

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 )  
COMPENSATION UNDER ORS 197.352 )  
(BALLOT MEASURE 37) OF )  
James Wyland, CLAIMANT )

FINAL ORDER  
CLAIM NO. M118388

Claimant: James Wyland (the Claimant)

Property: Tax Lot 700, Township3S, Range2E, Section 17, W.M., Clackamas County

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

Claimant 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:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimants division of the 3.7-acre property into three parcels or to his development of a residential dwelling on each parcel: applicable provisions of Statewide Planning Goals 4 and 14, ORS 215, and OAR 660 division 6 enacted after October 18, 1977. These laws will not apply to the claimant only to the extent necessary to allow the claimant to use of the property for the use described in this report, and only to the extent that use was permitted at the time he acquired the property on October 18, 1977.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property for the use described in this report, subject to the standards in effect on October 18, 1977. On that date, the property was subject to Statewide Planning Goals 4 and 14.
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 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 property imposed by private parties.

4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 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 property, it may be necessary for him 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 property by the claimant.

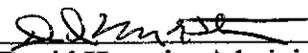
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under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

FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:

  
Lane Shetterly, Director  
DLCD

Dated this 13<sup>th</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:** M118388

**NAME OF CLAIMANT:** James Wyland

**MAILING ADDRESS:** 20590 South Leland Road  
Oregon City, Oregon 97045

**PROPERTY IDENTIFICATION:** Township 3S, Range 2E, Section 17  
Tax lot 700  
Clackamas County

**DATE RECEIVED BY DAS:** May 5, 2005

**180-DAY DEADLINE:** March 20, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimant, James Wyland, seeks compensation in the amount of \$165,000 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 claimant desires compensation or the right to divide the 3.7-acre property into three parcels of at least one acre each, and to develop a residential dwelling on each parcel. The property is located at 20590 S Leland Road, 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 this claim is valid. Department staff recommends, in lieu of compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimant's division of the property into three parcels and his development of a residential dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), Goal 14 (Urbanization), ORS 215, and OAR 660 division 6 enacted after the claimant acquired the property. These laws will not apply to the claimant only to the extent necessary to allow Mr. Wyland to use of the property for the use described in this report, and only to the

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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).

extent that use was permitted at the time he acquired the property on October 18, 1977. (See the complete recommendation in Section VI of this report.)

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

#### **Comments Received**

On May 25, 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 was received in response to the 10-day notice.<sup>2</sup>

The comment is relevant to whether the restriction of the claimant's use of the property reduces the fair market value of the property and has been considered by the department in preparing this report. (See 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 5, 2005, for processing under OAR 125 division 145. The claim identifies the local zoning that restricts the use of the property as the basis for the claim. The zone is based upon the statewide planning goal for forest lands. 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 claimant, James Wyland, acquired the subject property on October 18, 1977, as reflected by a Warranty Deed included with the claim. A copy of a Title Report dated April 11, 2005, indicates that James Wyland is the current owner of the subject property.

## **Conclusions**

The claimant, James Wyland, is an “owner” of the subject property, as that term is defined by ORS 197.352(11)(C), as of October 18, 1977.

### **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 states that “The zone change from RA 1 to TT20 deprived us the right to develop two additional tax lots of 1 + acres each. The zone change from RA 1 to TBR80 further deprived us the right to develop two additional tax lots of 1 + acres.” According to the claim, when the claimant acquired the property in 1977, it was zoned Rural Area Single Family (RA-1) by Clackamas County, which had a one-acre minimum lot size requirement for the creation of new parcels and allowed a dwelling on a parcel as a permitted use. The property was rezoned to Transitional Timber (TT-20) on June 19, 1980, and to County Timber (TBR) on July 20, 1994.

The County's TBR zone is based on Statewide Planning Goal 4, (Forest Lands) and laws applicable to land zoned for forest use under ORS 215, including ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6, which restrict the right of an owner to divide and develop the property.

ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993, (Chapter 792, Or Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to reflect those statutes. (See rule history under OAR 660-015-0000(4)).

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 660-006-0027 establish an 80-acre minimum lot size for the creation of a new parcel in a forest zone and also establish the standards for dwellings in forest zones under Statewide Planning Goal 4. The TBR zone standards are based on the standards contained in Statewide Planning Goal 4 and OAR 660, division 6.

Statewide Planning Goal 14 would apply to the division of the claimant's property into parcels of less than 2 acres in size. Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses.

When claimant acquired the property in 1977, the County's RA-1 zone applied. However, the County's zoning, including the RA-1 zone, had not been acknowledged by the Commission under the standards for approval of local comprehensive plans and land use regulations in ORS 197.250 and 197.251. Since the Commission had not acknowledged Clackamas County's plan when Mr. Wyland acquired the property in 1977, the Statewide Planning Goals, particularly Goals 4 and 14, applied directly to the property.<sup>3</sup>

Goal 4 required forest land, as defined by the Goal, to be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). In general, Goal 4 required local land use regulations to "conserve forestlands for forest uses." Specifically, Goal 4 only allowed land divisions that would protect commercial forestlands for commercial forest uses. Dwellings in forest zones were required to be "necessary and accessory" to a forest use.<sup>4</sup> Goal 14 required that land outside of urban growth boundaries be used for rural uses.

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<sup>3</sup> Statewide Planning Goals 4 and 14 became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the County's comprehensive plan and land use ordinances. (*Summyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), and *Alexanderson v. Polk County*, 289 Or 427, rev. denied, 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985). After the local plan and land use regulations are acknowledged by the Commission, the Statewide Planning Goals and implementing rules no longer directly apply to such local land use decisions, *Byrd v. Stringer*, 295 Or 311, (1983). However, insofar as the state and local provisions are materially the same in substance, the applicable statutes and rules must be interpreted and applied by the County in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).)

<sup>4</sup> Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for Forest Lands as well as those that were not necessary and accessory to an enumerated forest use, *Lamb v. Lane County*, 7 Or LUBA 137 (1983). Dwellings in forestlands were required to be "necessary and accessory" to show that such dwellings comply with the Goal 4 requirement that local land use regulations must "conserve forest lands for forest uses *1000 Friends v. LCDC/Curry County*, 301 Or 447 (1986). A dwelling that may "enhance" forest uses is not "necessary and

The opportunity to divide the property and to place residential dwelling on the property when the claimant acquired it in 1977 was limited to land divisions that were consistent with the provisions of Statewide Planning Goals 4 and 14 and ORS 215 that were in effect in 1977.<sup>5</sup>

### **Conclusions**

Current land use regulations, particularly lot size and dwelling standards enacted after the claimant acquired the property, restrict the claimants from dividing or developing the property as requested in the claim. However, while land use laws adopted since the claimant acquired the property in 1977, restrict the claimant from dividing or developing the property relative to the uses allowed when the claimant acquired the property, it is unclear whether the claimant's requested level of development complies with the standards in effect when he acquired it in 1977.

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 permit 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 \$165,000 as the reduction in the property's fair market value due to current land use regulations. This estimate is based on the claimant's statement of the market value of three home sites, minus the value of the existing parcel.

### **Conclusions**

As explained in Section V.(1) of this report, the claimant is a current owner of the subject property, and the property in 1977. Thus, under ORS 197.352, he is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair

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accessory" to a forest use to the extent required by Goal 4, *1000 Friends of Oregon v. LCDC/Lane County*, 305 Or 384 (1988).

<sup>5</sup> For guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective September 1, 1982, and in *1000 Friends of Oregon v. LCDC/Lane County*, 305 Or 384 (1988), *1000 Friends v. LCDC/Curry County*, 301 Or 447 (1986), and *Lamb v. Lane County*, 7 Or LUBA 137 (1983),.

market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted since 1977, restrict claimant's ability to divide the property. The claim states that the reduction in value is \$165,000.

Without an appraisal or other 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 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 Statewide Planning Goal 4 (Forest Lands), Statewide Planning Goal 14 (Urbanization) and laws applicable to land zoned for forest use under ORS 215 and OAR 660 division 6, which restrict the claimant's right to divide and develop the subject property. These laws are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimant acquired the property in 1977. Provisions of Goal 4, Goal 14 and ORS 215 in effect when the claimant acquired the property are exempt under Section 3(E), which exempts laws in effect when the claimant acquired the property.

The department notes that ORS 215.730 and OAR 660 division 6 include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes..." The department finds that siting standards for dwellings in forest zones in ORS 215.730 and in Goal 4 and its implementing rules (OAR 660 division 6) are exempt under ORS 197.352(3).

**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 forest land apply to the claimant's use of the property, and these laws are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimant acquired the property. Provisions of Goal 4 and ORS 215 in effect when Mr. Wyland acquired the property in 1977 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the property are also exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. In addition,

the restrictions in ORS 215.730 and provisions of OAR 660 division 6 that establish fire protection standards for dwellings in forest zones are exempt under ORS 197.352(3)(B) and will continue to apply to the subject 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 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 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 he has provided to the department in his 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**

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 owner to carry out a use of the 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 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 division of the subject property into three parcels and the development of a dwelling on each parcel. The claim asserts this amount to be \$165,000. 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 of whether or to what extent the claimant's requested use of the property would have been permitted when he acquired it, 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 just compensation, ORS 197.352 authorizes the department to modify, remove, or not apply all or parts of certain state land use regulations to allow the claimant to use the subject property for a use permitted at the time he acquired the property on October 18, 1977.

## **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 the claimants division of the 3.7-acre property into three parcels or to his development of a residential dwelling on each parcel: applicable provisions of Statewide Planning Goals 4 and 14, ORS 215, and OAR 660 division 6 enacted after October 18, 1977. These laws will not apply to the claimant only to the extent necessary to allow the claimant to use of the property for the use described in this report, and only to the extent that use was permitted at the time he acquired the property on October 18, 1977.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property for the use described in this report, subject to the standards in effect on October 18, 1977. On that date, the property was subject to Statewide Planning Goals 4 and 14.
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 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 property imposed by private parties.
4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 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 property, it may be necessary for him 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 property by the claimant.

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

The department issued its draft staff report on this claim on October 11, 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.