

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 )  
Robert L. Oliver, CLAIMANT )  
FINAL ORDER  
CLAIM NO. M118423

Claimant: Robert L. Oliver (the Claimant)

Property: Tax Lot 600, Township 33, Range 1W, Section 20 Jackson County (the Property)

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, the State of Oregon will not apply the following laws to Robert L. Oliver's division and development of the property: any applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and OAR 660, division 6 that took effect after April 7, 1999. These land use regulations will not apply to the claimant's use of the property only to the extent necessary to allow Robert L. Oliver a use permitted at the time he acquired the property on April 7, 1999. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will not allow him to use the property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property subject to the standards in effect on April 7, 1999. On that date, the property was subject to applicable provisions of Statewide Planning Goal 4, ORS 215, and OAR 660, division 6, then in effect, including OAR 660-006-0026 and- 0027 in effect on that date.
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

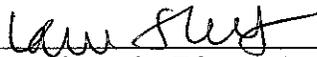
form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in 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 (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).

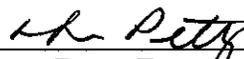
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the 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 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:

  
\_\_\_\_\_  
Lane Shetterly, Director  
DLCD  
Dated this 21st day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
\_\_\_\_\_  
Dugan Petty, Deputy Administrator  
DAS, State Services Division  
Dated this 21st 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 21, 2006

**STATE CLAIM NUMBER:** M118423

**NAME OF CLAIMANT:** Robert L. Oliver

**MAILING ADDRESS:** Post Office Box 255  
Trail, Oregon 97541

**IDENTIFICATION OF PROPERTY:** Township 33, Range 1W, Section 20  
Tax Lot 600  
Jackson County

**OTHER INTERESTS:** Linda D. McElroy (Agent)  
Post Office Box 255  
Trail, Oregon 97541

**DATE RECEIVED BY DAS:** May 12, 2005

**180-DAY DEADLINE:** March 27, 2006<sup>1</sup>

**I. CLAIM**

The claimant, Robert L. Oliver, seeks compensation in the amount of \$302,900 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 and develop the subject property. The property is located at 3686 Highway 227, near Trail, in Jackson 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

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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).

by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimant's division and development of the property: Statewide Planning Goal 4 (Forest Lands) and applicable provisions of ORS 215 and OAR 660, division 6 enacted after April 7, 1999. These laws will not apply to the claimant only to the extent necessary to allow Robert L. Oliver to use the property for a use permitted at the time he acquired the property on April 7, 1999. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will not allow him to use the property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS RECEIVED**

On June 7, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS), provided written notice to surrounding property owners. According to DAS, no written comments were received in response to the 10-day notice.<sup>2</sup>

### **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**

The claim was filed with DAS on May 12, 2005 for processing under OAR 125, division 145. The claim identifies Jackson County's Woodland Resource zone and land use regulations as the laws that are the basis for the claim. Only laws enacted prior to December 2, 2004, the effective date of Measure 37 as the basis for the claim. (See citations to statutory and rule history in the Oregon Revised Statutes and Administrative Rules.)

#### **Conclusions**

The claims were 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 are therefore timely filed.

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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.

## V. ANALYSIS OF CLAIM

### 1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws to “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

Robert L. Oliver, the claimant, along with Keitha P. Oliver, Herman P. Oliver and Emilie B. Oliver acquired the subject property on August 16, 1978. Robert L. Oliver fully conveyed his interest in the property through a divorce settlement to Keitha P. Oliver (his wife) and their children (John Robert Oliver and Roger Lee Oliver) on September 30, 1982. Subsequently, the property was conveyed by Bargain and Sale Deed from Herman P. Oliver and Emilie B. Oliver to the claimant, Robert L. Oliver, John Robert Oliver and Roger Lee Oliver on April 7, 1999.<sup>3</sup> The claimant remains a current owner of the property.

### Conclusions

The property has been owned by the claimant’s “family members,” as defined by ORS 197.352(11)(A), since 1978. Robert L. Oliver acquired his present interest in the property on April 7, 1999, and is currently an “owner” of the subject property as defined by ORS 197.352(11)(C).

### 2. The Laws that are the Basis for the 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 identifies the Jackson County’s 1980 Woodland Resource (WR-20) zoning ordinance as the land use regulation that restricts the use of the property.<sup>4</sup> The claim states that: “Property purchased by owner in 1978, therefore zoning ordinance of 1973, applies for this claim.” The claimant states that the April 24, 1973, ordinance would have allowed five-acre parcels.

The claim is based, generally, on Jackson County’s current Woodland Resource (WR-80) zone, which implement Statewide Planning Goal 4 (Forest Lands) and statutes applicable to land zoned

<sup>3</sup> On January 1, 2005, John Oliver and Roger Oliver conveyed their interest in the property to Robert Lee Oliver.

<sup>4</sup> See Jackson County ordinances amended February 23, 1982 (212.020, 212.030, 212.040 and 212.060).

for forest use under ORS 215, including ORS 215.705 to 215.755 and 215.780, and provisions of OAR 660, division 6 that restrict the property's zoning, use and division. Goal 4 became effective on January 25, 1975, and required forest land as defined by the Goal to be zoned for forest use. (See citations to statutory and rule history under OAR 660-015-0000(4).)

The forest land administrative rule, OAR 660, division 6, became effective September 1, 1982. ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993, (Chapter 792, Oregon Laws 1993) and were implemented by OAR 660-006-0026 and -0027 on March 1, 1994. (See citations to rule history under OAR 660-006-0026 and -0027.) ORS 215.730(1)(b) establishes approval standards for dwellings on lands zoned for forest use to protect the public health and safety with regard to fire safety, water supply and development on steep slopes.

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and -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.

On August 16, 1978, when the claimant's family first acquired the property, the Jackson County comprehensive plan and implementing land use regulations were not acknowledged by the Commission for compliance with the Statewide Planning Goals under ORS 197.251. Because the Commission had not acknowledged Jackson County's comprehensive plan and land use regulations, including any County code provisions applicable to the property, the provisions of Statewide Planning Goal 4 (Forest Lands) in effect at that time applied directly to property on the date the family acquired the property.<sup>5</sup> In general, Goal 4 required local land use regulations to "conserve forestlands for forest uses." Specifically, Goal 4 allowed only land divisions that would protect commercial forest lands for commercial forest uses. Dwellings in forest zones were required to be "necessary and accessory" to a forest use.<sup>6</sup>

The opportunity to divide the property and to place residential dwellings on the property when the claimant's family acquired it in 1978, was limited to land divisions that were consistent with the provisions of Statewide Planning Goal 4 that were in effect in 1978.

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<sup>5</sup> Statewide Planning Goal 4 was applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the County's Goal 4 program. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the County's plan and land use regulations were acknowledged by the Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same in substance, the applicable rules must be interpreted and applied by the county in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

<sup>6</sup> Statewide Planning 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 accessory" to a forest use to the extent required by Goal 4, *1000 Friends of Oregon v. LCDC/Lane County*, 305 Or 384 (1988).

## **Conclusions**

The minimum lot size and dwelling standards established by Statewide Planning Goal 4, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and -0027 and the Jackson County WR-80 Zone were all adopted after the Oliver family acquired the properties in 1978, and do not allow the division of the properties into parcels less than 80 acres in size or the approval of dwellings on smaller parcels. The current land use regulations, all adopted since 1978, restrict the use of the properties from what could have been done when the Oliver family acquired the property in 1978.

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, ORS 197.352(1) requires that the current land use regulations 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 specifies a reduction in the property's fair market value of \$302,900 due to current regulations. The claimant bases this estimate on the premise that the property could have been divided into smaller parcels before its current zoning. The claim includes a "Comparative Market Analysis" for the property with information about real estate sales in Jackson County.

### **Conclusions**

As explained in Section V.(1) of this report, the current owner of the property is Robert L. Oliver, whose family first acquired the property in 1978. 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. As explained in Section V.(2) of this report, the current land use regulations, all adopted since 1978, restrict the partition and use of the property from what could have been done when the property was first acquired by the Oliver family in 1978. The claim estimates the reduction in fair market value due to the restrictions as \$302,900.

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. The type of land use regulations not subject to a claim for compensation under ORS 197.352 are set forth in ORS 197.352(3).

#### **Findings of Fact**

The claim is based on land use regulations that restrict the use of the property relative to what would have been allowed in 1978, when the Oliver family acquired the property. These include Statewide Planning Goal 4 (Forest Lands) and applicable provisions of ORS 215 and OAR 660, division 6. These laws are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimant's family acquired the property. Provisions of Goal 4 and ORS 215 adopted before August 16, 1978, are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant's family acquired the property.

The department notes that ORS 215.730 and OAR 660, division 6 include standards for siting dwellings in forest zones. Those 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)(B).

#### **Conclusions**

Without a specific proposed use or a specific listing of laws that are the basis for the claim, 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 anticipated 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's family acquired the property on August 15, 1978. Provisions of Goal 4 and ORS 215 in effect on August 15, 1978, are exempt under ORS 197.352(3)(E) and will continue to apply to the subject property.

Other laws in effect when the claimant's family 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 siting requirements of ORS 215.730, Goal 4 and its implementing rules related to dwelling siting standards based on health and safety are exempt under ORS 197.352(3)(B) 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 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 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 he 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 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 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 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**

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the division of the subject property into parcels less than 80 acres or the approval of dwellings on smaller parcels. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$302,900. 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, 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 one or more land use regulations to allow Robert L. Oliver to use the subject property for a use permitted at the time he acquired an interest in the property on April 7, 1999. At that time, the state laws that currently apply to the property (described in Section V.(2) of this report) were in effect and limited the ability of the claimant to divide and develop the subject property.

### **Conclusions**

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

1. In lieu of compensation, the State of Oregon will not apply the following laws to Robert L. Oliver's division and development of the property: any applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and OAR 660, division 6 that took effect after April 7, 1999. These land use regulations will not apply to the claimant's use of the property only to the extent necessary to allow Robert L. Oliver a use permitted at the time he acquired the property on April 7, 1999. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will not allow him to use the property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property subject to the standards in effect on April 7, 1999. On that date, the property was subject to applicable provisions of Statewide Planning Goal 4, ORS 215, and OAR 660, division 6, then in effect, including OAR 660-006-0026 and- 0027 in effect on that date.
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 (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 18, 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.