Provisions of what are now ORS 92 and ORS 215 adopted before January 6, 1964, are exempt under Section 3 (E) of the Measure.

Certain specific provisions of Goal 4, OAR 660-006 and ORS 215.705 to 215.780 establish fire safety siting standards to protect against wildland fires. These laws were adopted to protect public health and safety and will continue to apply to the claimants' use of the property, as these laws are exempt under subsection 3(B) of Measure 37.

## **Conclusions**

Without knowing how the claimants' wish to use 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 use of forest 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. Provisions of ORS 92 and ORS 215 in effect when the claimants acquired the property in 1964 are exempt under section 3 (E) of the Measure and will continue to apply to the property. In addition, those provisions of Goal 4, OAR 660-006 and ORS 215.705 to 215.780 that establish fire safety siting standards will continue to apply to the claimants' use of the property as these laws are exempt under subsection 3(B) 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 prohibit or restrict it. 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. The 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 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 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, and the use of the property for residential purposes. The claim asserts that laws enforced by the Commission or department reduce the fair market value of the subject property by \$210,000. However, the claim does not provide a specific explanation for how the specified restrictions reduce the fair market value of the property, so a specific amount of compensation cannot be determined. Nevertheless, the department acknowledges that the laws on which the claim is based may 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 the extent necessary to allow the Holberts to use the subject property for a use permitted at the time they acquired the property on January 6, 1964.

### **Conclusion**

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 Holbert's residential use of the property: applicable provisions of Statewide Planning Goal 4 and OAR 660, division 6, and ORS 215.705 to 215.780, enacted after January 6, 1964. These land use regulations will not apply to the Holbert's use of their property only to the extent necessary to allow them a residential use permitted at the time they acquired the property on January 6, 1964. Those provisions of Goal 4, OAR 660-006 and ORS 215.705 to 215.780 that establish fire safety siting standards will continue to apply to the claimants' use of the property as these laws are exempt under subsection 3(B) of Measure 37.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property for residential use, subject to the standards in effect on January 6, 1964. On that date, the property was subject to applicable provisions of ORS 92 and ORS 215 then 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 5, 2005. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' 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.