

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,  
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF  
THE STATE OF OREGON

|                                   |   |                   |
|-----------------------------------|---|-------------------|
| IN THE MATTER OF THE CLAIM FOR    | ) | FINAL ORDER       |
| COMPENSATION UNDER ORS 197.352    | ) | CLAIM NO. M118378 |
| (BALLOT MEASURE 37) OF            | ) |                   |
| Garfield and Ruth Roth, CLAIMANTS | ) |                   |

Claimants: Garfield and Ruth Roth (the Claimants)

Property: Tax Lot 800, Township 6S, Range 4W, Section 5, Yamhill County (the Property)

Claim: The demand for compensation and any supporting information received from the Claimants by the State of Oregon (the Claim).

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

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 Garfield and Ruth Roth's establishment of one single-family dwelling on the property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33, enacted after December 22, 1993. These land use regulations will not apply to the claimants' use of the property only to the extent necessary to allow them the use of the property described in this report, and only to the extent that use was permitted at the time they acquired the property on December 22, 1993.
  
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on December 22, 1993. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and applicable provisions of OAR 660, division 33, then in effect.

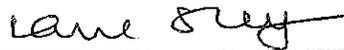
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first 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 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 claimants to use the property, it may be necessary for them 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 claimants 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 property by the claimants

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORSM197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director  
DLCD

Dated this 3<sup>rd</sup> day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:



David Hartwig, Administrator  
DAS, State Services Division

Dated this 13<sup>th</sup> day of March, 2006.

## **NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF**

You are entitled, or may be entitled, to the following judicial remedies:

1. **Judicial review under ORS 293.316:** Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. **Judicial review under ORS 183.484:** Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County and the Circuit Court in the county in which you reside.
3. **A cause of action under ORS 197.352:** A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

### **FOR INFORMATION ONLY**

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

**BALLOT MEASURE 37 (ORS 197.352)  
CLAIM FOR COMPENSATION**

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

March 13, 2006

**STATE CLAIM NUMBER:** M118378

**NAMES OF CLAIMANTS:** Garfield and Ruth Roth

**MAILING ADDRESS:** 1472 Southwest Susan Lane  
McMinnville, Oregon 97128

**PROPERTY IDENTIFICATION:** Township 6S, Range 4W, Section 5  
Tax Lot 800  
Yamhill County

**OTHER CONTACT INFORMATION:** Walter R. Gowell, Esq.  
Post Office Box 480  
McMinnville, Oregon 97128

**DATE RECEIVED BY DAS:** May 2, 2005.

**180-DAY DEADLINE:** March 17, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimants, Garfield and Ruth Roth, seek compensation in the amount of \$80,000 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 construct one single-family dwelling on the 80.5-acre property. The subject property is located on the east side of Highway 99W, adjacent to the Yamhill and Polk County border, south of the City of Amity in Polk 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

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<sup>1</sup> This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Measure 37 was suspended during the pendency of the appeal of Macpherson v. Dep't of Admin. Servs., 340 Or \_\_\_, 2006 Ore. LEXIS 104 (February 21, 2006).

not apply to Garfield and Ruth Roth's development of one single-family dwelling on the subject property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660, division 33, enacted after December 22, 1993. These laws will not apply to the claimants only to the extent necessary to allow them the use of the property only to the extent necessary to allow them a use of the property that was they acquired it in 1993. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On May 23, 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, one written comment, evidence or information was received in response to the 10-day notice.<sup>2</sup>

The comment is relevant to whether the restriction of the claimants' use of the property reduces the fair market value of the property. The comment has been considered by the department in preparing this report. (See the comment letter 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 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 May 2, 2005, for processing under OAR 125, division 145. The claim identifies Yamhill County zoning related to siting a dwelling in a farm zone as the law that restricts the use of the property and is 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.)

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<sup>2</sup> The 10-day notice period was suspended for 139 days during the pendency of the *Macpherson v. Dep't of Admin. Servs.*, 340 Or \_\_\_, 2006 Ore. LEXIS 104 (February 21, 2006), which suspended all Measure 37 deadlines.

## **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**

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 claimants, Garfield and Ruth Roth, acquired the subject property on December 22, 1993, as reflected by a Statutory Warranty Deed included with the claim. Information provided by the Yamhill County Assessor’s Office indicates that Garfield and Ruth Roth are the current owners of the subject property.

### **Conclusions**

The claimants, Garfield and Ruth Roth, are “owners” of the subject property, as that term is defined by ORS 197.352(11)(C), as of December 22, 1993.

### **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 claimants’ 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 claimants or a family member acquired the property.

### **Findings of Fact**

The claim is based, generally, on Yamhill County’s current EF-80 (Exclusive Farm Use with an 80-acre minimum lot size) Zone and the applicable provisions of state law that require such zoning. The claimants’ property is zoned Exclusive Farm Use (EFU) as required by Statewide Planning Goal 3 in accordance with OAR 660, division 33, and ORS 215 because the claimants’ property is “Agricultural Land” as defined by Goal 3.<sup>3</sup> Goal 3 became effective on

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<sup>3</sup> The claimants’ property is “Agricultural Land” because it predominantly contains Amity silt loam (Class IIw-2), Cove silty clay loam (Class IIIw-2), Dayton silt loam (Class IIIe-6) and Woodburn silt loam (Class IIw-6 and IIe-4). See USDA Soil Conservation Service Soil Survey of Yamhill Area, Oregon, January 1974, Sheet #50, Guide to Mapping Units, and pp. 45, 48, and 50. Also, Yamhill County has determined that the subject property is “high-value farmland” under OAR 660-033-0020(8).

January 25, 1975, and required that Agricultural Lands as defined by the Goal are zoned EFU pursuant to ORS 215.

Between August 7, 1993 and March 1, 1994, OAR 660-03-130(1) interpreted the statutory standard for a primary farm dwelling under ORS 215.283(1)(f). For high-value farmland, this rule required that the dwelling be situated on a farm or ranch that produced an annual gross income less than the current standard in OAR 660-033-0135(7). The current standard in OAR 660-033-0135(7) (applicable to farm dwellings on high-value farmland) became effective on March 1, 1994, and also 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, 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.) Under ORS 215.284(1), non-farm dwellings are only authorized on a lot or parcel predominantly composed of NRCS Class IV to VIII soils.

The claimants acquired the subject property on December 22, 1993. At that time, the property was zoned by Yamhill County as EF-40 (Exclusive Farm Use with a 40-acre minimum lot size) and AF-20 (Agriculture/Forestry with a 20-acre minimum lot size). It is not clear from the materials submitted with the claim whether Garfield and Ruth Roth could have established the desired dwelling at the time they acquired the property on December 22, 1993, under OAR 660-033-130(1) or 660-033-130(4).

### **Conclusions**

Current zoning requirements and 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 enacted after Garfield and Ruth Roth acquired ownership of the subject property in December 22, 1993. These laws allow the development of a dwelling on the property only as permitted under specific income requirements established in ORS 215, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimants in 1993. In 1993, the property was subject to the requirements of the County's EF-40 and AF-20 zones, which were adopted pursuant to the provisions of Statewide Planning Goal 3 (Agricultural Lands) and ORS 215 and OAR 660, division 33, then in effect. It is possible that the subject property could have qualified for a farm dwelling under the provisions of OAR 660-033-0130(1) at the time claimants 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 property based on the use 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, 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 \$80,000 as the reduction in value of the subject property due to current regulations. The claim does not include an explanation for the reduction in value or for the estimated value of the property either under current law or in the absence of current land use regulations.

#### **Conclusions**

As explained in Section V.(1) of this report, the current owners are Garfield and Ruth Roth who acquired the property on December 22, 1993. Under ORS 197.352, the claimants are 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 adopted since the claimants acquired the property restrict the development of a single-family dwelling on the subject property. The claimants estimate the reduction in value due to the restrictions to be \$80,000.

Without an appraisal or other documentation and without verification that the requested use was permitted at the time they acquired the property, 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 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 land use laws that restrict the use of the property relative to what would have been allowed in 1993 when the property was acquired by Garfield and Ruth Roth. State laws that are the basis for the claim include Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33, which Yamhill County implemented through its EFU zone. These laws are not exempt under ORS 197.352(3)(E), which exempts laws in effect at the time claimants acquired the subject property, to the extent

that they were enacted or adopted after claimants acquired the property. Provisions of Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33, in effect on December 22, 1993, are exempt under ORS 197.352(3)(E).

### **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 ORS 197.352. 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. These laws are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimants acquired the property on December 22, 1993. Provisions of Goal 3, ORS 215, and OAR 660, division 33, in effect when the claimants acquired the property in 1993, are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimants acquired the property are also exempt under ORS 197.352(3)(E), 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 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 property based on the use that the claimants have 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 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**

ORS 197.352(1) 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 in order to allow the present owners to carry out a use of the property permitted at the time the current owners 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 restrict the claimants' ability to develop the desired residential dwelling on the subject property. The claim asserts that laws enforced by the Commission or department reduce the fair market value of the subject property by \$80,000. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the property, and without verification that the requested use was permitted at the time they acquired the property, 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 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 Garfield and Ruth Roth to use the subject property for a use permitted at the time they acquired the property on December 22, 1993.

## **Conclusion**

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 Garfield and Ruth Roth's establishment of one single-family dwelling on the property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33, enacted after December 22, 1993. These land use regulations will not apply to the claimants' use of the property only to the extent necessary to allow them the use of the property described in this report, and only to the extent that use was permitted at the time they acquired the property on December 22, 1993.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on December 22, 1993. On that date, the property was subject to applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and applicable provisions of OAR 660, division 33, 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 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 claimants to use the property, it may be necessary for them 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 claimants 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 property by the claimants

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

The department issued its draft staff report on this claim on October 6, 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.