

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

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT  
Final Staff Report and Recommendation**

August 23, 2005

**STATE CLAIM NUMBER:** M119994

**NAME OF CLAIMANT:** Sally M. Merz

**MAILING ADDRESS:** 4951 Woodworth Drive  
Parkdale, Oregon 97041

**IDENTIFICATION OF PROPERTY:** Township 1N, Range 10E, Section 29  
Tax Lots 600, 700, 800  
Hood River County

**DATE RECEIVED BY DAS:** March 2, 2005

**180-DAY DEADLINE:** August 29, 2005

**I. CLAIM**

Sally M. Merz, the claimant, seeks compensation in the amount of \$783,270 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 claimant desires compensation or the right to subdivide her property for residential development. The property is located in Parkdale in Hood River County. The property consists of three tax lots in T1N, R10E, Section 29: Tax Lots 600 (containing approximately 0.2 acres), 700 (containing approximately 9.3 acres), and 800 (containing approximately 37.5 acres). (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 laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to claimant to allow her to divide the subject properties for residential development: the applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), and ORS 215 and OAR 660, division 33, to the extent necessary to allow Ms. Merz a use of the properties permitted at the time she acquired the subject properties. The claimant's use of the properties will be subject to those laws in effect on November 30, 1972 for Tax Lots 700 and 800, and on

March 6, 1989, for Tax Lot 600. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On March 16, 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, two written comments were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief (compensation or waiver) under Measure 37. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law. (See comment letter 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 March 2, 2005, for processing under OAR 125, division 145. The claim includes a list of land use regulations (see claim) all of which were enacted prior to December 2, 2004, the effective date of Measure 37. (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. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

### **Findings of Fact**

Sally M. Merz acquired an ownership interest in Tax Lots 700 and 800 by land sale contract, dated November 30, 1972. Sally M. Merz acquired Tax Lot 600 on March 6, 1989. A 2004-2005 Property Tax Statement in the name of the claimant, Sally M. Merz, confirms that she is a current owner of the properties.

### **Conclusions**

The claimant, Sally M. Merz, is an “owner” of the subject properties, as that term is defined under Section 11(C) of Ballot Measure 37 as of November 30, 1972 for Tax Lots 700 and 800, and as of March 6, 1989, for Tax Lot 600.

### **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 the claimant wishes to subdivide the subject properties into residential lots. The claimant states that there were no regulations in effect in 1972 that would have prohibited the subdivision of the land into residential building lots. However, materials submitted with the claim, and the Hood River County report on the Measure 37 claim to the county for this property indicate that the property was zoned Agriculture (A-1). Under the county ordinances then in effect, the minimum parcel size was five acres, and a single family dwelling was a conditional use (requiring a conditional use permit). In addition, under ORS 215.203 (as it existed in 1972) “[I]and within such [farm use zones] shall be used exclusively for farm use except as otherwise provided in ORS 215.213.” ORS 215.213(6) (as it existed in 1972) permitted a dwelling in conjunction with farm use.

The properties subject to this claim consist of Tax Lots 600, 700, and 800 are currently zoned EFU High Value Farmland, which restricts use and requires an 80-acre minimum lot size.

The claim is based, in part, on Hood River County's current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU as required by Goal 3 in accord with OAR 660, division 33 and ORS 215 because the claimant's 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.

Current land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660, division 33, as applied by Goal 3, 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 215.780 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 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

Tax Lots 700 and 800 were acquired in 1972, at that time the Statewide Planning Goals and implementing laws had not yet been adopted. Provisions of ORS 215 were adopted in 1963, however.

Tax Lot 600 is a small strip of land acquired from the railroad on March 6, 1989. The current provisions of ORS 215.284 and OAR 660-033-0135(7) and OAR 660-033-0130(4)(c) were adopted after the claimant acquired the property in 1989, and do not allow claimants to site a farm or non-farm dwelling on this parcel.

In 1989, the property was subject to Hood River County's EFU zone and statutory provisions in effect at that time including the applicable provisions of ORS 215.

### **Conclusion**

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, which apply to Tax Lots 700, 800, were all enacted after the claimant acquired the subject properties in November 1972, with the exception of the 1969 versions of ORS 215.203 and 215.213. These current land use regulations do not allow the division of the properties for residential development, thereby restricting the use of the properties relative to the uses allowed when the claimant acquired the properties in 1972.

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, which apply to Tax Lot 600, were enacted before the claimant acquired Tax Lot 600 in March 1989.

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and that may continue to apply to the claimant's 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 claimant seeks 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 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 includes a summary by the owner of the subject properties, which estimates a loss of value the properties \$783, 270 caused by laws prohibiting subdivision of the properties into residential lots. The estimate evaluates the current value of the properties with restrictions, then estimates a value based on the value of a potential of 9 home sites. The claim seeks \$783,270 in compensation for loss of value.

### **Conclusions**

As explained in section V. (1) of this report, the current owner is Sally M. Merz who acquired Tax Lots 700 and 800 in 1972 and Tax Lot 600 in 1989. Thus, under Ballot Measure 37, Sally M. Merz is due compensation for land use regulations that restrict the use of the subject properties in a manner that reduces fair market value. Sally M. Merz estimates the loss in value at \$783,270.

Without an appraisal based on the proposed use of the property or other explanation, it is not possible to substantiate the specific dollar amount the claimant demands 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 enacted or 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**

State land use laws, including Statewide Planning Goal 3 (Agricultural Lands), ORS 215 (specifically ORS 215.780, 215.284 and 215.263), and OAR 660, division 33, restrict the claimant's desired use of the properties. None of these laws appear to be exempt under subsection 3(E) of Ballot Measure 37, with the exception of provisions of ORS 215 that were adopted prior to the claimant's 1972 acquisition of Tax Lots 700 and 800, and provisions of Goal 3, ORS 215, and OAR 660, division 33, that were in effect prior to the claimant's 1989 acquisition of Tax Lot 600.

## **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 claimant's use of the property, and for the most part these laws are not exempt under subsection 3(E) of Measure 37. Provisions of ORS 215 in effect when the claimant acquired the property in 1972 are exempt under section 3(E) of the measure and will continue to apply to the property.

There may be other laws that continue to apply to the claimant's 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 claimant seeks 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 claimant has 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 claimant 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 his 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 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 conclusions set forth in this report laws enforced by the Commission or the department prohibit subdivision and residential development of the subject properties. The laws enforced by the Commission or the department reduce the fair market value of the subject properties to some extent. The claim asserts this amount to be \$783,270. Although the claim provides an estimate of the reduction in value, no appraisal or other specific documentation was submitted and it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, the department acknowledges that the laws on which the claim is based more likely than not have reduced the fair market value of the properties 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 all or parts of certain land use regulations to allow Sally M. Merz to use the subject properties for a use permitted at the time she acquired Tax Lots 700 and 800, on November 30, 1972, and Tax Lot 600 on March 6, 1989.

## **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 claimant's division of Tax Lots 700 and 800 and the establishment of a single-family dwelling on each lot or parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33, that took effect after November 30, 1972., In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to the claimant's division of Tax Lot 600 and the establishment of a single-family dwelling on each lot or parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33, that took effect after March 6, 1989. These laws will not apply to the claimant's use of the properties only to the extent necessary to allow the claimant a use permitted at the time she acquired it.
2. The action by the State of Oregon provides the state's authorization to subdivide Tax Lots 700 and 800 for residential development, subject to provisions in ORS 215 in effect when she acquired the Tax Lots 700 and 800 in 1972, and the provisions of Statewide Goal 3, ORS 215 and OAR 660, division 33 in effect when she acquired Tax Lot 600 in March 6, 1989. In 1972, use of land within the A-1 zone was limited to farm uses, and those non-farm uses listed in ORS 215.213, including a dwelling in conjunction with a farm use. As a result, any dwellings established under this order must be in conjunction with a farm use.
3. To the extent that any law, order, deed, agreement or other legally-enforceable public or private requirement provides that the properties may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the properties unless the claimant first obtains 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 properties posed by private parties.

4. Any use of the properties by the claimant 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 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 claimant to use the properties, it may be necessary for Sally M. Merz 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 properties. Nothing in this order relieves the claimant 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 properties by the claimant.

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

The department issued its draft staff report on this claim on July 29, 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.