

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**  
**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**  
**Draft Staff Report and Recommendation**

May 2, 2006

**STATE CLAIM NUMBER:** M118731

**NAME OF CLAIMANT:** Joan Neil Boyden

**MAILING ADDRESS:** 108 Mistletoe Street  
Medford, Oregon 97501

**PROPERTY IDENTIFICATION:** Township 39S, Range 1E, Section 01  
Tax lot 200  
Jackson County

Township 39S, Range 1E, Section 12  
Tax lots 311, 321 and 322  
Jackson County

**OTHER CONTACT INFORMATION:** Christian E. Hearn  
515 East Main Street  
Ashland, Oregon 97520

**DATE RECEIVED BY DAS:** July 8, 2005

**180-DAY DEADLINE:** May 23, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimant, Joan Neil Boyden, seeks compensation in the amount of \$4,192,327 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to: 1) divide tax lots 200, 311, 321 and 322, totaling 435.66 acres, into 88 parcels of up to five acres and develop a dwelling on each parcel; or 2) alternatively partition the property for a golf course, for an equestrian center and into a maximum of 105 parcels for housing. The subject property is located east of Interstate 5 and north of Dead Indian Memorial Road, near Ashland, in Jackson County. (See claim.)

---

<sup>1</sup> This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

## II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary 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: 1) Joan Neil Boyden's division of the 435.66-acre subject property into 88 parcels of up to five acres each and her development of a dwelling on each parcel; or 2) alternatively, her partition of the property for a golf course, for an equestrian center and into a maximum of 105 parcels for housing: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired tax lot 200 on May 13, 1963, and tax lots 311, 321 and 322 on September 15, 1970. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On August 29, 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, five written comments, evidence or information were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally 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 waive a state law. (See the comment letters in the department's claim file.)

## IV. TIMELINESS OF CLAIM

### Requirement

ORS 197.352(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 Measure 37 (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 Measure 37 (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 July 8, 2005, for processing under OAR 125, division 145. The claim identifies all the statewide planning goals, all provisions of ORS 197 and 215, OAR 660 and numerous Jackson County plan and code provisions as the basis for the claim. Only laws that were enacted or enacted or adopted prior to December 2, 2004, are the basis for this claim.

## **Conclusions**

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

## **V. ANALYSIS OF CLAIM**

### **1. Ownership**

ORS 197.352 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

### **Findings of Fact**

The claimant, Joan Neil Boyden, acquired tax lot 200 by inheritance from her mother, Kathryn Neil, on May 13, 1963, as reflected by a court order included with the claim. Kathryn Neil acquired tax lot 200 on October 3, 1952.<sup>2</sup>

Joan Neil Boyden, acquired tax lots 311, 321 and 322 on September 15, 1970,<sup>3</sup> as reflected by a contract of sale and warranty deeds included with the claim.

A March 15, 2005, title report submitted with the claim establishes the claimant’s current ownership of all four tax lots.

### **Conclusions**

The claimant, Joan Neil Boyden, is an “owner” of the subject property, as that term is defined by ORS 197.352(11)(C), as of May 13, 1963, for tax lot 200 and as of September 15, 1970, for tax lots 311, 321 and 322. The claimant’s family has owned tax lot 200 since October 3, 1952.

---

<sup>2</sup> The claimant first acquired tax lot 200 with her mother Kathryn Neil on October 3, 1952, and then subsequently conveyed her entire interest in that tax lot to her mother before she inherited it from her mother in 1963.

<sup>3</sup> The claim asserts conflicting acquisition dates in the claim form and Exhibit A to the claim form. An acquisition date of February 15, 1970, is noted; however, based on the evidence and documentation submitted with the claim, the acquisition date was determined to be September 15, 1970.

## **2. The Laws That are the Basis for This Claim**

In order to establish a valid claim, ORS 197.352(1) 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 indicates the claimant's desire to: 1) divide the 435.66-acre subject property into 88 parcels of up to five acres and develop a dwelling on each parcel; or 2) alternatively partition the property for a golf course, for an equestrian center and into a maximum of 105 parcels for housing. The claim cites numerous laws as precluding that desired use.<sup>4</sup>

The claim is based generally on Jackson County's current Exclusive Farm Use (EFU) Resource District 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 accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3.<sup>5</sup> 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 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) 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. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

---

<sup>4</sup> The claim lists all of the statewide planning goals, all of ORS 197 and 215, OAR 660 and numerous provisions of Jackson County's comprehensive plan and implementing ordinances as restricting the use of the property but does not establish how each of these regulations applies to and restricts the use of the subject property in a manner that reduces the property's fair market value. On their face, most of the regulations cited in the claim either do not apply to the subject property or do not restrict the use of the subject property. In the absence of any explanation by the claimant as to how these regulations restrict the use of the subject property in a manner that reduces the property's fair market value, this report addresses only those regulations that the department finds are applicable to and restrict the claimant's use of the subject property, based on the claimant's asserted desired use.

<sup>5</sup> The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

The claimant's family acquired tax lot 200 on October 3, 1952, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. The claimant acquired tax lot 200 on May 13, 1963, and tax lots 311, 321 and 322 on September 15, 1970, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant's family acquired tax lot 200 in 1952 and after the claimant acquired the subject property in 1963 and 1970 and do not allow the desired use of the property. These laws restrict the use of the subject property relative to the uses allowed when the claimant and her family acquired the property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject 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 subject 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 which laws apply to a use of subject 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, ORS 197.352(1) requires that any land use regulation 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 an estimate of \$4,192,327 as the reduction in the subject property's fair market value due to current regulations. This amount is based on a restricted use appraisal submitted with the claim.

### **Conclusions**

As explained in Section V.(1) of this report, the claimant is Joan Neil Boyden who acquired the subject property on May 13, 1963, and September 15, 1970, and whose family acquired tax lot 200 in 1952. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimant and her family acquired the subject property restrict the desired division and development of the property. The claimant estimates the reduction in value due to the restrictions to be \$4,192,327.

Without additional investigation and documentation, 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 the fair market value

of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

#### **4. Exemptions Under ORS 197.352(3)**

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

#### **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Jackson County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after the claimant and her family acquired the subject property.

#### **Conclusions**

Although a specific development proposal for the subject property was submitted with the claim, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that none of the general statutory, goal and rule restrictions on division and development of the claimant's property were in effect when the claimant and her family acquired the subject property. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant and her family acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of subject 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. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimant has identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimant should be aware that the less information she has provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her use of the subject property.

### **VI. FORM OF RELIEF**

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced laws that restrict the use of the subject property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the subject property permitted at the time the current owner acquired the property. The Commission, by

rule, has directed that if the department determines a claim is valid, the Director of the department 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 restrict the claimant's ability to divide and develop the property as described in the claim. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$4,192,327. Without additional investigation and documentation, 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 likely have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Joan Neil Boyden to use the subject property for a use permitted at the time she acquired tax lot 200 on May 13, 1963, and tax lots 311, 321 and 322 on September 15, 1970.

### **Conclusions**

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Joan Neil Boyden's division of the 435.66-acre subject property into 88 parcels of up to five acres and her development of a dwelling on each parcel, or alternatively, to her partition of the property for a golf course, for an equestrian center and into a maximum of 105 parcels for housing: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired tax lot 200 on May 13, 1963, and tax lots 311, 321 and 322 on September 15, 1970.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on May 13, 1963, and September 15, 1970.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject 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 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 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property 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 Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for her to obtain a decision under ORS 197.352 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 claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

## **VII. NOTICE OF OPPORTUNITY TO COMMENT**

This staff report is not a final decision by the department and does not authorize any use of the property that is the subject of this report. 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. Such response must be filed no more than 10 calendar days after the date this report is mailed to the claimant and any third parties. Responses to this draft staff report and recommendation will be considered only as comments related to the claim described in this report. All responses must be delivered to the Oregon Department of Administrative Services (DAS), Measure 37 Unit, Risk Management-State Services Division, 1225 Ferry Street SE, U160, Salem, Oregon 97301-4292 and will be deemed timely filed if either postmarked on the tenth day, or actually delivered to DAS by the close of business on the tenth day. Note: Please reference the claim number, claimant name and clearly mark your comments as "Draft Staff Report comments." Comments must be submitted in writing only. Those comments submitted electronically or by facsimile will not be accepted.