

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. M118486
(BALLOT MEASURE 37) OF	)	
Richard Mulhollen, CLAIMANT	)	

Claimant: Richard Mulhollen (the Claimant)

Property: Tax lots 600 and 700, Township 36S, Range 1W, Section 27, 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 under ORS 197.352, the State of Oregon will not apply the following laws to Richard Mulhollen's division of the 27.4-acre property and development of a manufactured home park: applicable provisions of Statewide Planning Goal 4, ORS 215 and OAR 660. These land use regulations will not apply to Richard Mulhollen's use of his property only to the extent necessary to allow the claimant to use the property for the use described in this report, to the extent that use was permitted at the time he acquired the property, in 1968 and 1972.
2. The action by the State of Oregon provides the state's authorization to the claimant, Richard Mulhollen, to use the property for the use described in this report, subject to the standards in effect on June 10, 1968, for tax lot 700 and September 14, 1972, for tax lot 600.
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, Richard Mulhollen, 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, Richard Mulhollen, 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, Richard Mulhollen, 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, Richard Mulhollen, 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 31<sup>st</sup> day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
Dugan Petty, Deputy Administrator  
DAS, State Services Division  
Dated this 31<sup>st</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 31, 2006

**STATE CLAIM NUMBER:** M118486

**NAME OF CLAIMANT:** Richard Mulhollen

**MAILING ADDRESS:** 1211 Covina Avenue  
Medford, Oregon 97504

**PROPERTY IDENTIFICATION:** Township 36S, Range 1W, Section 27  
Tax lots 600 and 700  
Jackson County

**OTHER CONTACT INFORMATION:** Douglass H. Schmor  
201 W. Main Street, Suite 5  
Medford, Oregon 97501

**DATE RECEIVED BY DAS:** May 23, 2005

**180-DAY DEADLINE:** April 7, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimant, Richard Mulhollen, seeks compensation in the amount of \$5,820,375 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 two tax lots totaling 27.4 acres and to develop a manufactured dwelling park. The property is located north of Corey Road, near Medford, 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 by the Land Conservation and Development Commission (the Commission) or the department not apply to Richard Mulhollen's division of the property for manufactured dwelling park development: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS and

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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).

OAR 660, division 6. These laws will not apply to the claimant only to the extent necessary to allow Richard Mulhollen to use the property for the use described in this report, to the extent that use was permitted at the time he acquired an interest in tax lot 700 June 10, 1968, and tax lot 600 on September 14, 1972. (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, no written comments were received in response to the 10-day notice.

### **IV. TIMELINESS OF CLAIM**

#### **Requirement**

ORS 197.352(5) (Ballot Measure 37, Section 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 criterion 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 criterion, whichever is later.

#### **Findings of Fact**

This claim was submitted to DAS on May 23, 2005, for processing under OAR 125, division 145. The claim identifies ORS 197, ORS 215.700 to 215.780, ORS 660-006-0000 to 660-006-0060 and any other state laws that would preclude development of a manufactured dwelling park as laws that restrict the use of the property and 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 claim includes a deed showing that Rozanna and Richard Mulhollen, husband and wife, along with Jerry and Hollyce Stratton, acquired tax lots 600 and 700, which constitute the subject property, on June 10, 1968.<sup>2</sup>

In April 1971, the Mulhollens conveyed their interest in tax lot 600 to Jerry Stratton, and Jerry Stratton thereafter conveyed his interest in tax lot 700 to the Mulhollens. On September 14, 1972, Jerry Stratton conveyed all of his interest in tax lot 600 back to the Mulhollens.<sup>3</sup>

A partial title history report dated April 22, 2005, demonstrates that Richard Mulhollen is a current owner of the subject property. (See claim).

### Conclusions

The claimant, Richard Mulhollen, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C) as of June 10, 1968 for tax lot 700, and as of September 14, 1972 for tax lot 600.

### 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.

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<sup>2</sup> The claim asserts the claimant has been an owner of tax lot 700 since April 1971. However, based on the narrative regarding the claimant’s acquisition of the property provided with the claim, and verified by the deeds included in the claim, the claimant acquired his interest in tax lot 700 on June 10, 1968.

<sup>3</sup> On October 19, 1998, Rozanna and Richard Mulhollen conveyed the subject claim property to Richard Mulhollen. On January 26, 2004, Richard Mulhollen conveyed the subject claim property back to himself and Rozanna Mulhollen. Rozanna Mulhollen is not named as a claimant on this claim.

## **Findings of Fact**

The claim identifies ORS 197, ORS 215.700 to 215.780, ORS 660-006-0000 to 660-006-0060 and any other state laws that would preclude division of the property and development of a manufactured dwelling park.<sup>4</sup>

The claim is based generally on Jackson County's current Open Space Reserve (OSR) zoning and the provisions of state law that require such zoning. The zoning of the claimant's property implements Goal 4 (Forest Land), in accord with OAR 660, division 6 and ORS 215 because the claimant's property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and required that forest land as defined by the Goal be zoned for forest use.

The administrative rule implementing Goal 4 (OAR 660, division 6) became effective on 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. Manufactured dwelling parks in forest zones are not provided for in the statutes and rules.

The claimant acquired tax lot 700 in 1968, and tax lot 600 in 1972, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. At that time, the property was not zoned by Jackson County.

## **Conclusions**

The zoning requirements, minimum lot size, dwelling standards, and use provisions established by Statewide Planning Goal 4 (Forest Lands), provisions applicable to land zoned for forest uses in ORS Chapter 215 and OAR 660, division 6 were all enacted after Richard Mulhollen acquired the subject property in 1968 and 1972. These laws do not allow the division of the property, residential development and establishment of a manufactured dwelling park thereby restricting the use of the property relative to the uses allowed Richard Mulhollen acquired the property, in 1968 and 1972.

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<sup>4</sup> The claimant summarily cites ORS 197 as a basis for the claim, but does not establish how that statute restricts the use of the property in a manner that reduces its fair market value, other than a statement that "property cannot be developed as claimant desires." On its face, ORS 197 does not in itself restrict the use of the claimant's property in a manner that reduces its fair market value. Absent an explanation by the claimant as to how, in this instance, that statute so restricts the use of this property, that statute is not addressed further in this report.

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 a claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, ORS 197.352(1) requires that any land use regulation described in Section V.(2) of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

#### **Findings of Fact**

The claim includes an estimate of \$5,820,375 as the reduction in the property's fair market value, as a result of current regulations. This amount is based on the claimant's estimate of the value per acre of developing the property as a mobile home park. (See claim).

#### **Conclusions**

As explained in Section V.(1) of this report, the claimant is a current owner of the subject property. Under ORS 197.352, Richard Mulhollen is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimant acquired the property restrict division and development of the subject property. The claimant estimates the reduction in value due to the restrictions to be \$5,820,375.

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 enacted or enforced by the Commission or the department.

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

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

#### **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the subject property relative to uses permitted when the claimant acquired the property in 1968 and 1972. These laws include Statewide Planning Goal 4 (Forest Lands), and applicable provisions of ORS 215 and OAR 660, division 6, which Jackson County has implemented through its current OSR zone.

These state land use regulations are not exempt under ORS 197.352(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. Those provisions include fire protection standards for dwellings. 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 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, Richard Mulhollen’s 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 claimant acquired the property are 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 public health and safety are exempt under ORS 197.352(3)(B) and will also continue to apply. 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 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 set forth in this report, laws enforced by the Commission or the department restrict the division of the subject property and the development of a manufactured home park. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$5,820,375. However, because the claim does not provide an appraisal or other specific explanation 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 certain land use regulations to allow Richard Mulhollen to use the subject property for a use permitted at the time he acquired the property in 1968 and 1972.

### **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 Richard Mulhollen's division of the 27.4-acre property and development of a manufactured home park: applicable provisions of Statewide Planning Goal 4, ORS 215 and OAR 660. These land use regulations will not apply to Richard Mulhollen's use of his property only to the extent necessary to allow the claimant to use the property for the use described in this report, to the extent that use was permitted at the time he acquired the property, in 1968 and 1972.
2. The action by the State of Oregon provides the state's authorization to the claimant, Richard Mulhollen, to use the property for the use described in this report, subject to the standards in effect on June 10, 1968, for tax lot 700 and September 14, 1972, for tax lot 600.
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, Richard Mulhollen, 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, Richard Mulhollen, 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, Richard Mulhollen, 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, Richard Mulhollen, 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 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.