

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. M118478
(BALLOT MEASURE 37) OF	)	
Olan and Carol Alexander, CLAIMANTS	)	

Claimants: Olan and Carol Alexander (the Claimants)

Property: Tax lot 700, Township 2S, Range 4W, Section 14, 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:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Olan and Carol Alexander's division of the 20-acre property into four, five-acre parcels or to their establishment of a single-family dwelling on each parcel created: applicable provisions of Statewide Goal 14 and OAR 660-004-0040 enacted after May 25, 1974. These land use regulations will not apply to Olan and Carol Alexander's use of their property only to the extent necessary to allow them to use the property for the use described in this report, and only to the extent that use was permitted at the time they acquired the property on May 25, 1974.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property for the use described in this report, subject to the standards in effect on May 25, 1974. On that date, the property was subject to the applicable provisions of ORS 215, including the requirements of the interim planning goals under ORS 215.515 (1973 edition.)
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 Deputy 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



George Naughton, Deputy Director  
DLCD

Dated this 29<sup>th</sup> day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:



Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 29<sup>th</sup> day of March, 2006.

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

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

1. **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 or the Circuit Court in the county in which you reside.
2. **A cause of action under ORS 197.352 (Measure 37 (2004)):** If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352<sup>1</sup>, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(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."

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<sup>1</sup> By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

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

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

March 29, 2006

**STATE CLAIM NUMBER:** M118478

**NAMES OF CLAIMANTS:** Olan and Carol Alexander

**MAILING ADDRESS:** 6011 Southeast Kelly Avenue  
Portland, Oregon 97239

**PROPERTY IDENTIFICATION:** Township 2S, Range 4W, Section 14  
Tax lot 700  
Yamhill County

**DATE RECEIVED BY DAS:** May 20, 2005

**180-DAY DEADLINE:** April 4, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimants, Olan and Carol Alexander, seek compensation in the amount of \$100,000 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 divide the 20-acre property into four, five-acre parcels for residential development. The property is located at 2279 Northwest Phillips Road, in Yamhill 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, 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 claimants' division of the property into four, five-acre parcels for residential development: the applicable provisions of Statewide Planning Goal 14 (Urbanization) and OAR 660-004-0040, enacted after May 25, 1974. These laws will not apply to the Alexanders' use of the property only to the extent necessary to allow the claimants to use the subject property for the use described in this report, and only to the extent that use was permitted at the time they

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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 Ballot 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).

acquired the property on May 25, 1974. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On June 22, 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, three written comments, evidence or information were received in response to the 10-day notice.

Two of the comments do not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352 (Ballot Measure 37). Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law.

One of the comments is relevant to whether a state law restricts the claimants' use of the property and whether the restriction of the claimants' use of the property reduces the fair market value of the property. The comments have been considered by the department in preparing this report. (See 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 Ballot 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 Ballot 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 May 20, 2005, for processing under OAR 125, division 145. The claim generally identifies state laws that restrict the division of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective

date of Ballot 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.)

### **Conclusions**

The claim has been submitted within two years of December 2, 2004, the effective date of Ballot 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, Olan and Carol Alexander, acquired the subject property on May 25, 1974, as reflected by a Real Estate Contract included with the claim. A copy of a Yamhill County property tax statement from 2004, included with the claim, indicates that Olan and Carol Alexander are the current owners of the subject property.

### **Conclusions**

The claimants, Olan and Carol Alexander, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of May 25, 1974.

### **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 states that state laws have restricted the property so that it cannot be divided into four, five-acre parcels with a dwelling on each parcel.

The claim is based, generally, on Yamhill County’s current Agriculture/Forestry Small Holding (AF-10) zone and the applicable provisions of state law that require such zoning. The Yamhill County AF-10 zone is a rural residential zone, in accord with Statewide Planning Goal 14 (Urbanization.), and requires a minimum lot size of 10 acres.

Goal 14 became effective on January 25, 1975, and required local comprehensive plans to provide for an orderly and efficient transition from rural to urban land use. The courts have found that Goal 14, generally, prohibits residential development at urban densities on rural lands. Rural lands are lands outside of an urban growth boundary (UGB). As interpreted by the courts and the Commission, Goal 14 generally prohibits residential development outside of an urban growth boundary where lot or parcel sizes are less than two acres. (See, e.g. *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986); *DLCD v. Klamath County*, 38 Or LUBA 769 (2000).) As a result of the 1986 *Curry County* Oregon Supreme Court decision, the Commission amended Statewide Planning Goal 14 (Urbanization) and adopted OAR 660-004-0040, establishing rules for rural residential development outside urban growth boundaries, which became effective on October 4, 2000. The rule provides that if, on October 4, 2000, a rural residential zone specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size which is already in effect (OAR 660-004-0040(7)(c)). The minimum lot size of the County's AF-10 zone exceeds two acres or more. Therefore, under the rule, the minimum area of any new lot or parcel must equal or exceed 10 acres.

The claimants acquired the subject property on May 25, 1974, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws, 1973, effective October 5, 1973,) but before the adoption of the statewide planning goals. As such, ORS 197.175(1) and 197.280 (1973 edition) required, in addition to any local plan or zoning provisions, the application of the interim land use goals set forth in ORS 215.515 (1973 edition) to the preparation, revision, adoption or implementation of any comprehensive plan prior to the effective date of the statewide planning goals (see *Petersen v. Klamath Falls*, 279 OR 249 (1977)). As a result, if the claimants had sought at that time to develop the property for the use requested in this claim, as a matter of law, the use would have been subject to compliance with the interim planning goals at 215.515.<sup>2</sup>

No information has been submitted demonstrating that claimants' requested use of the subject property complies with the interim planning goals in effect when they acquired the property on May 25, 1974.

### **Conclusions**

Statewide Goal 14 and OAR 660-004-0040 were adopted after the claimants acquired the subject property. Land use laws adopted since May 25, 1974, restrict the use of the property relative to the uses that may have been allowed when the claimants acquired the property on May 25, 1974. However, the claim does not establish whether or to what extent the claimants' requested use of the subject property would have been allowed under the interim planning goals in effect when they acquired the property.

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<sup>2</sup> See also, *Meeker v. Board of Commr's*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals; and *Housing Council v. Lake Oswego*, 48 Or App 525 (1981) (land use planning responsibility is not defined in ORS 197.) The Supreme Court has interpreted land use planning responsibility to include "annexation approvals, subdivision approvals and partition approvals." The use proposed here is to subdivide the land.

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 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 \$100,000 as the reduction in the property's fair market value due to current regulations. This estimate is based on the claimants' comparison of the value of similar properties.

#### **Conclusions**

As explained in Section V.(1) of this report, the current owners are Olan and Carol Alexander who acquired the property on May 25, 1974. 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 division of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$100,000.

Without an appraisal or other documentation, and without verification of whether or to what extent the requested use would have been permitted under the standards in effect when 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 regulations that restrict the use of the property relative to what may have been allowed in 1974, when the property was acquired by Olan and Carol Alexander.

These include Statewide Planning Goal 14 (Urbanization) and OAR 660-004-0040. All of these state laws were adopted after the claimants acquired the property in 1974. Therefore, they are not exempt, under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired the property.

### **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 rural residential development apply to the claimants' use of the property, and for the most part these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimants acquired the property, including the interim planning goals (ORS 215.515, 1973 edition) are 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 uses 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 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 set forth in this report, laws enforced by the Commission or the department restrict the claimants' division of the property into five-acre parcels and the development of a dwelling on each parcel. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$100,000.

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 as to whether or to what extent the requested use would have been permitted under the standards in effect when 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 Olan and Carol Alexander to use the subject property for a use permitted at the time they acquired the property on May 25, 1974.

### **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 Olan and Carol Alexander's division of the 20-acre property into four, five-acre parcels or to their establishment of a single-family dwelling on each parcel created: applicable provisions of Statewide Goal 14 and OAR 660-004-0040 enacted after May 25, 1974. These land use regulations will not apply to Olan and Carol Alexander's use of their property only to the extent necessary to allow them to use the property for the use described in this report, and only to the extent that use was permitted at the time they acquired the property on May 25, 1974.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property for the use described in this report, subject to the standards in effect on May 25, 1974. On that date, the property was subject to the applicable provisions of ORS 215, including the requirements of the interim planning goals under ORS 215.515 (1973 edition.)
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 March 13, 2006. 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.